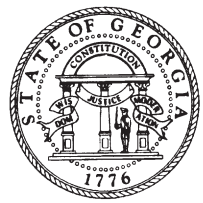
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With Provision for Subsequent Pocket Parts

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and
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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 18th Day of September, in the year of our Lord Two Thousand and Twenty and of the Independence of the United States of America the Two Hundred and Forty-Fifth.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume cumulates and replaces the 2013 edition of Volume 15 of the Official Code of Georgia Annotated, as supplemented by the 2019 Cumulative Supplement. The 2013 Volume 15 and its supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 17 by the General Assembly through the 2020 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through August 7, 2020. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice Forms, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2018, 2019, and 2020 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2018 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

Table of Titles

Title 1. General Provisions.
2. Agriculture.
3. Alcoholic Beverages.
4. Animals.
5. Appeal and Error.
6. Aviation.
7. Banking and Finance.
8. Buildings and Housing.
9. Civil Practice.
10. Commerce and Trade.
11. Commercial Code.
12. Conservation and Natural Resources.
13. Contracts.
14. Corporations, Partnerships, and Associations.
15. Courts.
16. Crimes and Offenses.
17. Criminal Procedure.
18. Debtor and Creditor.
19. Domestic Relations.
20. Education.
21. Elections.
22. Eminent Domain.
23. Equity.
24. Evidence.
25. Fire Protection and Safety.
26. Food, Drugs, and Cosmetics.
27. Game and Fish.
28. General Assembly.
29. Guardian and Ward.

30. Handicapped Persons.
31. Health.
32. Highways, Bridges, and Ferries.
33. Insurance.
34. Labor and Industrial Relations.
35. Law Enforcement Officers and Agencies.
36. Local Government.
37. Mental Health.
38. Military, Emergency Management, and Veterans Affairs.
39. Minors.
40. Motor Vehicles and Traffic.
41. Nuisances.
42. Penal Institutions.
43. Professions and Businesses.
44. Property.
45. Public Officers and Employees.
46. Public Utilities and Public Transportation.
47. Retirement and Pensions.
48. Revenue and Taxation.
49. Social Services.
50. State Government.
51. Torts.
52. Waters of the State, Ports, and Watercraft.
53. Wills, Trusts, and Administration of Estates.

In Addition, This Publication Includes

Constitution of the United States
Constitution of the State of Georgia
Tables of Comparative Sections
Table of Acts
Index to Local and Special Laws

Index to General Laws of Local Application
General Index

Table of Contents

VOLUME 15

Title 17

Criminal Procedure

CHAPTER		PAGE
1.	General Provisions, 17-1-1 through 17-1-4	3
2.	Jurisdiction and Venue, 17-2-1 through 17-2-4	12
3.	Limitations on Prosecution, 17-3-1 through 17-3-3	38
4.	Arrest of Persons, 17-4-1 through 17-4-62	72
5.	Searches and Seizures, 17-5-1 through 17-5-100	153
6.	Bonds and Recognizances, 17-6-1 through 17-6-114	338
7.	Pretrial Proceedings, 17-7-1 through 17-7-211	427
8.	Trial, 17-8-1 through 17-8-76	688
9.	Verdict and Judgment Generally, 17-9-1 through 17-9-63	923
10.	Sentence and Punishment, 17-10-1 through 17-10-71	983
11.	Assessment and Payment of Costs of Criminal Proceedings, 17-11-1 through 17-11-24	1264
12.	Legal Defense for Indigents, 17-12-1 through 17-12-128	1276
13.	Criminal Extradition, 17-13-1 through 17-13-49	1325
14.	Restitution and Distribution of Profits to Victims of Crimes, 17-14-1 through 17-14-32	1360
15.	Victim Compensation, 17-15-1 through 17-15-16	1402
15A.	Compensation for Criminally Inflicted Property Damage, 17-15A-1 through 17-15A-4	1420
16.	Discovery, 17-16-1 through 17-16-23	1423
17.	Crime Victims' Bill of Rights, 17-17-1 through 17-17-16	1528
18.	Written Statements of Information to Victims of Rape or Forcible Sodomy, 17-18-1, 17-18-2	1548
19.	Georgia Council on Criminal Justice Reform, 17-19-1 through 17-19-5 [Repealed]	1550

CHAPTER PAGE
20. Identification Procedures for Live Lineups, Photo Lineups, and Showups, 17-20-1 through 17-20-3 1551

Index to Title 17 1555

TITLE 17

CRIMINAL PROCEDURE

Chap.

1. General Provisions, 17-1-1 through 17-1-4.
2. Jurisdiction and Venue, 17-2-1 through 17-2-4.
3. Limitations on Prosecution, 17-3-1 through 17-3-3.
4. Arrest of Persons, 17-4-1 through 17-4-62.
5. Searches and Seizures, 17-5-1 through 17-5-100.
6. Bonds and Recognizances, 17-6-1 through 17-6-114.
7. Pretrial Proceedings, 17-7-1 through 17-7-211.
8. Trial, 17-8-1 through 17-8-76.
9. Verdict and Judgment Generally, 17-9-1 through 17-9-63.
10. Sentence and Punishment, 17-10-1 through 17-10-71.
11. Assessment and Payment of Costs of Criminal Proceedings, 17-11-1 through 17-11-24.
12. Legal Defense For Indigents, 17-12-1 through 17-12-128.
13. Criminal Extradition, 17-13-1 through 17-13-49.
14. Restitution and Distribution of Profits to Victims of Crimes, 17-14-1 through 17-14-32.
15. Victim Compensation, 17-15-1 through 17-15-16.
15A. Compensation for Criminally Inflicted Property Damage, 17-15A-1 through 17-15A-4.
16. Discovery, 17-16-1 through 17-16-23.
17. Crime Victims' Bill of Rights, 17-17-1 through 17-17-16.
18. Written Statements of Information to Victims of Rape or Forcible Sodomy, 17-18-1 through 17-18-2.
19. Georgia Council on Criminal Justice Reform, 17-19-1 through 17-19-5. [Repealed]
20. Identification Procedures for Live Lineups, Photo Lineups, and Showups, 17-20-1 through 17-20-3.

Cross references. — Habeas corpus generally, T. 9, C. 14. Apprehension, detention, disposition, and treatment of delinquent minors, T. 15, C. 11. Nonadmissibility in rape prosecution of complainant's past sexual behavior, § 24-4-412. Institution and prosecution of criminal proceedings involving property of Department of Transportation, § 32-1-4 et seq. Georgia Code of Military Justice, § 38-2-320 et seq.

Law reviews. — For article critically analyzing the omnibus hearing as a pretrial procedure, see 28 Mercer L. Rev. 329 (1976). For annual survey of criminal law and procedure, see 39 Mercer L. Rev. 127 (1987). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For annual survey article on criminal law and procedure, see 45 Mercer L. Rev. 135 (1993). For annual survey article on criminal law and procedure, see 46 Mercer L. Rev. 153 (1994). For annual survey discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000). For article, "Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution," see 26 Ga. St. U.L. Rev. 417 (2010). For article, "The Political Economy of Criminal Procedure Litigation," see 45 Ga. L. Rev. 721 (2011). For article, "Criminal Law as Family Law," see 33 Georgia St. U.L. Rev. 285 (2017). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: Garbage In, Garbage Out: Revising Strickland as Applied to Forensic Science Evidence," see 34 Ga. St. U.L. Rev. 893 (2018). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: The First Amendment Case for Public Access to Secret Algorithms Used in Criminal Trials," see 34 Ga. St. U.L. Rev. 915 (2018). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: The UK Forensic Science Regulator: A Model for Forensic Science Regulation?," see 34 Ga. St. U.L. Rev. 945 (2018). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: Three Transformative Ideals to Build a Better Crime Lab," see 34 Ga. St. U.L. Rev. 1007 (2018). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: Deploying the Secret Police: The Use of Algorithms in the Criminal Justice System," see 34 Ga. St. U.L. Rev. 1073 (2018). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: Symposium Keynote Address: Uncovering Forensic Laws: An Outside Perspective," see 34 Ga. St. U.L. Rev. 1221 (2018). For article, "From the Crime Scene to the Courtroom: The Future of Forensic Science Reform: Safety from Flawed Forensic Sciences Evidence," see 34 Ga. St. U.L. Rev. 1129 (2018). For article, "Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police," see 67 Emory L.J. 853 (2018). For article, "The Right to Two Criminal Defense Lawyers," see 69 Mercer L. Rev. 675 (2018). For article, "Participatory Defense: Humanizing the Accused and Ceding Control to the Client," see 69 Mercer L. Rev. 715 (2018). For article, "Racial Justice and Federal Habeas Corpus as Postconviction Relief from State Convictions," see 69 Mercer L. Rev. 453 (2018).

For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
17-1-1.	Filing and service of pleadings, motions, and other papers.	17-1-4.	Vacation of judgments, verdicts, rules, or orders obtained by perjury.
17-1-2.	Maintenance of penal actions.		
17-1-3.	Effect of mistake or misprision of clerk or other ministerial officer.		

Cross references. — Commencement of proceedings in Juvenile Court, Uniform Rules for the Juvenile Courts of Georgia, Rules 4.1 — 4.7 and 5.1 — 5.3. Filing of petition in Juvenile Court proceedings, Uniform Rules for the Juvenile Courts of Georgia, Rules 6.1 — 6.9.

17-1-1. Filing and service of pleadings, motions, and other papers.

(a) Unless otherwise provided by law or by order of the court, every pleading subsequent to the entry of the initial indictment or accusation upon which the defendant is to be tried; every order not entered in open court; every written motion, unless it is one as to which a hearing ex parte is authorized; and every written notice, demand, and similar paper shall be served upon each party.

(b)(1) Where service is required to be made, the service shall be made upon the party's attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court.

(2) As used in this subsection, delivering a copy means:

(A) Handing it to the attorney or to the party;

(B) Leaving it at his office with his clerk or other person in charge thereof; or

(C) If the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(3) Service by mail shall be deemed complete upon mailing.

(c) All original papers, copies of which are required to be served upon parties, shall be filed with the court either before service or immediately thereafter.

(d) The filing of pleadings and other papers with the court shall be made by filing them with the clerk of the court unless the judge permits the papers to be filed with him, in which event he shall note thereon the filing date and transmit them to the office of the clerk.

(e)(1) Proof of service may be made by certificate of an attorney or of his employee, written admission, affidavit, or other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service.

(2) When an attorney executes a certificate, which shall be attached to the original of the paper to be served, certifying as to the service thereof, the certificate shall be taken as prima-facie proof of such service.

(3) The certificate of service provided for in this subsection shall read substantially as follows:

Certificate of Service

I do certify that (copy) (copies) hereof have been furnished to (here insert name or names) by (delivery) (mail) this _____ day of _____, ____.

_____

Attorney

History. — Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1999, p. 81, § 17.

Law reviews. — For article surveying criminal law and procedure in 1984-1985, see 37 Mercer L. Rev. 179 (1985). For annual survey of criminal law and procedure, see 40 Mercer L. Rev. 153 (1988).

JUDICIAL DECISIONS

"Similar paper" defined. — Copies of indictments and appropriate responses to constitutionally and statutorily authorized discovery requests constitute "similar paper" under O.C.G.A. § 17-1-1(a) and, consequently, must be served upon a defendant and not merely furnished to the defendant by notifying the defendant of the presence of the documents in the clerk's office. Driver v. State, 188 Ga. App. 301, 372 S.E.2d 841 (1988).

Timely filing of service. — There was no authority indicating that untimely filing negated service and notice of the state's witness list in a felony case, especially since service was not disputed. Carter v. State, 253 Ga. App. 795, 560 S.E.2d 697 (2002).

Service by mail. — When it is undisputed that service of notice is properly made by mail in accordance with the statutory provisions, actual notice is not required, and it is immaterial that the notice was not received. Stubbs v. State, 202 Ga. App. 670, 415 S.E.2d 486 (1992).

Notice under O.C.G.A. § 17-10-2 sent to defense attorney held sufficient. — Trial court did not err in imposing a life sentence against the defendant as: (1) the state satisfied the notice requirement under O.C.G.A. § 17-10-2(a) by providing notice to the defendant's attorney; (2) the appeals court presumed that such information was communicated to the defendant; and (3) the defendant failed to contend otherwise. Blevins v. State, 283 Ga. App. 694, 642 S.E.2d 373 (2007).

Service on state by pro se defendant. — When a pro se defendant filed

motions to suppress, those motions which the defendant failed to serve on the state could not be considered, and any order which would have been entered as a result of those motions would have been of no effect. Owens v. State, 258 Ga. App. 647, 575 S.E.2d 14 (2002).

Prosecutorial immunity. — District attorney's failure to serve arrestee or arrestee's counsel with a copy of a motion and order resulting in the dead-docketing of charges, while not involving the exercise of any prosecutorial discretion or judgment, was intimately associated with the judicial phase of the criminal process, and therefore within the scope of the district attorney's absolute prosecutorial immunity. Holsey v. Hind, 189 Ga. App. 656, 377 S.E.2d 200 (1988).

In a proceeding on an ex parte motion to correct alleged clerical errors in the court's records of defendant's sentence, failure of the defendant to provide the state with notice or the opportunity made the court's order a nullity. Prater v. State, 222 Ga. App. 486, 474 S.E.2d 684 (1996).

Cited in State v. Bostwick, 181 Ga. App. 508, 352 S.E.2d 824 (1987); Devane v. State, 183 Ga. App. 60, 357 S.E.2d 819 (1987); Jones v. State, 185 Ga. App. 649, 366 S.E.2d 144 (1988); Cabell v. State, 250 Ga. App. 530, 551 S.E.2d 386 (2001); Patten v. State, 250 Ga. App. 498, 552 S.E.2d 110 (2001); Collins v. State, 338 Ga. App. 886, 792 S.E.2d 134 (2016); Putnal v. State, 303 Ga. 569, 814 S.E.2d 307 (2018); Schuman v. Dep't of Human Servs., 354 Ga. App. 509, 841 S.E.2d 218 (2020).

RESEARCH REFERENCES

ALR. — Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney, 90 A.L.R.6th 385.

17-1-2. Maintenance of penal actions.

A "penal action" is an action allowed in pursuance of public justice under particular laws. If no special officer is authorized to be the plaintiff therein, the state, the Governor, the Attorney General, or the prosecuting attorney may be the plaintiff.

History. — Orig. Code 1863, § 3178; Code 1868, § 3189; Code 1873, § 3254; Code 1882, § 3254; Civil Code 1895, § 4933; Civil Code 1910, § 5510; Code 1933, § 3-103.

Cross references. — Corresponding provisions relating to civil procedure, §§ 9-2-1, 9-2-29.

JUDICIAL DECISIONS

State, not victim, has interest in criminal prosecutions. — Because the purpose of criminal law is to serve the public functions of deterrence, rehabilitation, and retribution, it is the state, not the victim, that has an interest in criminal prosecutions. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989).

Trial court abused the court's discretion by dismissing charges alleging that the defendant violated state statutes prohibiting affrays, disrupting a public school, and criminal trespass by fighting on school grounds, over the state's objection, after defense counsel told the court that school officials wanted the charges dismissed. State v. Perry, 261 Ga. App. 886, 583 S.E.2d 909 (2003).

Action by informer generally impermissible. — Qui tam action, in accordance with this section, cannot be brought and prosecuted in the name of the informer unless a right thus to sue shall have been given distinctly by statute. O'Kelly v. Athens Mfg. Co., 36 Ga. 51 (1867).

No inherent right of informant to forfeiture in criminal case. — Informer who commences a qui tam action under a penal statute does not acquire thereby a vested right to the forfeiture. Bank of St. Mary's v. State, 12 Ga. 475 (1853); Robison v. Beall, 26 Ga. 1 (1858); Hargroves v. Chambers, 30 Ga. 580 (1860).

Cited in Malone v. Clark, 109 Ga. App. 134, 135 S.E.2d 517 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, §§ 1 et seq., 42 et seq. 59 Am. Jur. 2d, Parties, §§ 24, 26.

C.J.S. — 1A C.J.S., Actions, § 1 et seq. 7A C.J.S., Attorney General, § 59 et seq.

17-1-3. Effect of mistake or misprision of clerk or other ministerial officer.

The mistake or misprision of a clerk or other ministerial officer shall in no case work to the injury of a party where by amendment justice may be promoted.

History. — Laws 1799, Cobb's 1851 Digest, p. 480; Code 1863, § 3436; Code 1868, § 3456; Code 1873, § 3507; Code 1882, § 3507; Civil Code 1895, § 5125; Civil Code 1910, § 5709; Code 1933, § 81-1205.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-133.

JUDICIAL DECISIONS

Court may correct clerk's sentencing error with notice to defendant. — When, due to clerical error on the part of the clerk of the court and inadvertence on the part of the judge in signing the paper without discovering the error, a sentence is in part illegal, the court may, after notice and opportunity to be heard on the part of the defendant, order the error corrected. Wyatt v. State, 113 Ga. App. 857, 149 S.E.2d 837 (1966).

Order valid if error merely clerical. — If the error is merely clerical in nature and does not follow the oral sentence pronounced by the court at the time, then the order as entered nunc pro tunc is a valid and proper sentence. Wyatt v. State, 113 Ga. App. 857, 149 S.E.2d 837 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Clerks of Court, § 44.

C.J.S. — 71 C.J.S., Pleading, § 78.

ALR. — Effect of mistake in reference in statute to another statute, constitution, public document, record, or the like, 5 A.L.R. 996; 14 A.L.R. 274.

Power to amend record in criminal case after term on evidence dehors record, 5 A.L.R. 1127.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment, 164 A.L.R. 537.

17-1-4. Vacation of judgments, verdicts, rules, or orders obtained by perjury.

Any judgment, verdict, rule, or order of court which may have been obtained or entered shall be set aside and be of no effect if it appears that the same was entered in consequence of corrupt and willful perjury. It shall be the duty of the court in which the verdict, judgment, rule, or order was obtained or entered to cause the same to be vacated upon motion and notice to the adverse party; but it shall not be lawful for the court to do so unless the person charged with perjury shall have been duly convicted thereof and unless it appears to the court that the verdict, judgment, rule, or order could not have been obtained and entered without the evidence of the perjured person, saving always to third persons innocent of such perjury the rights which they may lawfully have acquired under the verdict, judgment, rule, or order before the same shall have been actually vacated.

History. — Laws 1833, Cobb's 1851 Digest, p. 804; Code 1863, § 3510; Code 1868, § 3533; Code 1873, § 3591; Code 1882, § 3591; Civil Code 1895, § 5366; Civil Code 1910, § 5961; Code 1933, § 110-706.

Cross references. — Perjury and related offenses generally, § 16-10-70 et seq.

JUDICIAL DECISIONS

Analysis

General Consideration
Perjury Conviction
Motions

General Consideration

Section does not deny equal protection. — This section applied to all persons alike, and hence, does not deny equal protection to anyone. Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

Section does not deny due process. — Even though a conviction for crime, procured by perjured evidence and known to be such by the state's prosecuting attorneys, amounts to a denial of due process of law, yet this section, which authorized a new trial when a conviction was based upon perjury and requires that proof of such perjury be made by a judgment of conviction, was not unconstitutional in that the conviction denied due process and equal protection of the law. Chatterton v. State, 221 Ga. 424, 144 S.E.2d 726 (1965), cert. denied, 384 U.S. 1015, 86 S. Ct. 1964, 16 L. Ed. 2d 1036 (1966).

Section shows how to prove perjury and requires that judgment be set aside. — This section not only required the setting aside of a judgment procured by perjured testimony, but prescribed the evidence by which the fact of perjury may be proved, thus affording due process. Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

Former Code 1933, § 110-706 (see O.C.G.A. § 17-1-4) was but the exercise of the sovereign right of the state to fix rules of evidence and was in harmony with former Code 1933, § 38-101 (see O.C.G.A. § 24-1-1). Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

Judgment overturned only if rights injured. — "Any judgment, verdict, rule, or order of court" refers only to those judgments or orders which go directly in

General Consideration (Cont'd)

support or defeat of the rights of the parties injuriously affected thereby. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Conviction based on perjured testimony of which prosecutor had knowledge. — When it is shown and not denied that a conviction was procured by perjured testimony, which testimony the state's prosecuting attorney knew to be perjured at the time the testimony was introduced, due process as guaranteed by U.S. Const., amend. 14 is denied, regardless of whether such testimony is merely impeaching in character or has probative force. Burke v. State, 205 Ga. 656, 54 S.E. 350 (1949).

Perjured exculpatory testimony versus inculpatory. — Trial court could not conclude that the jury's guilty verdicts could not have been obtained without the victim's admittedly perjured exculpatory testimony for the defense because even treating the battery victim's guilty plea and receipt of probation as a first offender conviction, the victim pled guilty to committing perjury with respect to exculpatory trial testimony, not inculpatory testimony during the state's case-in-chief. Walker v. State, 348 Ga. App. 273, 821 S.E.2d 567 (2018).

Witnesses are not judges of truth of testimony. — Witnesses themselves, whoever the witnesses may be, are not the legal judges of the truth of testimony delivered on the original trial, or on an extraordinary motion for a new trial, even though the testimony in controversy is the witnesses' own testimony and was contradictory on two occasions. The laws of the land have put this responsibility upon the judges and the courts, and have laid down certain rules which judges and the courts are to follow in determining this matter. Moore v. State, 59 Ga. App. 456, 1 S.E.2d 230 (1939).

When there was no allegation of indictment and conviction of any witnesses who allegedly testified falsely, the trial court did not err in dismissing the defendant's claim seeking to set aside the judgment against the defendant. Sun v. Bush, 179 Ga. App. 140, 345 S.E.2d 873 (1986).

Grounds for setting judgment aside generally. — Motion, whether the motion be construed as one to arrest or as one to set aside, did not show a proper cause for the relief sought because nowhere in the motion was it alleged that the judgment sought to be set aside or arrested was procured by accident, mistake, or fraud or through any defect not amendable appearing on the face of the record or pleadings or by perjury or any other irregularity. Chambless v. Oates Plumbing & Heating Co., 97 Ga. App. 80, 102 S.E.2d 83 (1958).

Judgment may be set aside even when defect not apparent on record. — This section provides clear recognition of the right to set aside a judgment for a defect not apparent on the record. Ford v. Clark, 129 Ga. 292, 58 S.E. 818 (1907); Lyons v. State, 7 Ga. App. 50, 66 S.E. 149 (1909).

Successful party's admissions may be grounds to set aside. — A new trial may be granted for newly discovered evidence of material admissions of the successful party, which is not cumulative to other evidence offered at the trial. Evidence of admissions made by the successful party after the trial, or subsequent declarations inconsistent with that party's testimony on the trial, may be ground for setting aside the verdict, at least in the interest of justice. Perry v. Hammock, 75 Ga. App. 171, 42 S.E.2d 651 (1947).

Fraud must be extrinsic, not just fraud in procuring judgment. — Frauds for which the court may set aside a former judgment between the same parties are limited to matters which are extrinsic and collateral to the issue tried in the former case, and do not include fraud in procuring a judgment by false testimony unless it is shown, among other things, that the witness has been convicted of perjury. Elliott v. Marshall, 182 Ga. 513, 185 S.E. 831 (1936).

Cited in J.S. Scholfield's Sons Co. v. Vaughn, 40 Ga. App. 568, 150 S.E. 569 (1929); Swords v. Roach, 175 Ga. 774, 166 S.E. 185 (1932); Bird v. Smith, 186 Ga. 301, 197 S.E. 642 (1938); Young v. Young, 188 Ga. 29, 2 S.E.2d 622 (1939); Haygood v. Haygood, 190 Ga. 445, 9 S.E.2d 834 (1940); Bonner v. State, 63 Ga. App. 464, 11 S.E.2d 431 (1940); Thompson v. State,

67 Ga. App. 240, 19 S.E.2d 777 (1942); Burke v. State, 205 Ga. 520, 54 S.E.2d 348 (1949); Armstrong v. Armstrong, 206 Ga. 540, 57 S.E.2d 668 (1950); Stembridge v. Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952); Harper v. Mayes, 210 Ga. 183, 78 S.E.2d 490 (1953); Self v. State, 108 Ga. App. 201, 132 S.E.2d 548 (1963); Farmer v. State, 223 Ga. 364, 155 S.E.2d 14 (1967); Bowen v. State, 144 Ga. App. 329, 241 S.E.2d 431 (1977); Arnold v. State, 163 Ga. App. 10, 293 S.E.2d 501 (1982); John v. State, 282 Ga. 792, 653 S.E.2d 435 (2007).

Perjury Conviction

Section requires perjury conviction as purest proof. — This section required evidence which was convincing and which came from the purest source, to wit, a conviction for perjury. Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

In order not to burden court with choice between contradictory statements. — This section sought the purest source from which proof of perjury could be obtained. It recognized that when one and the same person, speaking under the solemnity of an oath, testified to a state of facts and subsequently, speaking under the solemnity of an oath, gave testimony which completely contradict that previous testimony and assert that the person committed perjury, the court, seeking the discovery of the truth, ought not to be called upon to say whether or not one of such statements is enough reliable evidence to authorize disbelief of the other. Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

Verdict not set aside without perjury conviction. — Verdict will not be set aside because of the false testimony of a witness unless and until the witness has been convicted of perjury. Stephens v. Pickering, 192 Ga. 199, 15 S.E.2d 202 (1941); Parsons v. Georgia Power Co., 67 Ga. App. 517, 21 S.E.2d 257 (1942); Chandler v. Chandler, 107 Ga. App. 124, 129 S.E.2d 370 (1962); Marshall v. Russell, 222 Ga. 490, 150 S.E.2d 667 (1966), cert. denied, 386 U.S. 911, 87 S. Ct. 857, 17 L. Ed. 2d 783 (1967); Day v. State, 242 Ga. App. 899, 531 S.E.2d 781 (2000).

New trial was not warranted by the fact that a witness executed an affidavit stating that the witness lied when the witness said the defendant admitted to the witness that the defendant killed the victim since there was no evidence that the witness was convicted of perjury or that the defendant's conviction could not have been obtained without the witness's testimony. Ashley v. State, 263 Ga. 820, 439 S.E.2d 914 (1994).

Witness recants under oath. — Evidence that one of the state's witnesses, since the trial, has made declarations, even though under oath, that the witness's testimony given upon the trial was false, is not cause for a new trial. Hall v. State, 117 Ga. 263, 43 S.E. 718 (1903); Clark v. State, 117 Ga. 254, 43 S.E. 853 (1903); Jordan v. State, 124 Ga. 417, 52 S.E. 768 (1905); Hinsman v. State, 14 Ga. App. 481, 81 S.E. 367 (1914); Smarr v. Kerlin, 21 Ga. App. 813, 95 S.E. 306 (1918).

Recanting witness is sole witness. — Perjury of a witness is not a ground which requires the grant of a new trial unless it is made to appear that the witness has been duly convicted thereof, even though the witness who later declares the witness's testimony was false was the sole witness against the defendant. Morrow v. State, 36 Ga. App. 217, 136 S.E. 92 (1926); Moore v. State, 59 Ga. App. 456, 1 S.E.2d 230 (1939); Thompson v. State, 84 Ga. App. 419, 65 S.E.2d 925 (1951).

Perjury conviction not sufficient justification when judgment obtainable without perjured evidence. — Conviction of a perjured witness is not itself sufficient to justify a court in setting aside a verdict and judgment in a case in which the witness testified, unless the verdict or judgment could not have been obtained and entered without the evidence of such perjured person. Richardson v. Roberts, 25 Ga. 671 (1858); Munro v. Moody & Fry, 78 Ga. 127, 2 S.E. 688 (1886); Gant v. State, 115 Ga. 205, 41 S.E. 698 (1902); Thomason v. Thompson, 129 Ga. 440, 59 S.E. 236, 26 L.R.A. (n.s.) 536 (1907); Morgan v. State, 16 Ga. App. 559, 85 S.E. 827 (1915); Massie v. State, 24 Ga. App. 548, 101 S.E. 703 (1919); Tanner v. Wilson, 58 Ga. App. 229, 198 S.E. 77 (1938); Aycock v. State, 188 Ga. 551, 4 S.E.2d 221 (1939); Stephens v. Pickering, 192 Ga. 199, 15 S.E.2d 202 (1941).

Perjury Conviction (Cont'd)

Defendant's convictions were not obtained by the use of perjured testimony because there was no showing that any perjury actually occurred or that the witness was ever charged with or convicted of perjury; even assuming that the witness committed perjury, the guilty verdicts and consequent judgments could have been obtained without such evidence because there was testimony from other witnesses at the crime scene portraying the defendant's unjustified shooting of the victim. Nations v. State, 290 Ga. 39, 717 S.E.2d 634 (2011).

Perjured testimony as a turning point in the minds of the jurors. — When the verdict could have been obtained without the evidence of the perjured witness, the appellate court is without power to reverse the trial court which denied the motion for new trial, even though the testimony of the perjured witness may have constituted the turning point in the minds of the jurors bringing about the conviction. Harris v. State, 99 Ga. App. 717, 109 S.E.2d 912 (1959).

Court of equity will not set aside such judgment based on perjured testimony. — Court of equity will not set aside a judgment, although obtained by willful and corrupt perjury, unless it appears that the perjurer has been convicted of such perjury, and unless it appears that a judgment could not have been rendered without the perjured testimony. Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930); Elliott v. Marshall, 182 Ga. 513, 185 S.E. 831 (1936).

No evidence of defendant's perjury conviction. — Although the state argued that the order discharging the defendant from probation resulted from perjury and, thus, the trial court had jurisdiction, the state came forward with no evidence showing that the state had convicted the defendant of perjury and the trial court erred in granting the state's motion to set aside the discharge order. Whipkey v. State, 352 Ga. App. 746, 835 S.E.2d 740 (2019).

Grant of new trial is in judge's discretion. — Fact that a witness for the prevailing party has been afterwards convicted of perjury in respect to testimony given in the trial of the case will not absolutely require the grant of a new trial or a setting aside of the verdict rendered unless it also appears that such verdict could not have been rendered or returned except for such perjured testimony. The fact, however, that the testimony of such witness does not require, as a matter of law, the grant of a new trial will not prevent the trial judge in using judicial discretion from granting such a motion although the judge is not required by law so to do. Geo. A. Hormel & Co. v. Ramsey, 62 Ga. App. 343, 7 S.E.2d 789 (1940).

Not error to refuse to consider perjury evidence without conviction. — No verdict or judgment may be set aside on the grounds of corrupt and willful perjury unless it appears to the court that the person charged with such perjury has been thereof duly convicted. Consequently, there is no error when, on motion for new trial, the trial court refuses to consider any evidence of perjury which would not comply with this section. Mitchell v. State, 120 Ga. App. 447, 170 S.E.2d 765 (1969).

Section may help defendant under certain phases of case. — This section, under certain phases of a case, might operate in favor of a defendant, for irrespective of what the trial judge might think as to whether a new trial should be granted on an extraordinary motion, if it appears that the verdict was entered up on consequence of corrupt and willful perjury, and the persons charged with such perjury have been duly convicted thereof, the verdict should be set aside, unless it appears to the court that the verdict or judgment could have been obtained and entered up without the evidence of such perjured person or persons. Moore v. State, 59 Ga. App. 456, 1 S.E.2d 230 (1939).

Motions

Essential elements of affidavit of illegality. — In order to support an affidavit of illegality based on perjury, two things must appear: (1) there must have been a conviction of perjury; and (2) it must appear that the judgment could not have been obtained without this perjured

evidence. Lewis v. Wall, 70 Ga. 646 (1883).

Essential elements of petition to have verdict set aside. — Petition asking that a verdict and decree be set aside because the verdict and decree were rendered on the perjured testimony of a named witness does not set forth a cause of action for that reason when the petition fails to allege that the witness has been duly convicted of perjury with respect to such testimony and that the verdict and decree were based on that testimony alone. Hubbard v. Whatley, 200 Ga. 751, 38 S.E.2d 738 (1946); Day v. Day, 210 Ga. 454, 81 S.E.2d 6 (1954).

Motion in arrest of judgment must allege grounds. — If nowhere in the motion for arrest of judgment it is alleged that the judgment sought to be arrested was procured by accident, mistake, or fraud, through any defect not amendable appearing on the face of the record or pleadings, by perjury, or any other irregularity, the motion is without merit. Stefanick v. Ouellette, 97 Ga. App. 644, 104 S.E.2d 156 (1958).

When motion to vacate fails. — Motion to vacate, presented to the judge at the trial term, wholly fails to meet the requirements of a proceeding to set aside a judgment when it is not addressed to some unamendable defect appearing on the face of the record, as is required of a motion in arrest of judgment and of a statutory motion to set aside, nor if it is founded upon a charge of perjury, and does not seek relief against a judgment irregularly or improperly obtained. East Side Lumber & Coal Co. v. Barfield, 193 Ga. 273, 18 S.E.2d 492 (1942).

Motion to set aside due to alleged perjured testimony. — Defendant was not entitled to have the defendant's convictions set aside due to alleged perjured testimony as the defendant made no showing any perjury actually occurred. Coggins v. State, 293 Ga. 864, 750 S.E.2d 331 (2013).

RESEARCH REFERENCES

ALR. — Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 A.L.R. 1219.

Perjury as ground of attack on judgment or order of court, 126 A.L.R. 390.

Statements of witness in civil action secured after trial, inconsistent with his testimony, as basis for new trial on ground of newly discovered evidence, 10 A.L.R.2d 381.

Dismissal of action because of party's perjury or suppression of evidence, 11 A.L.R.3d 1153.

CHAPTER 2

JURISDICTION AND VENUE

Sec.
17-2-1. Jurisdiction over crimes and persons charged with commission of crimes generally.
17-2-2. Venue generally.
17-2-3. Jurisdiction and venue as to crimes committed on boundary lines between this state and other states.
17-2-4. Defendant arrested, held, or present in county other than that in which indictment or accusation is pending.

RESEARCH REFERENCES

ALR. — Continuous transaction constituting a complete offense in each county or district as constituting more than one offense, 73 A.L.R. 1511.

Retroactive operation and effect of venue statute, 41 A.L.R.2d 798.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

17-2-1. Jurisdiction over crimes and persons charged with commission of crimes generally.

(a) It is the policy of this state to exercise its jurisdiction over crime and persons charged with the commission of crime to the fullest extent allowable under, and consistent with, the Constitution of this state and the Constitution of the United States.

(b) Pursuant to this policy, a person shall be subject to prosecution in this state for a crime which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:

(1) The crime is committed either wholly or partly within the state;

(2) The conduct outside the state constitutes an attempt to commit a crime within the state; or

(3) The conduct within the state constitutes an attempt to commit in another jurisdiction a crime under the laws of both this state and the other jurisdiction.

(c) A crime is committed partly within this state if either the conduct which is an element of the crime or the result which is such an element occurs within the state. In homicide, the "result" is either the act which causes death or the death itself; and, if the body of a homicide victim is found within this state, the death is presumed to have occurred within the state.

(d) A crime which is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the accused at the time of the omission.

History. — Code 1933, § 26-301, enacted by Ga. L. 1968, p. 1249, § 1.

Cross references. — Jurisdiction of state over crimes committed aboard aircraft in flight over state, § 6-2-4. Homicide generally, § 16-5-1 et seq. Jurisdiction for crime of sexual extortion, § 16-11-92. Jurisdiction in cases involving computer pornography and child exploitation, § 16-12-100.2. Jurisdiction in and over lands acquired by United States for sites for courthouses, forts, and other purposes, § 50-2-23.

Law reviews. — For article, "A Comprehensive Analysis of Georgia RICO," see 9 Ga. St. U.L. Rev. 537 (1993).

JUDICIAL DECISIONS

Circumstantial evidence cannot equivocate on jurisdiction. — Venue may be proved by circumstantial evidence; but circumstances which render it possible that an alleged crime was committed within the jurisdiction of the court are insufficient to establish the jurisdictional element of venue when, from the circumstances adduced, it is as reasonable and possible that the crime was committed beyond the jurisdiction of the court. Brown v. State, 52 Ga. App. 536, 183 S.E. 848 (1936).

Jurisdiction held established by record. — When there was undisputed testimony that the misdemeanor crimes with which the defendant was charged and convicted occurred in DeKalb County, Georgia, and that the defendant was identified as the perpetrator of the offenses, the record affirmatively established that the state court of DeKalb County exercised both personal and subject matter jurisdiction over the defendant. Freeman v. State, 194 Ga. App. 905, 392 S.E.2d 330 (1990).

Under O.C.G.A. § 17-2-1(b)(1), Georgia had subject matter jurisdiction over a kidnapping case even though the victim was killed in South Carolina. As the victim was abducted in Georgia, the kidnapping occurred there; when the victim was later injured in South Carolina, it was nevertheless a bodily injury for purposes of the Georgia kidnapping. Hunsberger v. State, 299 Ga. App. 593, 683 S.E.2d 150 (2009).

Evidence was sufficient to convict the defendant of concealing the death of another because, notwithstanding that the victim was killed and placed in the trunk of a car in South Carolina, the undisputed evidence showed that the car was set on fire in Georgia with the intent to conceal the victim's death. Clary v. State, 344 Ga. App. 710, 812 S.E.2d 31 (2018).

Venue established by defendant's residence from which crime committed. — Because a police officer testified that the defendant sold methamphetamine from the defendant's residence, the state met the state's burden of proving beyond a reasonable doubt that venue of the crimes charged was properly in the county in which the defendant was tried; therefore, the trial court properly denied the defendant's motion for a new trial. Borders v. State, 299 Ga. App. 100, 682 S.E.2d 148 (2009).

Jurisdiction established. — State had jurisdiction to prosecute the defendant for computer child exploitation because the evidence showed that after being told that the person the defendant thought was a 14-year-old girl lived in Georgia, the defendant violated O.C.G.A. § 16-12-100.2 by utilizing computer on-line services to communicate with the purported child and entice the child to meet the defendant to engage in sexual activity. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

State had jurisdiction to prosecute the defendant for attempted child molestation because the defendant committed the crime at least partly within Georgia when the defendant took a substantial step in Georgia toward committing child molestation, namely by traveling to Georgia to

meet with a person the defendant thought was a 14-year-old girl for the purpose of engaging in sexual activity. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

Because it was undisputed that the defendant's crimes took place in Fulton County and that the defendant was tried in Fulton County, the defendant failed to demonstrate that the convictions were void for lack of jurisdiction or improper venue. Brown v. State, 346 Ga. App. 245, 816 S.E.2d 111 (2018).

Because the undisputed evidence presented at trial showed that the child was present in Georgia for at least some period of time after suffering an older bone break, even if the charged conduct occurred outside of Georgia, the result occurred in Georgia, and the defendant's jurisdictional challenge was without merit. Hines v. State, 353 Ga. App. 710, 839 S.E.2d 208 (2020).

High speed chase. — Because a police officer was involved in a high-speed chase with the defendant through two counties and because the officer kept the defendant in sight throughout the entire chase, venue was proper in the county in which the chase began. Ryan v. State, 277 Ga. App. 490, 627 S.E.2d 128 (2006).

Cited in Anderson v. State, 249 Ga. 132, 287 S.E.2d 195 (1982); Stevens v. State, 176 Ga. App. 583, 336 S.E.2d 846 (1985); Raftis v. State, 175 Ga. App. 893, 334 S.E.2d 857 (1985); Fulton County v. State, 282 Ga. 570, 651 S.E.2d 679 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 6, 472 et seq., 482 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 124 et seq., 132 et seq., 154 et seq.

ALR. — Absence from state at time of offense as affecting jurisdiction of offense, 42 A.L.R. 272.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed, 76 A.L.R. 1034.

Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 A.L.R. 1262.

Civil and criminal liability of soldiers, sailors, and militiamen, 158 A.L.R. 1462.

Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child, 44 A.L.R.2d 886.

Jurisdiction to prosecute conspirator who was not in state at time of substantive criminal act, for offense committed pursuant to conspiracy, 5 A.L.R.3d 887.

Choice of venue to which transfer is to be had where change is sought because of local prejudice, 50 A.L.R.3d 760.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

17-2-2. Venue generally.

(a) **In general.** Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided by law.

(b) **Crime committed on boundary line of two counties.** If a crime is committed on, or immediately adjacent to, the boundary line between two counties, the crime shall be considered as having been committed in either county.

(c) **Criminal homicide.** Criminal homicide shall be considered as having been committed in the county in which the cause of death was inflicted. If it cannot be determined in which county the cause of death

was inflicted, it shall be considered that it was inflicted in the county in which the death occurred. If a dead body is discovered in this state and it cannot be readily determined in what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered.

(d) **Crime commenced outside the state.** If the commission of a crime under the laws of this state commenced outside the state is consummated within this state, the crime shall be considered as having been committed in the county where it is consummated.

(e) **Crime committed while in transit.** If a crime is committed upon any railroad car, vehicle, watercraft, or aircraft traveling within this state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the railroad car, vehicle, watercraft, or aircraft has traveled.

(f) **Crime committed on water boundaries of two counties.** Whenever a stream or body of water is the boundary between two counties, the jurisdiction of each county shall extend to the center of the main channel of the stream or the center of the body of water; and, if a crime is committed on the stream or body of water and it cannot be readily determined in which county the crime was committed, the crime shall be considered as having been committed in either county.

(g) **Crime committed on water boundaries of two states.** Whenever a crime is committed on any river or body of water which forms a boundary between this state and another state, the accused shall be tried in the county of this state which is situated opposite the point where the crime is committed. If it cannot be readily determined on which side of the line a crime was committed between two counties which border the river or body of water, the crime shall be considered as having been committed in either county.

(h) **Crime in more than one county.** If in any case it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed.

(i) **Cumulative effect of Code section.** This Code section is cumulative and shall not supersede venue provisions found in other parts of this Code.

History. — Laws 1833, Cobb's 1851 Digest, p. 840; Ga. L. 1855-56, p. 265, § 1; Code 1863, §§ 39, 40, 4556, 4557, 4558; Code 1868, §§ 37, 38, 4576, 4577, 4578; Code 1873, §§ 35, 36, 4570, 4571, 4572, 4686; Code 1882, §§ 35, 36, 4570, 4571, 4572, 4686, 5172; Ga. L. 1895, p. 70, § 1; Penal Code 1895, §§ 23, 24, 26, 27, 28, 29; Penal Code 1910, §§ 23, 24, 26, 27, 28, 29; Code 1933, §§ 27-1101, 27-1102, 27-1103,

27-1104, 27-1105, 27-1106; Code 1933, § 26-302, enacted by Ga. L. 1968, p. 1249, § 1.

Cross references. — Venue generally, Ga. Const. 1983, Art. VI, Sec. II. Venue for prosecution of actions for certain offenses involving theft, § 16-8-11. Venue for prosecution of actions for offense of theft by extortion, § 16-8-16. Change of venue, § 17-7-150 et seq.

U.S. Code. — Venue, Federal Rules of Criminal Procedure, Rule 18.

Law reviews. — For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

JUDICIAL DECISIONS

Analysis

General Consideration
Proof of Venue

General Consideration

Section abrogates rule at common law. — At common law, jurisdiction attached in the county where death occurred, but by this section jurisdiction attached in the county where the mortal blow was given. Roach v. State, 34 Ga. 78 (1864).

Section does not violate due process. — O.C.G.A. § 17-2-2 is not unconstitutionally vague or indefinite so as to violate state and federal concepts of due process. Rather, the statute adequately provides a mechanism to carry into effect the mandate of the state's constitution that criminal trials be held in the county in which the crime was committed. Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

Constitutional requirement that case be tried where crime committed not violated. — O.C.G.A. § 17-2-2 does not conflict with state constitutional requirement that all criminal cases be tried in the county where the crime was committed. Miller v. State, 174 Ga. App. 42, 329 S.E.2d 252 (1985).

Subsection (b) of O.C.G.A. § 17-2-2 does not violate Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (Ga. Const. 1983, Art. VI, Sec. II, Para. VI), providing that criminal trials be held in the county in which the crime was committed. Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

Under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2, venue in all criminal cases must be laid in the county in which the crime was allegedly committed. Walker v. State, 258 Ga. App. 354, 574 S.E.2d 317 (2002).

Purpose of O.C.G.A. § 17-2-2 is to provide for establishment of venue in situations where there is either some doubt as to which county was the scene of the crime or where the crime in fact occurred in more than one county. Its purpose is the same as O.C.G.A. § 16-8-11. Bundren v. State, 247 Ga. 180, 274 S.E.2d 455 (1981).

Section provides proper jurisdiction where location of crime unclear. — O.C.G.A. § 17-2-2 provides a mechanism by which the mandate of Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (Ga. Const. 1983, Art. VI, Sec. II, Para. VI) can be carried out when the place in which the crime is committed cannot be determined with certainty. Bundren v. State, 247 Ga. 180, 274 S.E.2d 455 (1981).

Under O.C.G.A. § 16-13-30(j)(1), it was unlawful for any person to possess marijuana, and since the marijuana was found in defendant's pocket when the defendant was arrested, and defendant was observed traveling in Newton County before the defendant's arrest in Rockdale County, the evidence was sufficient to conclude beyond a reasonable doubt that the defendant was guilty of possession of less than one ounce of marijuana since O.C.G.A. § 17-2-2(e) provided that if a crime was committed upon any vehicle traveling within the state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county

in which the crime could have been committed through which the vehicle has traveled. Johnson v. State, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Location of crime is clear. — For purposes of the aggravated battery — family violence offense and other offenses occurring in the parties' home, venue was proper in Athens-Clarke County because one of the responding officers of the Athens-Clarke County Police Department directly testified that the house where the defendant and the victim lived was located in Athens-Clarke County. Jones v. State, 329 Ga. App. 439, 765 S.E.2d 639 (2014).

Because the victim's body was discovered in Douglas County, Georgia, and the county in which the cause of death was inflicted could not be determined, venue for the murder charge against both of the defendants was proper in Douglas County. Perera v. State, 295 Ga. 880, 763 S.E.2d 687 (2014).

Effect on jurisdiction of change of venue. — Upon a change of venue in a criminal case, the county from which the case is transferred loses all jurisdiction to try the accused upon the indictment transferred at the time of the change, or any other indictment charging the same offense. Johnston v. State, 118 Ga. 310, 45 S.E. 381 (1903).

Venue of crime is jurisdictional fact. — Venue must be proved as part of the general case. Dempsey v. State, 52 Ga. App. 35, 182 S.E. 56 (1935); Wright v. State, 219 Ga. App. 119, 464 S.E.2d 216 (1995).

After a defendant was granted a directed verdict on the basis that the state failed to prove venue in a criminal prosecution for driving under the influence per se, retrial was not barred under U.S. Const. amend. V and O.C.G.A. § 16-1-8 because, while venue had to be laid in the county in which the crime was allegedly committed under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2 and venue was a jurisdictional fact, failure to prove venue was a procedural error that implied nothing as to the defendant's guilt or innocence. Hudson v. State, 296 Ga. App. 758, 675 S.E.2d 603, cert. denied, No. S09C1163, 2009 Ga. LEXIS 413 (Ga. 2009), cert. denied, 558 U.S. 1076, 130 S. Ct. 799, 175 L. Ed. 2d 559 (2009).

Venue determination reserved for finder of fact. — Trial court erred by making a per se determination of venue and granting the defendant's motion to transfer the case to a different county within the response to the defendant's motion to suppress because a determination of venue was reserved for the finder of fact at trial. State v. Hasson, 334 Ga. App. 1, 778 S.E.2d 15 (2015).

Criminal defendant cannot require bill of exceptions when venue change denied. — Defendant in a criminal case is not entitled to a direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) to a judgment denying a motion for change of venue on the ground that the defendant cannot obtain a fair trial in the county where the case is then pending. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951).

Place of occurrence of homicide. — Use of O.C.G.A. § 17-2-2(h) to determine venue in a homicide case is not precluded by § 17-2-2(c). Felker v. State, 252 Ga. 351, 314 S.E.2d 621, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

Prosecution venue for enticing child for immoral purposes. — Venue lies in the county where the child was first enticed. Cornelius v. State, 213 Ga. App. 766, 445 S.E.2d 800 (1994).

Venue in cases of kidnapping. — Venue is proper in the county where the victim was seized. Harris v. State, 165 Ga. App. 249, 299 S.E.2d 924 (1983).

Kidnapping is not a continuing offense, and the crime is consummated when the victim is seized; thus, the prosecution in an attempt to prove kidnapping failed to prove venue in a state county when the evidence showed that the victim was seized in another state. Miller v. State, 174 Ga. App. 42, 329 S.E.2d 252 (1985); Jordan v. State, 242 Ga. App. 408, 530 S.E.2d 42 (2000), overruled on other grounds, Shields v. State, 276 Ga. 669, 581 S.E.2d 536 (2003).

Because the evidence was sufficient to support a finding that a kidnapping might have been committed in Douglas County, there was no ground for reversal. A police

General Consideration (Cont'd)

officer testified that a bar and all the buildings surrounding the bar, from which a victim was abducted, were in Douglas County, although the bar was situated near the county line with Cobb County; while the victim was driven to an ATM in Cobb County, there was no evidence of the route taken between the bar and that ATM. Epps v. State, 297 Ga. App. 66, 676 S.E.2d 791 (2009).

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. Aldridge v. State, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Venue in RICO cases governed by RICO venue provision. — Venue for charges under the Georgia Racketeer and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., was proper against one of the three defendants in Cobb County pursuant to O.C.G.A. § 16-14-11, even though the defendant was acquitted of a conspiracy charge and the defendant personally committed no acts in Cobb County. Lowery v. State, 347 Ga. App. 26, 815 S.E.2d 625 (2018).

Venue in cases of Medicaid fraud. — Venue was proper in the county where a false report is submitted and processed in an attempt to fraudulently obtain medical assistance. Culver v. State, 254 Ga. App. 297, 562 S.E.2d 201 (2002).

In a Medicaid fraud case committed by a fraudulent scheme or device under O.C.G.A. § 49-4-146.1(b)(1)(C) of the Georgia Medical Assistance Act, O.C.G.A. § 49-4-140 et seq., pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a), venue is proper in any county where an act was committed in furtherance of the fraudulent transaction. Because defendants committed acts in furtherance of the fraud in counties in which the defendants were tried and convicted, venue in those counties was proper and the appellate court improperly reversed the defendants' convictions. State v. Kell, 276 Ga. 423, 577 S.E.2d 551 (2003).

Venue in robbery case. — When the victim was given a ride by appellant at the Fort Gordon bus station, the victim was robbed in Augusta, which is in Richmond County, and the victim was let out about one mile from the Augusta airport, the evidence established beyond a reasonable doubt that the offense might have been committed in Richmond County, and is sufficient to show venue in Richmond County. Harper v. State, 172 Ga. App. 69, 321 S.E.2d 805 (1984).

Court of appeals erred in reversing the defendant's conviction for armed robbery because the trial court properly declined to instruct the jury on the lesser included offense of theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant committed theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue. State v. Dixon, 286 Ga. 706, 691 S.E.2d 207 (2010).

Venue in a conspiracy case. — Venue is properly laid in the county in which the substantive offense is committed, even though the defendant may never have entered that county. Osborn v. State, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

County where vehicle first spotted is county of venue. — County where a defendant was arrested was not the proper venue since an officer spotted the defendant driving in another county and followed the defendant across the county line to make the arrest; the county in which the defendant was first driving was

the proper venue. Pippins v. State, 204 Ga. App. 318, 419 S.E.2d 28, cert. denied, 204 Ga. App. 922, 419 S.E.2d 28 (1992).

With respect to the offenses relating to or arising out of the police chase, including the offense of fleeing and attempting to elude police officers, venue was proper in Athens-Clarke County because, although the defendant drove through other counties, the police chase began in Athens-Clarke County, and there was testimony that the defendant's vehicle traveled in Athens-Clarke County during the course of the police chase. Jones v. State, 329 Ga. App. 439, 765 S.E.2d 639 (2014).

Venue for crime in vehicle anywhere vehicle traverses. — When a crime is committed in a vehicle traveling within this state, it may be considered to have been committed in any county traversed. Polk v. State, 142 Ga. App. 785, 236 S.E.2d 926 (1977).

When the crime occurred in a car traveling across several counties and continued as the car headed "back into town," and the evidence showed that the crime might have been committed in the forum county, venue was appropriate in that county under O.C.G.A. § 17-2-2 (e) and (h). Hendrix v. State, 242 Ga. App. 678, 530 S.E.2d 804 (2000).

Venue was proper in the county where the defendant committed several moving violations, although an arrest was effectuated in a neighboring county due to the officer's hot pursuit; the officer had legal authority to initiate pursuit and arrest, and the arrest was not invalid merely because the officer was outside the officer's jurisdiction. Page v. State, 250 Ga. App. 795, 553 S.E.2d 176 (2001).

When the defendant committed the offense in the defendant's vehicle while taking the victim to a car repair shop, and all of the roads to the repair shop were in the county where the defendant's trial occurred, under O.C.G.A. § 17-2-2(e), the trial court had jurisdiction to try the defendant as the defendant could have been tried in any county through which defendant's vehicle traveled. Gearin v. State, 255 Ga. App. 329, 565 S.E.2d 540 (2002).

Evidence of venue in fleeing and eluding case. — In a fleeing and eluding case under O.C.G.A. § 40-6-395, the evidence was sufficient to establish venue as required by Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a), based on evidence that the chase originated in the county and continued there, including an eyewitness's testimony, dash cam footage, and a map. Payne v. State, 338 Ga. App. 677, 791 S.E.2d 451 (2016), overruled on other grounds by Worthen v. State, 2019 Ga. LEXIS 22 (Ga. 2019).

Venue for receiving stolen goods in county received. — Venue of a charge of receiving stolen goods, knowing the goods to be stolen, is the county where such goods are received. Dempsey v. State, 52 Ga. App. 35, 182 S.E. 56 (1935).

Venue for the crime of making a false statement. — Venue was in the county where the defendant signed a form falsely attesting to the use being made of government property, not the location of the office to which the form was sent. Spray v. State, 223 Ga. App. 154, 476 S.E.2d 878 (1996).

Trial court committed reversible error as a result of convicting a defendant for making false statements to a state or local government agency or department in a case wherein the state failed to prove venue in the jurisdiction that the defendant was tried. The state was obligated to prove that the defendant's false statements to Federal Bureau of Investigation officers occurred in Fulton County wherein the defendant was tried; thus, the defendant's conviction required reversal. Tesler v. State, 295 Ga. App. 569, 672 S.E.2d 522 (2009), cert. denied, No. S09C0810, 2009 Ga. LEXIS 334 (Ga. 2009).

No venue when police trick defendant into county for venue. — Police officers' activities in maneuvering appellant into a county for the sole purpose of obtaining venue constituted a subterfuge and impermissibly conferred apparent venue over the defendant in that county. McCarty v. State, 152 Ga. App. 726, 263 S.E.2d 700 (1979).

Venue when custody unlawfully retained. — When a parent lawfully removes the child from the state, but unlawfully retains custody out of state, the legislature intended that the victim's domicile, i.e., the custodial parent, should be

General Consideration (Cont'd)

the venue of any criminal prosecution. State v. Evans, 212 Ga. App. 415, 442 S.E.2d 287 (1994).

Proving venue in cruelty to children case. — Trial court did not err in denying the defendant's motion for new trial because the state did not fail to prove venue beyond a reasonable doubt as to the counts of cruelty to children in the second degree for fracturing the second victim's ribs and cruelty to children in the first degree for fracturing the first victim's ribs and a leg because the evidence showed that the defendant and the children's mother moved with their children to an apartment in Clayton County in April 2009 and that they were the children's sole caretakers; that the victims' injuries were discovered in July 2009; and a doctor testified that the bone fractures had to have occurred at least one to two weeks in the past and at most a few months in the past. Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

Venue in drug possession charge cases. — O.C.G.A. § 17-2-2(h) applies when a drug possession charge results from the detection of metabolites that can remain in a defendant's urine two to four days after the drug is ingested, and venue is appropriate in the county where the defendant is present immediately before being asked to provide the urine sample. Pruitt v. State, 264 Ga. App. 44, 589 S.E.2d 864 (2003).

Venue is a question to be decided by the jury and the jury's decision will not be set aside as long as there is any evidence to support the decision. Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980); Davis v. State, 203 Ga. App. 106, 416 S.E.2d 375 (1992).

Venue a jury question when no concrete evidence presented as to where rape committed. — When there is evidence that the victim was with the defendant in numerous counties, but there is no concrete evidence as to in which county she was raped and assaulted, the issue is properly submitted to the jury as to venue. Moss v. State, 160 Ga. App. 42, 285 S.E.2d 776 (1981).

Jury instruction on venue in homicide cases. — Jury instruction in a murder case under O.C.G.A. § 17-2-2(c), that, if it could not be determined where the cause of death was inflicted, it "shall be considered" that it was inflicted in the county where the body was discovered, did not impermissibly shift the burden of proof to the defendant. As a result, the following cases are disapproved: Napier v. State, 276 Ga. 769(2), 583 S.E.2d 825 (2003), Owens v. State, 286 Ga. 821, 827(3), 693 S.E.2d 490 (2010), and Owens v. McLaughlin, 733 F.3d 320, 327 (11th Cir. 2013). Shelton v. Lee, 299 Ga. 350, 788 S.E.2d 369 (2016), cert. denied, 137 S. Ct. 1066, 197 L. Ed. 2d 187 (U.S. 2017).

Venue in violation of state ethics law. — When the defendants were indicted under O.C.G.A. § 21-5-9 for failing to file documents with the state ethics commission under O.C.G.A. § 21-5-34, venue was in the county where the commission was exclusively located; the place fixed for performance of the required act fixed the situs of the alleged crime. McKinney v. State, 282 Ga. 230, 647 S.E.2d 44 (2007).

Venue not relevant to motion to suppress. — Grant of the defendant's motion to suppress on the basis of venue was reversed because the state did not need to establish venue at the pretrial hearing on the defendant's motion to suppress as it was not relevant to the issues raised in the motion, which challenged the reasonable basis for the traffic stop or whether the resulting search of the defendant and the defendant's vehicle were supported by probable cause. State v. Wallace, 338 Ga. App. 611, 791 S.E.2d 187 (2016).

Jury is not obliged to accept opinion evidence. — Jury may accept evidence from surveyors and reject opinion evidence of law enforcement officers relating to the location of a county line. Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

Special instructions. — When the case against the defendant is based upon the defendant's activities as a party or conspirator to the crime charged in the indictment and these activities took place in a county other than the one in which the prosecution is brought, a special instruction on venue is necessary to clarify

the nature of the criminal activity for which the defendant is on trial. Osborn v. State, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

Failure to instruct on venue. — Although the trial court did not instruct the jury on venue, and neither party requested an instruction on venue, its complete charge on reasonable doubt, and instruction that the crimes as alleged in the indictment had to be proven beyond a reasonable doubt, when coupled with an indictment which specified that the crimes were committed in Fulton County, was sufficient such that the trial court's failure to instruct the jury on venue provided no basis for reversal. Watson v. State, 263 Ga. App. 95, 587 S.E.2d 243 (2003).

Because the trial court properly instructed the jury that venue was a jurisdictional fact that had to be proven beyond a reasonable doubt as to each crime charged in the indictment, no reversible error resulted from the charge. Clark v. State, 283 Ga. 234, 657 S.E.2d 872 (2008).

Jury instruction. — Supreme Court of Georgia has urged trial courts to give a separate charge on venue to encourage prosecutors to prove venue and to alert juries to the juries' specific role in determining venue, and also has recommended language to use in instructing the jury on venue; although the Court has encouraged the giving of the instruction, the Supreme Court has declined to reverse a conviction and require a new trial based on the trial court's failure to sua sponte instruct the jury on venue. Lanham v. State, 291 Ga. 625, 732 S.E.2d 72 (2012).

Former jeopardy. — If a defendant is tried in one county in a court having jurisdiction of the offense, but the crime occurred in another county, no jeopardy attaches. Schiefelbein v. State, 258 Ga. 623, 373 S.E.2d 354 (1988), cert. denied, 489 U.S. 1026, 109 S. Ct. 1156, 103 L. Ed. 2d 215 (1989).

Effect of judgment on determination of venue issue. — Litigation of the issue of venue in a second prosecution of defendant for a rape that allegedly occurred on a boundary lake was subject to collateral estoppel as defendant had been acquitted in an earlier proceeding at which the state had the opportunity to present evidence on the issue. Ganong v. State, 223 Ga. App. 163, 477 S.E.2d 324 (1996).

Cited in Blackman v. State, 80 Ga. 785, 7 S.E. 626 (1888); Woolfolk v. State, 85 Ga. 69, 11 S.E. 814 (1890); Rawlins v. State, 124 Ga. 31, 52 S.E. 1 (1905); Upton v. State, 229 Ga. 834, 195 S.E.2d 21 (1972); Maddox v. State, 145 Ga. App. 363, 243 S.E.2d 740 (1978); Taylor v. State, 154 Ga. App. 279, 267 S.E.2d 891 (1980); Dabney v. State, 154 Ga. App. 355, 268 S.E.2d 408 (1980); Bundren v. State, 155 Ga. App. 265, 270 S.E.2d 807 (1980); Anderson v. State, 249 Ga. 132, 287 S.E.2d 195 (1982); Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982); Radford v. State, 251 Ga. 50, 302 S.E.2d 555 (1983); Miller v. State, 169 Ga. App. 668, 314 S.E.2d 684 (1984); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984); Thomas v. State, 255 Ga. 38, 334 S.E.2d 675 (1985); Miller v. State, 174 Ga. App. 703, 331 S.E.2d 616 (1985); Sypho v. State, 175 Ga. App. 833, 334 S.E.2d 878 (1985); Amerson v. State, 177 Ga. App. 97, 338 S.E.2d 528 (1985); Worth v. State, 179 Ga. App. 207, 346 S.E.2d 82 (1986); Caviness v. State, 180 Ga. App. 792, 350 S.E.2d 813 (1986); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Sanders v. State, 182 Ga. App. 581, 356 S.E.2d 537 (1987); Henderson v. State, 191 Ga. App. 275, 381 S.E.2d 423 (1989); Head v. State, 191 Ga. App. 262, 381 S.E.2d 519 (1989); White v. State, 193 Ga. App. 428, 387 S.E.2d 921 (1989); Randall v. State, 195 Ga. App. 755, 395 S.E.2d 2 (1990); Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990); Melton v. State, 204 Ga. App. 103, 418 S.E.2d 428 (1992); Dennis v. State, 263 Ga. 257, 430 S.E.2d 742 (1993); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695 (1994); Weidmann v. State, 222 Ga. App. 796, 476 S.E.2d 18 (1996); Turner v. State, 273 Ga. 340, 541 S.E.2d 641 (2001); Hanson v. State, 275 Ga. 470, 569 S.E.2d 513 (2002); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); Rogers v. State, 298 Ga. App. 895, 681 S.E.2d 693 (2009); Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011); Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

Proof of Venue

Court assumes county in evidence is county within state. — If a county is named in the evidence, the state will indulge the presumption that it is a county of this state, and if the name mentioned in the evidence is the county of the trial, the court will assume that the county at trial is the county in the evidence. Gibson v. State, 52 Ga. App. 297, 183 S.E. 83 (1935).

Court would take judicial notice. — Court would take notice that named municipality was site of county wherein defendant was prosecuted and wholly within such county, and if all the evidence strongly tends to show that the crime was committed in the county where the trial was had, and if there is no evidence warranting even a bare conjecture that it was committed elsewhere, then venue is satisfactorily established. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951).

Court could take judicial notice that a city was located wholly within the county in which the defendant was tried. Gilmer v. State, 234 Ga. App. 309, 506 S.E.2d 452 (1998), overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019).

Testimony that crime committed in certain county proves committed within state. — On an indictment tried in Putnam County, testimony that the crime was committed in Putnam County is sufficient proof that the crime was committed in Putnam County, Georgia. Dennis v. State, 51 Ga. App. 538, 180 S.E. 909 (1935).

Defendant was arrested for obstruction of a police officer for refusing to obey an officer's order to move the defendant's vehicle which was stopped on a public road. The officer's testimony that the road was located in Dawson County was sufficient to prove venue in Dawson County beyond a reasonable doubt. West v. State, 296 Ga. App. 58, 673 S.E.2d 558 (2009), overruled on other grounds, 2019 Ga. LEXIS 22 (Ga. 2019).

Testimony that crime committed in certain county. — With regard to the defendant's murder conviction, the state established venue by proof beyond a reasonable doubt via testimony of the chief investigator, who used aerial photographs obtained from the tax assessor's office in Bryan County, Georgia, and identified the location of the residences of the defendant, the defendant's parents, the victim, and the place where the victim's body was found. Lanham v. State, 291 Ga. 625, 732 S.E.2d 72 (2012).

Georgia Supreme Court corrected the Court's prior holdings of Gosha v. State, 56 Ga. 36 (1876) that a jury can never reasonably infer that a crime committed near a location in one county was committed in the same county and the same holding in Jones v. State, 272 Ga. 900 (2000) and expressly overruled all cases following those holdings in Gosha and Jones and disapproved all cases that have cited those holdings favorably. Worthen v. State, 304 Ga. 862, 823 S.E.2d 291 (2019).

Evidence was sufficient to support the jury's finding that venue for a murder count (and the associated firearm count) was proved beyond a reasonable doubt to be Fulton County, Georgia as the record showed that police witnesses testified that 490 Angier Avenue was in Fulton County, which included the crime scene of the sidewalk or the street in front of the building where the appellant shot and killed the victim. Worthen v. State, 304 Ga. 862, 823 S.E.2d 291 (2019).

Proof crime committed in municipality does not prove venue in state's county. — Proof that an offense was committed in a designated municipality is not of itself sufficient to show venue in any particular county of this state. Gibson v. State, 52 Ga. App. 297, 183 S.E. 83 (1935).

Trial of defendant in the Atlanta Traffic Court, a city court which sits in the Fulton County portion of Atlanta, was improper, after the state proved that the alleged offense took place in the city of Atlanta but did not offer any proof that the offense occurred in Fulton County; the defendant is entitled to be tried in the county in which the offense was alleged to have occurred. Waller v. State, 231 Ga. App. 323, 498 S.E.2d 362 (1998).

Venue in multi-county crime spree. — State failed to prove venue for armed robbery and hijacking a motor vehicle since the facts showed that the victim was forced at gunpoint into the victim's car in a parking lot in one county and then was

ordered to drive into a second county (the place of trial) where the victim was taken from the car and shot; both offenses were complete in the first county, and neither O.C.G.A. § 16-8-11 nor O.C.G.A. § 17-2-2 were applicable to confer venue in the second county. Bradley v. State, 272 Ga. 740, 533 S.E.2d 727 (2000).

Venue was proper in the county in which the victim's body was discovered because it could not be readily determined in which county the cause of death was inflicted. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11 (2005).

In general, criminal actions are tried in the county where the crime was committed; the victim's testimony that the defendant committed sexual assault offenses in Colquitt County, even though the defendant also committed some of the offenses in other counties, was sufficient to establish venue. Henry v. State, 274 Ga. App. 139, 616 S.E.2d 883 (2005).

Venue demonstrable by circumstantial evidence. — Venue in a criminal case, like any other fact, may be shown by circumstantial as well as direct evidence. Shi v. State, 52 Ga. App. 358, 183 S.E. 331 (1936); Hancock v. State, 196 Ga. 351, 26 S.E.2d 760 (1943); Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980); McCord v. State, 248 Ga. 765, 285 S.E.2d 724 (1982); Parrott v. State, 190 Ga. App. 784, 380 S.E.2d 343 (1989).

Circumstantial, as well as direct evidence, may be used to establish venue. Levitt v. State, 201 Ga. App. 63, 410 S.E.2d 170 (1991).

Evidence that the arresting officer worked for the county in which the offenses occurred and was on duty on the day the officer made the arrest was sufficient to support a finding that the offenses of which the defendant was accused occurred in the county in which the defendant was tried. Joiner v. State, 231 Ga. App. 61, 497 S.E.2d 642 (1998), overruled on other grounds, Jones v. State, 272 Ga. 900, 537 S.E.2d 80 (2000), overruling Perry v. State, 154 Ga. App. 559, 269 S.E.2d 63 (1980); Mega v. State, 220 Ga. App. 481, 469 S.E.2d 771 (1996); Calloway v. State, 227 Ga. App. 775, 490 S.E.2d 521 (1997).

Trial court properly found that venue existed in Jones County, Georgia as: (1) the last time the victim was seen alive, the victim was involved in an altercation with defendant at their Jones County home; and (2) if defendant did kill the victim during that altercation, the defendant killed the victim in a moment of passion, as the jury necessarily found, then the death of the victim at the victim's Jones County home was consistent with this finding. Glidewell v. State, 279 Ga. App. 114, 630 S.E.2d 621 (2006), overruled on other grounds, Reynolds v. State, 285 Ga. 70, 673 S.E.2d 854 (2009).

In a murder prosecution where the victim's body was never found, the evidence established that the defendant and the victim had left a ball park where they worked within five minutes of each other, that the victim's car was found abandoned at a gas station adjacent to the park, that a person whose voice characteristics matched the defendant's said on the telephone that the defendant took the victim at "the station," and that the park and the gas station were in DeKalb County was sufficient evidence to show beyond a reasonable doubt that the murder might have been committed in DeKalb County; thus, the proper trial venue under O.C.G.A. § 17-2-2(h) was proved to be in that county. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365 (2006).

In a child molestation case, venue in McIntosh County was proper; the victim testified that the crime occurred in the home of the victim's aunt, where the victim currently lived, and the aunt testified that she currently lived in McIntosh County. Flanders v. State, 285 Ga. App. 805, 648 S.E.2d 97 (2007).

Sufficient evidence supported that venue was properly established in Bibb County, Georgia, with regard to the defendant's aggravated assault, kidnapping, and rape convictions because although the two women were not sure where the defendant had driven them, the testimony of the camper whom one victim had found upon escaping established venue in Bibb County and the second area where the other victim was raped was only three minutes from the first. Howard v. State, 340 Ga. App. 133, 796 S.E.2d 757 (2017).

In the defendant's murder trial, there

Proof of Venue (Cont'd)

was sufficient evidence from which the jury could find that venue was properly laid in Upson County pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI, and O.C.G.A. § 17-2-2(c), including evidence that the crime occurred in Thomaston and the admission of evidence bags marked "Upson." Raines v. State, 304 Ga. 582, 820 S.E.2d 679 (2018).

Evidence as to venue, though slight, may be sufficient. — Evidence may be sufficient when there is no conflicting evidence. Baker v. State, 55 Ga. App. 159, 189 S.E. 364 (1937); Ellard v. State, 233 Ga. 640, 212 S.E.2d 816 (1975); Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979); Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980); Arthur v. State, 154 Ga. App. 735, 269 S.E.2d 887 (1980), cert. denied, 449 U.S. 1088, 101 S. Ct. 880, 66 L. Ed. 2d 815 (1981); Adcock v. State, 194 Ga. App. 627, 391 S.E.2d 438, aff'd, 260 Ga. 302, 392 S.E.2d 886 (1990); Sawyer v. State, 217 Ga. App. 406, 457 S.E.2d 685 (1995).

Venue must be established beyond a reasonable doubt. However, when the evidence is not conflicting and when no challenge to venue is raised at trial, slight evidence is sufficient to prove venue. Davis v. State, 203 Ga. App. 106, 416 S.E.2d 375 (1992).

With regard to the defendant's murder conviction, sufficient evidence was submitted to support the conclusion that the cause of the victim's death was a beating involving blows to the head and while no direct evidence was presented establishing where the beating was committed, sufficient indirect or circumstantial evidence was presented from which the jury could conclude the victim was beaten at the pull-off on a road in Harris County, Georgia, where the victim was found. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

Venue proved where evidence indicates crime committed in trial county. — When all of the evidence introduced on the trial of a criminal case strongly and decidedly tended to show that the offense was committed in the county where the trial was had, and there was no evidence warranting even a bare conjecture that the crime was committed elsewhere, the venue was sufficiently proved. Roberson v. State, 69 Ga. App. 541, 26 S.E.2d 142 (1943).

When the victim testified that the movant took a car from the victim at gunpoint in Chatham County, Georgia, a reasonable trier of fact was authorized to find beyond a reasonable doubt that the movant committed the crimes of armed robbery and possession of a firearm during the commission of a felony in Chatham County, making that county the appropriate venue for the movant's trial pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a); thus, the convictions and sentences were not void and the trial court properly dismissed, based on a lack of subject matter jurisdiction, the movant's post-conviction motion to vacate the convictions and sentences. Green v. State, 259 Ga. App. 195, 575 S.E.2d 921 (2002).

Venue was proven by testimony that the DVD-player that the defendant was accused of shoplifting from a store would not have come up on a scanner if it had not come from the particular store. Walker v. State, 268 Ga. App. 669, 602 S.E.2d 351 (2004).

Defendant's conviction for underaged drinking of an alcoholic beverage was upheld on appeal since the police officer smelled alcohol on the defendant's breath in the county wherein the defendant was arrested, which was enough to establish venue, pursuant to O.C.G.A. § 17-2-2(h). Burchett v. State, 283 Ga. App. 271, 641 S.E.2d 262 (2007).

With regard to a defendant's conviction for child molestation, the victim's testimony that the victim lived in a particular city, which was located in Spalding County, and that the incident occurred at another apartment, which the evidence revealed through the testimony was also located in that particular city, there was sufficient evidence to prove venue in Spalding County beyond a reasonable doubt. Mahone v. State, 293 Ga. App. 790, 668 S.E.2d 303 (2008).

State did not fail to prove venue beyond a reasonable doubt because the proof was that the crime was committed in the

County of Clayton; that the trial court was sitting in the County of Clayton and the State of Georgia was a fact known to the trial court from the court's own records and the public law, and when therefore it was proven that the crime was committed in the County of Clayton it was proven that the crime was committed in the county in which the trial court entertained jurisdiction over the crime. Gresham v. State, 289 Ga. 103, 709 S.E.2d 780 (2011).

Since there was no clear evidence that the fatal injury was inflicted anywhere other than Harris County, where the victim was found, and where the victim died, the state sufficiently proved venue. Walton v. State, 293 Ga. 607, 748 S.E.2d 866 (2013).

Contrary to the appellant's contention, venue for the murder committed was properly established in DeKalb County, Georgia, because the victim's body was found there and it was not readily determinable where the appellant shot and killed the victim; thus, O.C.G.A. § 17-2-2(c) applied. Hernandez v. State, 304 Ga. 895, 823 S.E.2d 272 (2019).

O.C.G.A. § 17-2-2(e) allows for venue for crimes committed while in transit to lie in any county in which the crime could have been committed through which the vehicle has traveled. Hernandez v. State, 304 Ga. 895, 823 S.E.2d 272 (2019).

Since it was not readily determinable in a murder case where the cause of death was inflicted or where the death occurred, then the appellate court must sustain the verdict if the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that the body was found in the county where the defendant was indicted. Hernandez v. State, 304 Ga. 895, 823 S.E.2d 272 (2019).

Proving venue in child molestation cases. — Statements by the victim of a child molestation that the defendant inserted a finger into the victim's private area and that the incident occurred in the bedroom of the victim's home, and a second statement that the incident occurred in the grandparent's house, where the child in fact lived, coupled with the fact that the grandparent's house was in the county where the defendant's trial was conducted, was sufficient to allow a rational juror to find beyond a reasonable doubt that the crime occurred in the county where the trial was held. Chalifoux v. State, 262 Ga. App. 895, 587 S.E.2d 62 (2003).

State proved venue in Cobb County beyond a reasonable doubt, with direct and circumstantial evidence, which showed that the defendant committed aggravated sexual battery upon the child victim while traveling from the victim's home in Cobb County to a bus stop. Harris v. State, 279 Ga. App. 570, 631 S.E.2d 772 (2006).

In a case where the defendant was convicted of aggravated child molestation and aggravated sodomy, there was sufficient evidence to establish venue under O.C.G.A. § 17-2-2(e); the evidence that the defendant, the defendant's parents, and the victim, who were traveling, stopped in Houston County, that the defendant entered the camper where the victim was sleeping, and that the defendant soon thereafter performed sex acts on the victim was sufficient to establish that the crimes could have been committed in Houston County. Boileau v. State, 285 Ga. App. 221, 645 S.E.2d 577 (2007).

Even though the victim was unable to testify with precision as to which county the attack took place, such was not required in order to establish the proper venue as the evidence showed beyond a reasonable doubt that the rape and aggravated sexual battery might have been committed in Fulton County, this evidence was sufficient to establish Fulton County as the proper venue. Arnold v. State, 284 Ga. App. 598, 645 S.E.2d 68 (2007).

Although the defendant argued that the state failed to prove venue beyond a reasonable doubt, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a) generally, a criminal case had to be tried in the county in which the crime was committed. The state had the burden of proving venue, which the state could do using either direct or circumstantial evidence, and whether the evidence as to venue satisfied the reasonable-doubt standard was a question for the jury, and the state's decision will not be set aside if there is any evidence to support the decision; therefore, because in

Proof of Venue (Cont'd)

the defendant's case, the victim testified that the defendant molested the victim in their residence and that the residence was located in Grady County, Georgia, venue was established beyond a reasonable doubt. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Body found in county, although shooting site unconfirmed. — Even when the evidence as to where the fatal shot was fired was inconclusive, if the evidence that the body was found in a particular county in the state was not contradicted, the contention that venue was not proven was without merit. Aldridge v. State, 236 Ga. 773, 225 S.E.2d 421 (1976).

Even though circumstances pointed to another county as the place of death, when no actual evidence of the murder was ever found in that county, the place of death could not be readily determined; thus, venue was appropriate in the county where the body was found. Kidwell v. State, 264 Ga. 427, 444 S.E.2d 789 (1994); Cook v. State, 273 Ga. 828, 546 S.E.2d 487 (2001).

Location of burning car supported venue. — Police officer's testimony that the burning car in which the victim's body was found was located in Fulton County was sufficient to establish venue in that county. Jackson v. State, 292 Ga. 685, 740 S.E.2d 609 (2013).

Confession of crime location to witness. — Statement by defendant to a witness, during the investigation of a case, that the defendant committed the offense at a certain geographically located spot, plus the sworn testimony of the witness during the trial that such spot is in the county of the court taking jurisdiction, is sufficient proof of venue, when there are no circumstances tending to prove that the venue was in fact in some other county. Austin v. State, 89 Ga. App. 866, 81 S.E.2d 508 (1954).

Lottery documents found at defendant's home in county with lottery. — Contention that the state failed to show jurisdictional venue in lottery prosecution was without merit since the lottery documents were seized at the defendant's home on the date defendant was arrested, and the jury was authorized to find that the exhibited documents were current, even though no dates were shown, and that the documents were being used in the numbers games which the evidence showed was at that time in full operation in the county. Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944).

Statement showing murder in decedent's home in trial county. — When the uncontradicted evidence and the defendant's statement showed that the accused did the killing as alleged in the indictment for murder without justification or mitigation, and that the killing was at the home of the deceased who lived on a named person's place in Clay County, and the trial was in Clay County, the verdict of guilt of murder without recommendation was supported by the evidence, and the venue was shown to be in Clay County, the place of trial. Jones v. State, 197 Ga. 604, 30 S.E.2d 192 (1944).

Venue in a murder case was proper. — Venue proper in Columbia County, where the victim was shot in Columbia County, but the victim's body was discovered in a car in a lake in Lincoln County, and the medical examiner listed drowning, secondary to a bullet wound to the head, as the cause of death. Tankersley v. State, 261 Ga. 318, 404 S.E.2d 564 (1991).

Jury could properly find that venue of a murder trial was proper under O.C.G.A. § 17-2-2(c) as the victim's body was discovered in the county of the proceedings and the county in which the cause of death was inflicted could not be readily determined; the mere fact that some circumstances pointed to another county as the place of death did not mean that there was a fatal variance between the allegata and probata since there was no actual evidence of the place of the murder. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Since the defendant conceded that the homicide was committed in a moving vehicle and the victim's body was found in Houston County, and there was no evidence that the fatal injury was inflicted

anywhere other than Houston County, the state sufficiently proved venue as to the murder. Faulkner v. State, 295 Ga. 321, 758 S.E.2d 817 (2014).

In a murder case, although there may have been conflicting evidence regarding in which county the victim's injuries were inflicted, it was undisputed that the victim's body was found in Pike County, and the jury was therefore authorized to find beyond a reasonable doubt that venue was proper in Pike County, pursuant to O.C.G.A. § 17-2-2(c). Crawford v. State, 297 Ga. 680, 777 S.E.2d 463 (2015).

Evidence established beyond a reasonable doubt that venue was properly in Houston County because the state presented testimony at trial establishing that the crimes against the victim culminating in the victim's murder were committed in Houston County as the place where the victim was severely beaten was in Houston County, the place where the victim was strangled to death was in Houston County, and the place where the victim's body was discovered was in Houston County; thus, the failure to prove venue was not a meritorious basis for granting directed verdicts of acquittal. Pike v. State, 302 Ga. 795, 809 S.E.2d 756 (2018).

Georgia Supreme Court held that if a body is discovered in Georgia and it cannot be readily determined in what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered. Hernandez v. State, 304 Ga. 895, 823 S.E.2d 272 (2019).

Evidence that victim gave funds to embezzler in trial county. — When the evidence authorized the jury to infer that at the time the money was entrusted for a specific purpose in Fulton County, the defendant intended to convert the money to defendant's own use and not to apply the money to the benefit and use of the owner so entrusting it, then venue could be laid in Fulton County. Price v. State, 76 Ga. App. 283, 45 S.E.2d 462 (1947).

County border location evidence. — Evidence was sufficient to trigger the provisions of subsection (b) of O.C.G.A. § 17-2-2 since the evidence showed that the victim was standing on the doorstep of the victim's home in Wilkinson County within walking distance of Twiggs County when the defendant, walking through a nearby backyard, threw a pipe at the victim. Carswell v. State, 244 Ga. App. 516, 534 S.E.2d 568 (2000).

Prosecution for larceny after trust where conversion in other county. — Venue in prosecution for larceny after trust may be laid in the county where the property was entrusted, although the physical conversion of it was in another county, where the facts authorized the jury to find that the intent to convert the money was formed in the county where the property was entrusted. Price v. State, 76 Ga. App. 283, 45 S.E.2d 462 (1947).

Confession and corroboration authorized venue. — On the prosecution for cattle stealing in which the defendant made an admissible confession as to every essential element of the crime, and the evidence was sufficient to establish the corpus delicti aliunde the confession, and the confession as to venue as well as the other essential elements of the crime was corroborated by other evidence, a verdict of guilty was authorized. Kicklighter v. State, 76 Ga. App. 246, 45 S.E.2d 719 (1947).

Evidence sufficient to establish the venue of crime of cattle stealing. Kicklighter v. State, 76 Ga. App. 246, 45 S.E.2d 719 (1947).

Venue of offense of attempting to steal cattle was sufficiently proved. — Davis v. State, 66 Ga. App. 877, 19 S.E.2d 543 (1942).

When venue is not contested at trial, slight proof is sufficient. Jackson v. State, 177 Ga. App. 718, 341 S.E.2d 274 (1986); Brown v. State, 205 Ga. App. 31, 421 S.E.2d 340 (1992).

When evidence as to venue is conflicting. — State must prove venue as jurisdictional fact beyond a reasonable doubt. Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

Venue needs clear proof beyond reasonable doubt. — Although slight evidence of venue may be sufficient when the fact of venue is not contested, nevertheless, it is a jurisdictional fact and must be proved clearly and beyond reasonable doubt. Gibson v. State, 52 Ga. App. 297, 183 S.E. 83 (1935); Rowland v. State, 90 Ga. App. 742, 84 S.E.2d 209 (1954).

Proof of Venue (Cont'd)

Venue of the crime must be established clearly and beyond a reasonable doubt. Jackson v. State, 177 Ga. App. 718, 341 S.E.2d 274 (1986).

Venue must be established beyond a reasonable doubt. Levitt v. State, 201 Ga. App. 63, 410 S.E.2d 170 (1991).

Absent sufficient proof establishing venue, and proof that a crime took place within a city without also proving that the city was entirely within a county did not establish venue, the defendant's aggravated sexual battery and aggravated sodomy convictions were reversed. Melton v. State, 282 Ga. App. 685, 639 S.E.2d 411 (2006).

Evidence of venue, though slight, may be sufficient. — Defendant's conviction for impersonating a law enforcement officer was affirmed as venue was established since the state presented evidence that the defendant lived and was arrested in Catoosa County, Georgia, which authorized the jury to find beyond a reasonable doubt that the defendant might have held oneself out as a law enforcement officer via the online application in Catoosa County; therefore, proof of venue was sufficient. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802 (2016).

Uniform traffic citations are not evidence for venue purposes. — Citation cannot provide the factual basis necessary to establish venue. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, Jones v. State, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Proof insufficient if venue evidence equivocal. — Venue may be proved by circumstantial evidence; but circumstances which render it possible that an alleged crime was committed within the jurisdiction of the court are insufficient to establish the jurisdictional element of venue when, from the circumstances adduced, it is as reasonable and possible that the crime was committed beyond the jurisdiction of the court. Clark v. State, 55 Ga. App. 162, 189 S.E. 379 (1937).

When the indictment did not charge uttering a forged instrument, but only charged the defendant with making, signing, forging, and counterfeiting the instrument, and the evidence failed to establish with any degree of clearness where this act may have taken place, the venue of the crime was not supported by the evidence. Rowland v. State, 90 Ga. App. 742, 84 S.E.2d 209 (1954).

Only rank speculation supported venue in the defendant's trial for cruelty to children; therefore, the trial court erred in not granting the defendant's motion for a directed verdict on this charge. Nihart v. State, 227 Ga. App. 272, 488 S.E.2d 740 (1997).

Evidence insufficient to establish venue. — Evidence at defendant's trial on a charge of aggravated assault, in violation of O.C.G.A. § 16-5-21, was insufficient to establish venue for purposes of O.C.G.A. § 17-2-2(e), since the crime arose while the defendant was driving after a former girlfriend and the girlfriend testified to living with her parents in Paulding County, near the line of Polk County, and further, that when she was minutes or less from home, she stopped on the side of the road; there was no evidence by her or anyone else that the site off the roadway where the crime occurred was in Douglas County and, accordingly, reversal of the conviction was required. Morris v. State, 263 Ga. App. 115, 587 S.E.2d 272 (2003).

Juvenile's numerous delinquency adjudications were reversed because the relevant county was never mentioned by any witness and it is not sufficient to prove that a crime occurred in a particular city without also proving that the city is entirely within the relevant county. In the Interest of J.B., 289 Ga. App. 617, 658 S.E.2d 194 (2008).

Defendant's convictions for rape and related crimes involving one out of six victims was reversed on appeal as the state failed to prove that the crimes against that victim occurred in Fulton County, Georgia, where the trial was held as the victim stated that the victim was using a pay phone on a certain street at a certain location at the time the victim was abducted, but the state never put forth any evidence establishing that the street at issue was in Fulton County. Further,

there was no evidence offered by the state to establish the location of the school the victim had met the police at after the crime. Baker v. State, 295 Ga. App. 162, 671 S.E.2d 206 (2008), cert. denied, No. S09C0571, 2009 Ga. LEXIS 183 (Ga. 2009).

State's failure to prove beyond a reasonable doubt that the defendant and the codefendant possessed a pipe with traces of methamphetamine on the pipe, which was discovered in a search of the defendant's impounded vehicle in the county, rendered the verdict contrary to law, without a sufficient evidentiary basis, because venue was an essential element of the crime, and there was no direct evidence of possession of the pipe in the county; because there was no evidence placing the pipe in the vehicle while the vehicle was in the county, and there was a possibility that the pipe was put in the vehicle after the shootings during one of several stops the defendant and the codefendant made while in Alabama, venue for possession of methamphetamine was not proven to be in the county. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009).

State failed to prove venue beyond a reasonable doubt because evidence that the defendant's drugs sales to an informant occurred somewhere in Vidalia, Georgia, was insufficient to establish that the crimes occurred in Toombs County since the habeas court properly took judicial notice that Vidalia was located in two different counties, Toombs and Montgomery, and O.C.G.A. § 17-2-2(e) was inapplicable; because the informant would have known the general locations where the sales occurred and because the drug task force agents knew the exact route that the informant and the defendant traveled, the state could have readily determined whether the drug sales occurred in Toombs County and offered evidence to the jury on that essential point. Thompson v. Brown, 288 Ga. 855, 708 S.E.2d 270 (2011).

Defendant's claim that the state failed to prove venue lacked merit as an officer testified that the victim's body was found in Baldwin County and additional testimony proved that the defendant drove the victim to the location where the victim was found, shot the victim, and left the victim for dead. Hargrove v. State, 291 Ga. 879, 734 S.E.2d 34 (2012), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685 (Ga. 2018).

State failed to present evidence of venue necessary for a fleeing and eluding conviction, as the testimony merely identified streets, but did not indicate the counties in which the chase or shooting took place. Grant v. State, 326 Ga. App. 121, 756 S.E.2d 255 (2014).

Sufficient evidence supported the defendant's conviction for theft by taking since the evidence showed that the defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that the defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that the defendant exercised any control over the $ 350,000 in Dodge County. Davis v. State, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Defendant's conviction for making a false statement in violation of O.C.G.A. § 16-10-20 was reversed on appeal because the state offered no proof that the jail where the alleged statement was made was in a particular county and since the defendant was also driven, the false statement may have been made in another county. Stockard v. State, 327 Ga. App. 184, 755 S.E.2d 548 (2014).

Since the state failed to present circumstantial evidence supporting a finding that the defendant and the victim entered Fulton County, the jury had no basis to apply O.C.G.A. § 17-2-2(h). State v. Robertson, 329 Ga. App. 182, 764 S.E.2d 427 (2014).

There was insufficient evidence to support the defendant's conviction for failing to stop at a stop sign because the state failed to prove venue. Glispie v. State, 335 Ga. App. 177, 779 S.E.2d 767 (2015), aff'd in part and rev'd in part, 300 Ga. 128 793 S.E.2d 381 (Ga. 2016).

Defendant's murder conviction was reversed because although the evidence established that the cause of death, the shooting of the victim, was inflicted on a

Proof of Venue (Cont'd)

boat ramp in or near Lock and Dam Park and venue was proper where the boat ramp was situated under O.C.G.A. § 17-2-2(c), there was no evidence as to the county in which the park was located. Twitty v. State, 298 Ga. 204, 779 S.E.2d 298 (2015).

Testimony of victim. — Testimony from the victim that property was taken from the victim's premises located in a certain county is sufficient to establish venue in that county. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

Venue for financial transaction card theft. — Because both the restaurant where defendant had access to the card and the store where the card was used were located in the same county, there was sufficient evidence to establish venue for financial transaction card theft. Johnson v. State, 246 Ga. App. 239, 539 S.E.2d 914 (2000).

Defendant's convictions on 20 counts of financial transaction card fraud were not authorized since the evidence on each count created the inference that the financial transaction card was presented and goods were received in a county other than that in which defendant was prosecuted. Newsom v. State, 183 Ga. App. 339, 359 S.E.2d 11 (1987).

Evidence sufficient to establish venue. — In a drug possession case, the state properly established venue in Cherokee County beyond a reasonable doubt because O.C.G.A. § 17-2-2(h) permitted venue to be established in the county where a defendant was immediately present before being asked to provide a urine sample, which in the instant case was in the defendant's Cherokee County apartment where police officers were executing a search warrant. West v. State, 288 Ga. App. 566, 654 S.E.2d 463 (2007).

With regard to defendant's convictions on two counts of cruelty to children in the first degree and one count of aggravated battery, the state proved venue in Cobb County, Georgia, based on the defendant being indicted in Cobb County for crimes committed sometime between July 1, 2002, and December 22, 2002; the evidence presented at trial established that the defendant lived with the victim's parent and the victim at an apartment located in Cobb County during that time; the manager of the apartment complex saw the victim at the apartment on a daily basis and knew that the victim lived in the apartment with defendant; defendant admitted to whipping the victim on a daily basis; and the manager saw the victim in the apartment with injuries. Glover v. State, 292 Ga. App. 22, 663 S.E.2d 772 (2008).

As there was evidence from the defendant's confession to police and testimony from bank employees, together with physical evidence, that the defendant wrote a check out from a victim's checkbook in the defendant's name and then cashed the check at the bank, there was sufficient evidence to support a conviction for forgery in violation of O.C.G.A. § 16-9-1(a); the element of venue was properly established by the evidence as well pursuant to O.C.G.A. § 17-2-2(a). Bell v. State, 284 Ga. 790, 671 S.E.2d 815 (2009).

Jury's determination that venue was proper in Fulton County was supported by the record and, thus, the trial court's denial of the defendant's motion for a directed verdict was not erroneous under circumstances in which the victim was abducted at a mall in Fulton County, the victim stated that the defendant originally got on a northbound interstate, but that the victim had no idea where the victim and the defendant went from there, the victim and the defendant drove around for about 20 minutes, the victim was wearing blacked-out sunglasses and could not see, and eventually the victim was taken from the vehicle into an unknown location and raped; the most definite testimony regarding the location of the crimes related to the mall, which was shown to be located in Fulton County, and the jury was authorized to find beyond a reasonable doubt that the rape might have occurred in Fulton County. Leftwich v. State, 299 Ga. App. 392, 682 S.E.2d 614 (2009), cert. denied, No. S09C2013, 2009 Ga. LEXIS 710 (Ga. 2009), cert. denied, 559 U.S. 1019, 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

Evidence that a police officer found the victim lying on a sidewalk in Fulton

County was sufficient to establish venue in that county under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a). Branford v. State, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Venue with regard to convictions for possession of methamphetamine and of less than an ounce of marijuana was established as being in the county where the drugs were discovered during a search of the defendant's impounded vehicle because although the state presented no evidence that the methamphetamine residue and the marijuana found in the vehicle were in the possession of the defendant and the codefendant while they were in the county. On cross-examination, the defendant admitted to having hand-rolled a marijuana cigarette found in the vehicle the morning of the shooting; that testimony, coupled with the undisputed fact that the defendant, the codefendant, and the vehicle were at a service station in the county at a time following the point at which the defendant admitted having made the cigarette, established beyond a reasonable doubt that the defendant and the codefendant possessed the marijuana cigarette in the county. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009).

Since a shooting victim was assaulted in a vehicle that was shown by an investigator's officer to have been traveling through Fulton County, the state proved beyond a reasonable doubt that venue was proper in Fulton County. Saxton v. State, 300 Ga. App. 535, 685 S.E.2d 780 (2009).

State met the state's burden of proving beyond a reasonable doubt that venue of the crime charged was properly in Fulton County because, although the victim did not know the exact location of the shooting, the logical import of the victim's testimony was that the crime scene itself was in Fulton County; the victim testified to driving from one street to what the victim thought was another street where the defendant shot the victim, and the state established that the first street was in Fulton County. Sewell v. State, 302 Ga. App. 151, 690 S.E.2d 634, cert. denied, No. S10C0856, 2010 Ga. LEXIS 530 (Ga. 2010).

State's proof of venue was sufficient because the uncontradicted evidence at trial was that the victim was shot and buried on a hunting property in Echols County. Cantera v. State, 304 Ga. App. 289, 696 S.E.2d 354 (2010).

State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

In an aggravated battery and gang activity case in which the crimes occurred at a bus stop outside Six Flags Over Georgia amusement park, there was sufficient evidence to establish venue in Cobb County because one defendant testified that the fight was "on Cobb County's side of the bus…" and other witnesses indicated on an exhibit the location where the witnesses exited the park and testified that the witnesses were at the Cobb County Transit bus stop. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504 (2011), cert. denied, No. S12C0451, 2012 Ga. LEXIS 592 (Ga. 2012).

State met the state's burden of proving beyond a reasonable doubt that venue of the crime charged was properly in Troup County, Georgia because the testimony of the victim's grandmother first established the exact location of the crime scene, and the victim testified that the events on the night in question took place in that county; the defendant offered no evidence to the contrary. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

Pursuant to O.C.G.A. § 17-2-2(h), the state adequately proved venue was in DeKalb County as to a murder victim whose body was never found because the victim was last seen alive in that county, the defendant confessed that the defendant shot the victim in Atlanta, which was partly in DeKalb County, and the defendant and the victim had been together every day at the defendant's residence in

Proof of Venue (Cont'd)

that county. Rogers v. State, 290 Ga. 401, 721 S.E.2d 864 (2012).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

State met the state's burden of proving beyond a reasonable doubt that venue was properly in Cobb County, Georgia, based on the evidence which showed that the child victim lived with the defendants at the family's residence which was located in Cobb County, there was evidence that the male defendant tied the victim up, tied the victim to a bedroom door at the home and whipped the victim, and the victim also testified that the male defendant had hit the victim at the family's home on the day the victim ran to a neighbor's home. Moore v. State, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

There was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that the crimes were committed in Walton County, including that numerous officers from the Walton County Sheriff's Office responded to the scene of the crimes, evidence was collected by the criminal investigation unit of that office and, thus, venue was proven. Propst v. State, 299 Ga. 557, 788 S.E.2d 484 (2016), cert. denied, 137 S. Ct. 646, 196 L. Ed. 2d 542 (U.S. 2017), overruled on other grounds, Worthen v. State, 2019 Ga. LEXIS 22 (Ga. 2019).

Evidence as a whole was sufficient to prove venue beyond a reasonable doubt because the state demonstrated that the defendant encountered the victim at the Washington Street barber shop in Newton County; after the victim was shot, the victim's vehicle came to rest at a Washington Street service station in Newton County; the cause of death was inflicted on Washington Street within a few hundred yards of the Washington Street service station; and the victim was shot on Washington Street only minutes after the victim left the Washington Street barbershop and only moments before the victim's vehicle crashed and came to rest at the service station. McMullen v. State, 300 Ga. 173, 794 S.E.2d 118 (2016).

Evidence supported a finding that the crimes occurred in Floyd County where the Sheriff's Department employees heard the defendant's and the co-defendant's false statements to them about the purported death of the defendant's son's father. Reeves v. State, 346 Ga. App. 414, 816 S.E.2d 401 (2018).

Evidence that the defendant took the victim from a park in Athens-Clarke County to the defendant's apartment was sufficient to support venue in that county. Ward v. State, 353 Ga. App. 1, 836 S.E.2d 148 (2019).

Testimony sufficient to support evidence regarding venue. — When one of the officers testified that a round of shots was directed at the officers' vehicle at a location that the officer believed to be within Clayton County, this testimony of the officer was sufficient to support the jury's finding that venue was in Clayton County. Davis v. State, 203 Ga. App. 106, 416 S.E.2d 375 (1992).

Testimony of police officers that the crimes charged in the indictment occurred in the county where defendant's trial was conducted was sufficient to authorize a finding of venue. Jones v. State, 220 Ga. App. 161, 469 S.E.2d 300 (1996).

State's misstatement about an address where the crimes arising from the defendant's attack on a taxi driver occurred, made during the state's opening statement, did not prevent the state from proving venue beyond a reasonable doubt; the state's opening statement was not evidence, a witness and a police officer stated the correct address, the officer also identified the county where the crimes occurred, and any conflict in the evidence

about where the crimes occurred was resolved by the jury in favor of the state. Schofield v. State, 261 Ga. App. 70, 582 S.E.2d 11 (2003).

By applying the provisions of O.C.G.A. § 17-2-2(e) and (h), the jury could conclude that venue was proper because there was evidence that the victim's presence in the car remained voluntary until it became clear that the defendant was not mistakenly driving toward Alabama and that the defendant would not accommodate the victim's wish that the victim not be taken there; the jury could determine that the crime of kidnapping was complete when the defendant refused to turn the car around or to stop and let the victim exit. Pruitt v. State, 279 Ga. 140, 611 S.E.2d 47, cert. denied, 546 U.S. 866, 126 S. Ct. 165, 163 L. Ed. 2d 152 (2005).

Venue of defendant's armed robbery, theft by taking a motor vehicle, and possession of a firearm during the commission of a crime trial was proper in Hall County as the victim gave the victim's address and a police officer testified that the officer was called to investigate a robbery at that address in Hall County, where the officer spoke with the victim. Olarte v. State, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Jury was authorized to interpret the testimony of a victim's parent that the parent lived with the daughter in Heard County, Georgia and that the parent lived in a different trailer than the one in which the family lived when the defendant molested the victim at the parent's home to mean that the victim's family had been residing in Heard County when defendant molested the victim as evidence that the offenses were committed in Heard County. Moody v. State, 279 Ga. App. 457, 631 S.E.2d 473 (2006).

Venue was established in a child molestation case when the victim's aunt testified that the victim told her that the defendant molested the victim at the "big house," which was what the victim called the house where the victim's grandmother lived, and the evidence established that the "big house" was in Meriwether County. Brooks v. State, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Venue in Randolph County had been proven for second-degree criminal damage and for criminal trespass involving a couple's property. A neighbor testified that the couple's home was "probably five or six houses past" the defendant's house and stated "yes" when asked if all of those houses were located in Randolph County. Bass v. State, 288 Ga. App. 690, 655 S.E.2d 303 (2007), rev'd on other grounds, 2009 Ga. LEXIS 31 (Ga. 2009).

In defendants' trial for fleeing a police officer, reckless driving, and speeding, in Newton County, because a state trooper testified that the trooper first encountered defendants in Newton County and described the route using a map of Newton County. The trooper testified that no part of the pursuit took place off the map. Even had the route of pursuit taken the parties across county lines out of Newton County, venue would still be properly founded in Newton County pursuant to O.C.G.A. § 17-2-2(e) or (h), which allowed venue wherever a portion of the crime took place or wherever the evidence showed the crime took place. Brewster v. State, 300 Ga. App. 143, 684 S.E.2d 309 (2009).

Incest and child molestation. — Because the victim lived in the county where the trial was held and the defendant would stay overnight, this evidence supported an inference that the defendant had access to the victim in that county and showed beyond a reasonable doubt that the defendant might have had intercourse with the victim there; consequently, pursuant to O.C.G.A. § 17-2-2(h), the evidence was sufficient to support venue there. Drake v. State, 238 Ga. App. 584, 519 S.E.2d 692 (1999).

Child molestation in travelling car. — Although the victim testified that the victim did not know where the car was when the defendant touched the victim, venue was proper in a county which was said to have been traversed by adults who were also present in the vehicle. Withman v. State, 210 Ga. App. 159, 435 S.E.2d 519 (1993).

Rape in traveling car. — Rape victim's testimony that she and abductors traveled for a time while making many turns, combined with evidence as to the county in which she was abducted, was sufficient to prove that the rape could

Proof of Venue (Cont'd)

have occurred in that county. Dillard v. State, 223 Ga. App. 405, 477 S.E.2d 674 (1996).

Since the evidence sufficiently established that the defendant's coconspirator raped and sodomized the victim in a hijacked car while the defendant was driving the car between counties, venue was sufficiently established under O.C.G.A. § 17-2-2(b), (e), (h). Short v. State, 276 Ga. App. 340, 623 S.E.2d 195 (2005).

Sodomy in traveling car. — Incident on which a sodomy charge was based occurred about one mile from the home in Gordon County where the defendant and the victim lived, when the defendant and the victim were driving home; thus, under O.C.G.A. § 17-2-2(e), the crime was considered to have occurred in Gordon County, through which the car traveled, and the state proved venue. Prudhomme v. State, 285 Ga. App. 662, 647 S.E.2d 343 (2007).

Venue established by subsection (h). — Because O.C.G.A. § 17-2-2(h) applies by the statute's terms to "any case," use of subsection (h) to determine venue in a homicide case is not precluded and where the evidence allowed the jury to find beyond a reasonable doubt that the murder might have been committed in Laurens County it was sufficient to support the jury's finding that venue was appropriate in Laurens County. Nelson v. State, 262 Ga. 763, 426 S.E.2d 357 (1993), but see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999).

For venue purposes, evidence that showed that a murder victim's blood was found in a motel room in Floyd County, along with the fact that the victim was last seen alive in Floyd County, was sufficient under O.C.G.A. § 17-2-2(h) to allow a jury to consider that the murder might have been committed in Floyd County beyond a reasonable doubt. Edmond v. State, 283 Ga. 507, 661 S.E.2d 520 (2008).

State does not have to prove where drug ingested. — Because the presence of methamphetamine in defendant's urine constituted circumstantial evidence that defendant knowingly possessed the drug within three days prior to a urine test, and because the state did not have to prove where the drug was actually ingested, the evidence was sufficient to support defendant's conviction and venue under O.C.G.A. § 17-2-2(h). Harbin v. State, 297 Ga. App. 877, 678 S.E.2d 553 (2009).

Evidence of highway number insufficient proof of venue. — In a DUI case under O.C.G.A. § 40-6-391(a)(1), the state failed to prove that venue was proper in Fayette County: the evidence showed only that the defendant was stopped on Highway 138 by a Fayette County Sheriff's deputy, which was insufficient to prove venue; because DUI elements were established by the evidence, retrial was permitted. Smith v. State, 345 Ga. App. 43, 812 S.E.2d 117 (2018).

Stipulating to venue. — Pretermitting whether the decisions not to move for a directed verdict for lack of venue and to stipulate to venue fell below the objective standard of reasonableness, the defendant could not prove that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Indeed, if defense counsel either moved for a directed verdict as to the lack of venue or decided against ultimately stipulating to venue, the trial transcript clearly showed that the state was prepared to reopen the evidence to recall a witness to prove venue. Muldrow v. State, 322 Ga. App. 190, 744 S.E.2d 413 (2013).

Jury instruction was not improper. — Although the better practice was to give a jury instruction on venue that indicated that a jury "may consider" whether a crime was committed in any county in which the evidence showed beyond a reasonable doubt that the crime might have been committed, a jury instruction that instead mirrored the language of O.C.G.A. § 17-2-2 was not erroneous and did not improperly shift the burden of proof regarding venue to the defendant in a murder case. Edmond v. State, 283 Ga. 507, 661 S.E.2d 520 (2008).

Venue a question of fact for the jury. — Venue was a question for the jury where the victim was abducted in the county in which the trial was held and where the defendant's testimony was sufficiently contradicted in other areas so as

to place in the hands of the jury all issues concerning the weight and credibility of the defendant's statements as to the location of the conduct. Campbell v. State, 223 Ga. App. 484, 477 S.E.2d 905 (1996).

State proved beyond a reasonable doubt that the defendant's fleeing or attempting to elude crimes took place in the county where the defendant's trial took place such that the trial court in that county had venue and jurisdiction; weighing the evidence of venue was a jury, not an appeals court, function. Ward v. State, 270 Ga. App. 427, 606 S.E.2d 877 (2004).

Whether the state established venue was a question for a jury because the question of whether the defendant's efforts to abandon the illegal files was successful when the defendant placed the files in the trash before entering Clayton County could not be determined as a matter of law at the pretrial stage. State v. Al-Khayyal, 322 Ga. App. 718, 744 S.E.2d 885 (2013).

Instruction that jurors had to consider cause of death occurred where body found. — Jury instructions set forth in O.C.G.A. § 17-2-2(c) violated the habeas petitioner's due process rights since Ga. Const. 1983, Art. VI, Sec. II, Para. V made venue an essential element of malice murder, and the instruction's mandate that jurors had to consider the cause of death to have occurred where the body was found improperly shifted the burden of proving otherwise onto the defendant. Owens v. McLaughlin, 733 F.3d 320 (11th Cir. 2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 487 et seq. 40A Am. Jur. 2d, Homicide, § 186.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ALR. — Constitutionality of statute fixing venue of offense committed while upon public conveyances, or at stations or depots upon the route thereof, 11 A.L.R. 1020.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 A.L.R. 636.

Absence from state at time of offense as affecting jurisdiction of offense, 42 A.L.R. 272.

Where offense of obtaining money by fraud is deemed to be committed when mail or telegraph is employed, 43 A.L.R. 545.

Right to be tried in county or district in which offense was committed, as susceptible of waiver, 137 A.L.R. 686.

Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child, 44 A.L.R.2d 886.

Venue in homicide cases where crime is committed partly in one county and partly in another, 73 A.L.R.3d 907.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Venue in bribery cases where crime is committed partly in one county and partly in another, 11 A.L.R.4th 704.

17-2-3. Jurisdiction and venue as to crimes committed on boundary lines between this state and other states.

This state claims jurisdiction of an offense committed on any of her boundary lines with other states for the county bordering on that part of the line where the offense was committed and, if doubtful as to which of two counties as set forth in subsection (g) of Code Section 17-2-2, for either county, and will proceed to arrest, indict, try, and punish unless the other state makes a demand for the accused person as a fugitive from justice, in which event the progress of the case shall be suspended by order of the Governor until the question of jurisdiction is settled.

History. — Orig. Code 1863, § 41; Code 1868, § 39; Code 1873, § 37; Code 1882, § 37; Penal Code 1895, § 25; Penal Code 1910, § 25; Code 1933, § 27-1107.

U.S. Code. — Venue, Federal Rules of Criminal Procedure, Rule 18.

Law reviews. — For comment, "The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit," see 66 Mercer L. Rev. 781 (2015).

JUDICIAL DECISIONS

Trial counsel was not ineffective for failing to challenge venue as such a motion would have failed given the evidence supporting a finding that the fatal gunshot was inflicted on the Georgia side of the bridge before the defendant threw the body into the river. McDonald v. State, 296 Ga. 643, 770 S.E.2d 6 (2015).

Cited in Simpson v. State, 92 Ga. 41, 17 S.E. 984, 44 Am. St. R. 75, 22 L.R.A. 248 (1893); James v. State, 10 Ga. App. 13, 72 S.E. 600 (1911); State v. Wilson, 220 Ga. App. 538, 469 S.E.2d 804 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 472 et seq., 482 et seq.

ALR. — Person who steals property in one state or country and brings it into another as subject to prosecution for larceny in latter, 156 A.L.R. 862.

17-2-4. Defendant arrested, held, or present in county other than that in which indictment or accusation is pending.

(a) A defendant arrested, held, or present in a county other than that in which an indictment or accusation is pending against that defendant may state in writing a wish to plead guilty, guilty but mentally ill, guilty but with intellectual disability, or nolo contendere; to waive trial in the county in which the indictment or accusation is pending; and to consent to disposition of the case in the county in which the defendant was arrested, held, or present, subject to the approval of the prosecuting attorney for each county. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney for each county, the clerk of the court in which the indictment or accusation is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the county in which the defendant was arrested, held, or present, and the prosecution shall continue in that county.

(b) A defendant arrested, held, or present in a county other than the county in which a complaint or arrest warrant is pending against that defendant may state in writing a wish to plead guilty, guilty but mentally ill, guilty but with intellectual disability, or nolo contendere; to waive venue and trial in the county in which the complaint or warrant was issued; and to consent to disposition of the case in the county in which the defendant was arrested, held, or present, subject to the approval of the prosecuting attorney for each county. Upon receipt

of the defendant's statement and the written approval of the prosecuting attorney for each county, the clerk of the court in which the complaint or arrest warrant is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the county in which the defendant was arrested, held, or present, and the prosecution shall continue in that county.

(c) If after the proceeding has been transferred pursuant to subsection (a) or (b) of this Code section the defendant pleads not guilty or not guilty by reason of insanity, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. A defendant's statement that the defendant wishes to plead guilty, guilty but mentally ill, guilty but with intellectual disability, or nolo contendere shall not be used against the defendant.

History. — Code 1981, § 17-2-4, enacted by Ga. L. 1995, p. 1250, § 1; Ga. L. 2017, p. 471, § 2/HB 343.

Law reviews. — For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

For note on the 1995 enactment of this Code section, see 12 Ga. St. U.L. Rev. 144 (1995).

JUDICIAL DECISIONS

State not required to stipulate to venue. — Venue is not a fact to which the state is required to stipulate whenever the defendant wishes to do so, particularly when the state disbelieves the defendant's account of that fact, because stipulations and waivers of jurisdictional defenses streamline a proceeding in which both parties agree on a fact, making further proof unnecessary; stipulations and jurisdictional waivers are not a means of forcing an opposing party to agree to facts the opposing party believes are not true and would mislead the factfinder. If the facts are disputed, the parties' competing evidence and arguments can be presented to the factfinder to resolve. State v. Dixon, 286 Ga. 706, 691 S.E.2d 207 (2010).

Trial court not required to instruct jury on lesser included offense over which court lacks venue. — Court of appeals erred in reversing the defendant's conviction for armed robbery because the trial court properly declined to instruct the jury on the lesser included offense of theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant committed theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue. State v. Dixon, 286 Ga. 706, 691 S.E.2d 207 (2010).

CHAPTER 3

LIMITATIONS ON PROSECUTION

Sec.
17-3-1. Generally.
17-3-2. Periods excluded.
17-3-2.1. Exclusions for certain offenses involving a victim under 16 years of age.
17-3-2.2. Statute of limitations.
17-3-3. Other exclusions.

Law reviews. — For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 27-601 are included in the annotations for this chapter.

State must show crime committed before accusation. — It is essential, to sustain a conviction of a criminal offense, that it be distinctly shown that the alleged offense was committed prior to the suing out of the accusation. Rivers v. State, 55 Ga. App. 290, 189 S.E. 923 (1937) (decided under former Code 1933, § 27-601).

Burden on state to show accusation made within statute of limitations and after crime. — Burden is as much upon the state to prove affirmatively that the accusation was subsequent in time to the commission of the alleged offense as it is to show that the offense did not so far antedate the accusation as to be barred by the statute of limitations, the failure to prove either being fatal to the state's cause. Rivers v. State, 55 Ga. App. 290, 189 S.E. 923 (1937) (decided under former Code 1933, § 27-601).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 37, 144 et seq.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 589 et seq.

ALR. — Burden on state to show that crime was committed within limitation period, 13 A.L.R. 1446.

Power of court to amend indictment, 68 A.L.R. 928.

Right of prosecution to review of decision quashing or dismissing indictment or information, or sustaining demurrer thereto, 92 A.L.R. 1137.

Construction and application of phrase "fleeing from justice" or similar phrase in exception to statutory limitation of time for criminal prosecution after commission of offense, 124 A.L.R. 1049.

Accessories to crimes enumerated in statute of limitations respecting prosecution for criminal offenses, as within contemplation of statute, 160 A.L.R. 395.

Limitations statute applicable to criminal contempt proceedings, 38 A.L.R.2d 1131.

When statute of limitations begins to run against action for conversion of property by theft, 79 A.L.R.3d 847.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

Waivability of bar of limitations against criminal prosecution, 78 A.L.R.4th 693.

17-3-1. Generally.

(a) A prosecution for murder may be commenced at any time.

(b) Except as otherwise provided in Code Section 17-3-2.1, prosecution for other crimes punishable by death or life imprisonment shall be commenced within seven years after the commission of the crime except as provided by subsection (d) of this Code section; provided, however, that prosecution for the crime of forcible rape shall be commenced within 15 years after the commission of the crime.

(c) Except as otherwise provided in Code Section 17-3-2.1, prosecution for felonies other than those specified in subsections (a), (b), and (d) of this Code section shall be commenced within four years after the commission of the crime, provided that prosecution for felonies committed against victims who are at the time of the commission of the offense under the age of 18 years shall be commenced within seven years after the commission of the crime.

(d) A prosecution for the following offenses may be commenced at any time when deoxyribonucleic acid (DNA) evidence is used to establish the identity of the accused:

(1) Armed robbery, as defined in Code Section 16-8-41;

(2) Kidnapping, as defined in Code Section 16-5-40;

(3) Rape, as defined in Code Section 16-6-1;

(4) Aggravated child molestation, as defined in Code Section 16-6-4;

(5) Aggravated sodomy, as defined in Code Section 16-6-2; or

(6) Aggravated sexual battery, as defined in Code Section 16-6-22.2;

provided, however, that a sufficient portion of the physical evidence tested for DNA is preserved and available for testing by the accused and provided, further, that if the DNA evidence does not establish the identity of the accused, the limitation on prosecution shall be as provided in subsections (b) and (c) of this Code section.

(e) Prosecution for misdemeanors shall be commenced within two years after the commission of the crime.

History. — Code 1933, § 26-502, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1987, p. 330, § 1; Ga. L. 1996, p. 1115, § 4; Ga. L. 2002, p. 650, § 1; Ga. L. 2012, p. 899, § 4-1/HB 1176.

Cross references. — Limitations on prosecutions before military courts for desertion, mutiny, and other offenses, § 38-2-437.

Editor's notes. — Ga. L. 1987, p. 330, § 2, not codified by the General Assembly, provided that the Act, which added the

proviso at the end of subsection (c), would apply to offenses committed on or after July 1, 1987.

Ga. L. 2002, p. 650, § 2, not codified by the General Assembly, provides that this Act shall apply to crimes which occur on or after July 1, 2002.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 118 (2002). For article, "The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws," see 20 Ga. St. U.L. Rev. 565 (2004). For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Limitation Period Application
Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249
Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249
Decisions Under Former Penal Code 1910, § 30

General Consideration

Construction with tolling provision of O.C.G.A. § 17-3-2.2. — Trial court erred by applying O.C.G.A. § 17-3-2.2 to the RICO and theft charges against the defendants because it was necessary for the state to show that the victim was over 65 years of age, was the principal stockholder of the corporation, was the owner of the property allegedly stolen, not the corporation, to determine the date the crime became known to the victim. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

When period begins to run. — In criminal cases, the statute of limitations runs, with certain exceptions, from the time of the crime to the time of indictment, not from time of the act to time of the trial. Cain v. State, 144 Ga. App. 249, 240 S.E.2d 750 (1977).

Prosecution against the defendant for simple battery was timely filed within two years, pursuant to O.C.G.A. § 17-3-1(d), since the accusation was filed within the time period which was deemed to be the commencement of the matter pursuant to O.C.G.A. § 16-1-3(14); the fact that the supporting affidavit was filed six days after the limitations period ran did not affect the timeliness of the action pursuant to O.C.G.A. § 17-7-71(a) because that document was for the issuance of an arrest warrant. Cochran v. State, 259 Ga. App. 130, 575 S.E.2d 901 (2003).

Trial court erred in dismissing the accusations filed against the defendants in separate cases as the evidence showed that in each case the accusation was filed against the respective defendant within the applicable two-year time period set forth in O.C.G.A. § 17-3-1(d). State v. Thompson, 261 Ga. App. 828, 584 S.E.2d 7 (2003).

Trial court did not err in denying the defendant's motion to dismiss as prosecution of the defendant for misdemeanors was not commenced outside the applicable two-year statute of limitations after the defendant had the defendant's case transferred from the county probate court to the superior court and a superior court indictment was issued for the same of-

fenses contained in the Uniform Traffic Citation (UTC) issued to the defendant on the day of the alleged offenses; rather, the prosecution against the defendant "commenced" at the time the UTC was issued, which occurred within the statute of limitations. Bishop v. State, 261 Ga. App. 445, 582 S.E.2d 571 (2003).

Four-year statute of limitations contained in O.C.G.A. § 17-3-1(c) did not bar charges for money taken from the city by the defendant, the city's employee, more than four years before the indictment since: (1) the series of transactions constituted a single embezzlement and could be charged as a single charge in the indictment; (2) the embezzlement was not discovered until mid-July 2000; and (3) the indictment was made within four years after that discovery. Stack-Thorpe v. State, 270 Ga. App. 796, 608 S.E.2d 289 (2004).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the applicable statute of limitations ran on the rape offenses before the defendant was charged because in applying the 1996 amendment to O.C.G.A. § 17-3-1 and the tolling provisions of O.C.G.A. § 17-3-2.1, the limitation period for the defendant's crime ran 15 years from December 13, 1995, when the crimes were first reported to authorities. Thus, because the state had until December 13, 2010, to indict the defendant, the January 7, 2008, indictment was timely and no ex post facto violation arose because the original seven-year limitation period had not expired at the time. Flournoy v. State, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Burden of proof on state. — Burden is on the state to prove that a crime occurred within the applicable statute of limitation. Tarver v. State, 198 Ga. App. 634, 402 S.E.2d 365 (1991).

State was not required to prove the crime occurred on a date certain. — Statute of limitation for aggravated child molestation is seven years; when the date of the alleged offenses was not stated as a material element of the offense charged, the state was not required to prove the crime occurred on a date certain, and the state's proof showing that the offenses occurred within the applicable seven-year limitation period was adequate. Tyler v. State, 266 Ga. App. 221, 596 S.E.2d 651 (2004).

Allegation and proof of exception to limitation required. — When an exception is relied upon to prevent the bar of the statute of limitations in a criminal case, it must be alleged and proved. Moss v. State, 220 Ga. App. 150, 469 S.E.2d 325 (1996).

Prosecution not time barred when intending to prove exception. — Defendant's argument that the trial court erred in determining that a superceding indictment served to toll the statutes of limitations as to Counts 2, 4, and 5 because the tolling language in those defectively referred back to Count 1, rather than the count in question, was meritless because the defendant was sufficiently apprised of all the essential elements of the charges when read as a whole, including the fact that the state intended to prove that the statutes of limitations for the crimes were tolled until 2005 pursuant to O.C.G.A. §§ 17-3-1(c.1) and 17-3-2(2) due to the fact that the defendant's identity was unknown until that time; the superfluous language "as to count one (1)" contained in Counts 2 through 6 was not enough to confuse the defendant about the offenses or the applicable exception to the statutes of limitations, which the state intended to prove at trial. Because the state was alleging an exception to the statutes of limitations, it was not barred from proceeding against the defendant under the superceding indictment. Leftwich v. State, 299 Ga. App. 392, 682 S.E.2d 614 (2009), cert. denied, No. S09C2013, 2009 Ga. LEXIS 710 (Ga. 2009), cert. denied, 559 U.S. 1019, 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

Nolle prosequi to indictment. — Because the state re-indicted the defendant within six months of the entry of the nolle prosequi pursuant to O.C.G.A. § 17-3-3, the trial court did not err in denying the defendant's plea in bar. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

Second indictment did not need to allege special exception to statute of limitations. — Trial court properly de-

General Consideration (Cont'd)

nied the defendant's motion in arrest of a judgment of conviction for burglary and theft by taking because the second indictment was filed within the six-month extension authorized by O.C.G.A. § 17-3-3 and, therefore, did not need to allege an exception to the four-year statute of limitation. Johnson v. State, 335 Ga. App. 886, 782 S.E.2d 50 (2016).

State need only prove date within period of limitations. — Date of the offense need not be proved with preciseness, but only that the offense occurred during the period of limitations. Cain v. State, 144 Ga. App. 249, 240 S.E.2d 750 (1977).

Exact date is not material. — Court did not err in instructing the jurors that a verdict of guilty would be authorized if the jurors found beyond a reasonable doubt that the defendant committed the offense of bribery at any time within four years immediately preceding the filing of the indictment, as it is well settled in Georgia law that evidence of guilt is not restricted to the day mentioned in the indictment, but may extend to any day previous to the finding of the bill and within the statute of limitation for the prosecution of the offense. Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984).

When the defendant was accused of committing armed robbery on or about September 15, 2001, the defendant was tried in August 2002, and the defendant testified that the robbery occurred "last fall," the evidence supported a finding that the crime was committed during the fall of 2001, which was within the seven-year statute of limitations for armed robbery pursuant to O.C.G.A. §§ 16-8-41(b) and 17-3-1(b); as the exact date of the commission of the crime was not a material allegation of the indictment, the commission of the offense could be proved to have occurred any time within the limitations period. Houston v. State, 267 Ga. App. 383, 599 S.E.2d 325 (2004).

With regard to defendant's conviction for burglary, the trial court did not err in allowing evidence of an April 30, 2003, burglary based on the date range of April 18 to 22, 2003, being set forth in the indictment because the date of the burglary was not an essential element of the burglary offense charged, and defendant did not assert a defense — alibi or otherwise — making the date material. Because the burglary of April 30, 2003, was within the applicable four-year statute of limitation, the trial court did not err in allowing evidence of the date. McDaniel v. State, 289 Ga. App. 722, 658 S.E.2d 248 (2008).

Defendant's conviction for misstating a material fact to a victim in connection with the sale of a security for an indictment dated December 22, 2004, was properly proven by the state to have occurred within the four year statute of limitations period, by the state establishing that the victim invested in the stock by two checks, dated November 28 and December 13, 2001, and the victim testified that the investment was made based on conversations with the defendant during the months of October and November of 2001; as a result, the evidence was sufficient to show that the defendant's violative acts as to the sale of securities occurred within the period provided by the statute of limitations. Haupt v. State, 290 Ga. App. 616, 660 S.E.2d 383 (2008).

Dismissals with prejudice as statute of limitations expired. — Dismissal orders due to the failure of the state to provide discovery in 10 cases were vacated because the trial court exceeded the court's authority as the defendants were accused of committing offenses between May 9, 2015 and October 27, 2015, which caused the orders to operate as a dismissal with prejudice since the state was barred from prosecuting those defendants as the statute of limitations had expired. State v. Banks, 348 Ga. App. 876, 825 S.E.2d 399 (2019).

Trial court erred in dismissing the misdemeanor prosecution of the defendant because the trial court's dismissal functioned as an impermissible dismissal with prejudice in a criminal case as the state was barred from re-accusing the defendant because the two-year statute of limitation for misdemeanor offenses had ran, and the state had not sought by nolle prosequi or other means to extend that

limitation period. State v. Walker, No. A20A0544, 2020 Ga. App. LEXIS 423 (July 2, 2020).

Trial court, not jury, required to make factual findings raised in pretrial plea in bar alleging statute of limitations defense. — Trial court erred in reserving for the jury resolution of the defendants' pleas in bar, alleging a statute of limitations defense under O.C.G.A. § 17-3-1(c) to indictments charging thefts by taking and receiving in connection with a client's property transfers, because the trial court, and not the jury, was required to make factual findings based on evidence received during a pretrial hearing on this matter. Rader v. State, 300 Ga. App. 411, 685 S.E.2d 405 (2009).

Crime committed prior to indictment. — Unless time is an essential element of the offense charged, the time of the commission of the offense alleged in the indictment is immaterial. To sustain a conviction, there must be proof to establish that the offense occurred prior to the return of the indictment and within the statute of limitations. Reynolds v. State, 147 Ga. App. 488, 249 S.E.2d 305 (1978).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient evidence that the crimes for which the defendant was charged, aggravated assault, making terroristic threats, and cruelty to children in the third degree, were committed on the date alleged in the indictment because there was sufficient evidence to support the allegations of the indictment; the exact date of the crimes was not a material allegation of the indictment because the exact date was not an essential element with respect to any of the charged offenses, and the date of the crimes proved at trial was prior to the return of the indictment and within the limitation periods for the crimes. Coats v. State, 303 Ga. App. 818, 695 S.E.2d 285 (2010), overruled on other grounds by McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

Offense date demonstrable by circumstantial evidence. — Date of the offense may be established by circumstantial evidence. Cain v. State, 144 Ga. App. 249, 240 S.E.2d 750 (1977).

Circumstantial evidence was sufficient to show that acts of cruelty committed by the defendant on the defendant's 13-year-old stepson were committed within the statute of limitation. Lee v. State, 232 Ga. App. 300, 501 S.E.2d 844 (1998).

Superseding indictment not barred. — Timely accusation charging the defendant with misdemeanors, which was later followed by an indictment that included the misdemeanor charges and a felony charge filed more than two years after the commission of the crimes, was not barred by the statute of limitations; the indictment merely duplicated the original misdemeanor charges, and the felony indictment was within the applicable statute of limitation period of four years. Wooten v. State, 240 Ga. App. 725, 524 S.E.2d 776 (1999).

Malpractice in office. — In an action for malpractice in office brought against a judge of recorder's court for inappropriate handling of traffic cases for purposes of O.C.G.A. § 17-3-1(d), the traffic cases became final on the date that the recorder's court entered the court's judgment of nolle prosequi or accepted a plea of guilty to a lesser offense and that result was entered by the court as the court's disposition. State v. Lester, 170 Ga. App. 471, 317 S.E.2d 295 (1984); Andrews v. State, 175 Ga. App. 22, 332 S.E.2d 299 (1985).

Prosecution for misdemeanor. — Trial court did not err in refusing to dismiss uniform traffic citations issued within two years of the date the offenses occurred, but later amended by the state, on the ground that the statute of limitation expired; the amended accusations did not constitute the commencement of a new prosecution and there had been no final disposition of the previously filed accusations. Prindle v. State, 240 Ga. App. 461, 523 S.E.2d 44 (1999).

Prosecution for felony murder. — Defendant's prosecution for felony murder was not barred by O.C.G.A. § 17-3-1(a) even though the statute of limitations expired regarding the underlying felony because felony murder is a form of murder for which there is no statute of limitations. State v. Jones, 274 Ga. 287, 553 S.E.2d 612 (2001).

General Consideration (Cont'd)

When, in defendant's murder trial, counsel did not object to counts in the indictment as to when the statute of limitations expired, ineffective assistance of counsel was not shown because there was no prejudice as these counts were later dismissed, except those counts were allowed to serve as underlying felonies for a felony murder charge, and it was proper to allow felonies as to which the statute of limitations had expired to be used in this manner, and the evidence used to prove these felonies was admissible to prove those crimes as to which the statute of limitations had not expired. Zellars v. State, 278 Ga. 481, 604 S.E.2d 147 (2004).

Trial counsel was not ineffective for failing to demur to the fatally flawed felony murder counts in the indictment because the defendant did not demonstrate prejudice as the defendant failed to show that the state would not have simply re-indicted the defendant after dismissal of the original indictment and the state faced no imminent deadlines on the murder counts. Martin v. State, 306 Ga. 747, 833 S.E.2d 122 (2019).

Amendment filed after two-year period in subsection (d). — When an original accusation was timely filed and valid within the meaning of O.C.G.A. § 17-7-71(c), and was subsequently amended after the two-year period of limitations set forth in O.C.G.A. § 17-3-1(d), the amendment did not negate the prior valid commencement of prosecution which occurred before the expiration of the operative statute of limitations. Freeman v. State, 194 Ga. App. 905, 392 S.E.2d 330 (1990).

Lesser included offense. — Statute of limitations did not bar conviction on lesser included offense of voluntary manslaughter as the statute of limitations applicable in a criminal case was that which related to the offense charged in the indictment, and not to any minor offense included therein of which the accused might be found guilty. Glidewell v. State, 279 Ga. App. 114, 630 S.E.2d 621 (2006), overruled on other grounds, Reynolds v. State, 285 Ga. 70, 673 S.E.2d 854 (2009).

Application for plea in bar. — Trial court clearly erred in denying the defendant's plea in bar as to the kidnapping, aggravated assault, and burglary charges because the original indictment was brought ten years after the offenses occurred while the statute of limitations for those offenses was seven years, four years, and four years respectively, but the trial court did not err in denying the plea in bar as to the rape charge, which had a 15-year limitations period. Lynch v. State, 346 Ga. App. 849, 815 S.E.2d 340 (2018).

Waiver. — There was no absolute bar to the defendant's waiver of the right to protection of the statute of limitations in a plea agreement signed by the defendant and the defendant's counsel. State v. Barrett, 215 Ga. App. 401, 451 S.E.2d 82 (1994), rev'd on other grounds, 265 Ga. 489, 458 S.E.2d 620 (1995).

No ineffective assistance of counsel for failing to quash indictment based on date. — When the evidence showed that the offenses for which a defendant was charged occurred within the alleged date range and within the governing statute of limitation set forth in the indictment, and the defendant did not show that the evidence permitted the state to allege a specific date for any of the charges, nor did the defendant show that the lack of specific dates in the indictment materially affected the defendant's ability to present a defense, there was no reasonable probability that but for the defendant's trial counsel's failure to move to quash the indictment, the outcome of the defendant's trial would have been different. Stroud v. State, 284 Ga. App. 604, 644 S.E.2d 467 (2007), cert. denied, No. S07C1137, 2007 Ga. LEXIS 506 (Ga. 2007).

No ineffective assistance of counsel for failing to quash indictment based on grand jury composition. — Trial counsel was not ineffective for failing to move to quash the indictment or to arrest judgment because even if a timely motion to quash had been filed, the indictment likely would have been dismissed because a convicted felon served on the grand jury in violation of O.C.G.A. § 15-12-60, however, the state would have been free to obtain the identical indictment from a properly constituted grand jury. Brooks v. State, 332 Ga. App. 396, 772 S.E.2d 838

(2015), cert. denied, No. S15C1548, 2015 Ga. LEXIS 573 (Ga. 2015).

Cited in Bloodworth v. State, 128 Ga. App. 657, 197 S.E.2d 423 (1973); Pope v. State, 129 Ga. App. 209, 199 S.E.2d 368 (1973); Holloman v. State, 133 Ga. App. 275, 211 S.E.2d 312 (1974); State v. Madden, 242 Ga. 637, 250 S.E.2d 484 (1978); State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151 (1981); Lett v. State, 164 Ga. App. 584, 298 S.E.2d 541 (1982); Andrews v. State, 175 Ga. App. 22, 332 S.E.2d 299 (1985); Peavy v. State, 179 Ga. App. 397, 346 S.E.2d 584 (1986); Keri v. State, 179 Ga. App. 664, 347 S.E.2d 236 (1986); Weaver v. State, 179 Ga. App. 641, 347 S.E.2d 295 (1986); Sanders v. State, 182 Ga. App. 581, 356 S.E.2d 537 (1987); Watkins v. Laser/Print-Atlanta, Inc., 183 Ga. App. 172, 358 S.E.2d 477 (1987); In re J.B., 183 Ga. App. 229, 358 S.E.2d 620 (1987); Duncan v. State, 193 Ga. App. 793, 389 S.E.2d 365 (1989); Martin v. State, 196 Ga. App. 145, 395 S.E.2d 391 (1990); State v. Auerswald, 198 Ga. App. 183, 401 S.E.2d 27 (1990); Barton v. State, 199 Ga. App. 363, 405 S.E.2d 92 (1991); Brantley v. State, 199 Ga. App. 623, 405 S.E.2d 533 (1991); State v. Meredith, 206 Ga. App. 562, 425 S.E.2d 681 (1992); Watkins v. State, 206 Ga. App. 701, 426 S.E.2d 238 (1992); State v. Rustin, 208 Ga. App. 431, 430 S.E.2d 765 (1993); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695 (1994); Vadner v. Dickerson, 212 Ga. App. 255, 441 S.E.2d 527 (1994); Early v. State, 218 Ga. App. 869, 463 S.E.2d 706 (1995); Mobley v. State, 219 Ga. App. 789, 466 S.E.2d 669 (1996); Lee v. State, 224 Ga. App. 542, 481 S.E.2d 264 (1997); Hall v. State, 241 Ga. App. 454, 525 S.E.2d 759 (1999); Long v. State, 241 Ga. App. 370, 526 S.E.2d 85 (1999); Beasley v. State, 244 Ga. App. 836, 536 S.E.2d 825 (2000); Carroll v. State, 252 Ga. App. 39, 554 S.E.2d 560 (2001); Merritt v. State, 254 Ga. App. 788, 564 S.E.2d 3 (2002); McKinney v. State, 261 Ga. App. 218, 582 S.E.2d 463 (2003); James v. State, 274 Ga. App. 498, 618 S.E.2d 133 (2005); Hill v. State, 315 Ga. App. 833, 729 S.E.2d 1 (2012); Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013); Bighams v. State, 296 Ga. 267, 765 S.E.2d 917 (2014); Gordon v. Caldwell, 303 Ga. 715, 814 S.E.2d 680 (2018); Jenkins v. Keown, 351 Ga. App. 428, 830 S.E.2d 498 (2019); State v. Heath, 843 S.E.2d 801, No. S19G0967, 2020 Ga. LEXIS 362 (2020).

Limitation Period Application

Judge may charge four-year statute. — Trial judge's charge on four-year statute of limitations pursuant to this section did not create harmful error even though the requisites for the offense had changed less than four years ago since all evidence showed the crime, if committed, was committed after those changes. Almond v. State, 128 Ga. App. 758, 197 S.E.2d 836 (1973).

Misstatement of limitation period. — Reversal was not warranted when the trial court misstated the applicable statute of limitations for child molestation because a correct statement would not have changed the result and harm to the defendant was not established. Arnold v. State, 236 Ga. App. 380, 511 S.E.2d 219, aff'd, 271 Ga. 780, 523 S.E.2d 14 (1999).

Even though the trial court erred in charging the jury that the statute of limitations for incest is seven years, the error was harmless because the defendant's acts of incest occurred well within the applicable four-year limitation period. Wiser v. State, 242 Ga. App. 593, 530 S.E.2d 278 (2000).

Although the trial court erroneously instructed the jury on the applicable statute of limitations for rape, the error was beneficial to the defendant because the instruction held the state to a higher burden to show the state commenced prosecution within seven years, not 15 years, and, thus, the defendant's contention of error lacked merit. Pauley v. State, 355 Ga. App. 47, 842 S.E.2d 499 (2020).

No evidence concerning DNA presented. — Trial court did not err in granting the defendant's plea in bar because the state failed to meet the state's burden to invoke O.C.G.A. § 17-3-1(d), as the state presented no evidence whatsoever at the plea in bar hearing concerning the DNA evidence and what the evidence would have established. State v. Watson, 340 Ga. App. 678, 798 S.E.2d 295 (2017).

Seven year statute of limitations. — When the victim was born on August 19, 1982, the evidence showed that the moles-

Limitation Period
Application (Cont'd)

tations began when the victim was five or six while the victim lived in a Gwinnett County apartment, and the mother testified that they lived in Gwinnett from 1986 to 1990, the evidence authorized the determination that the acts of molestation charged occurred in Gwinnett after July 1, 1987, and within the applicable seven years statute of limitations. Thompson v. State, 212 Ga. App. 175, 442 S.E.2d 771 (1994), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Under the former version of O.C.G.A. § 17-3-1, it was error to convict the defendant for acts of child molestation that allegedly occurred after the victim turned 14 years old when the indictment against the defendant was returned six months beyond the four years after the victim turned 16. However, for acts that occurred while the victim was 13, the seven-year statute of limitations period applied and the indictment was returned within that time period, so the defendant was ordered retried on charges regarding acts occurring while the victim was 13; since the exact dates of the offenses were not material allegations in the indictment, those dates could be proved as of any time within the applicable statute of limitations. Tompkins v. State, 265 Ga. App. 760, 595 S.E.2d 599 (2004).

Trial court properly granted the defendant's plea in bar on statute of limitations grounds as to the charges against the defendant for armed robbery and kidnapping with bodily injury; a seven-year statute of limitations applied to those offenses, the record showed that the defendant was indicted for them more than seven years after the alleged crimes occurred, there was no tolling of the applicable limitations period, and there was also no reason for the trial court to rule that the statute of limitations issue regarding those offenses should be submitted to the jury. Jenkins v. State, 278 Ga. 598, 604 S.E.2d 789 (2004).

Because an underage sexual abuse victim did not report molestation by the defendant until December 2001, the seven-year statute of limitations did not even begin to run until that time, pursuant to O.C.G.A. §§ 17-3-1(c) and 17-3-2.1(a); further, the defendant's own statement that the defendant only knew the victim for two or three years would have been sufficient to show that the molestation took place at some point within the limitations period. Porter v. State, 270 Ga. App. 860, 608 S.E.2d 315 (2004).

Trial court's denial of defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, on two counts of child molestation in violation of O.C.G.A. § 16-6-4, was proper because the evidence of the defendant's inappropriate sexual abuse of the victim, defendant's son, sufficiently placed the dates of the charged offenses within the seven-year limitations period of O.C.G.A. §§ 17-3-1(c) and 17-3-2.1(a)(5). Allen v. State, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Trial court erred in dismissing the counts of the indictment charging the defendant with aggravated child molestation, child molestation, and statutory rape with a child under the age of 16 because the indictment sufficiently invoked the tolling provision of O.C.G.A. § 17-3-2.1; pursuant to O.C.G.A. § 17-3-1(c), the state had seven years to indict the defendant, and the defendant was indicted within seven years. State v. Godfrey, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Trial court did not err in granting the defendant's plea in bar to dismiss the counts of an indictment charging the defendant with child molestation and aggravated child molestation to a child under the age of 14 because the state failed to indict the defendant within the limitation period, O.C.G.A. § 17-3-1(c); because the state did not allege that the victim was under the age of 16, the tolling provision of O.C.G.A. § 17-3-2.1 was not invoked. State v. Godfrey, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the defendant failed to show that the defense

was prejudiced by the six year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c). Billingslea v. State, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

Four year statute of limitations. — Trial court properly granted the defendant's plea in bar concerning the burglary, aggravated assault, and firearm possession charges as the state's prosecution against the defendant on those charges was barred by the applicable four-year statute of limitations regarding those offenses since the record showed that more than seven years passed between the time the crimes occurred and the state's indictment of the defendant on those charges, and no showing was made that the applicable statute of limitations was tolled; further, since the applicable statute of limitations barred those actions, the trial court erred in finding that the statute of limitations issue should be submitted to the jury. Jenkins v. State, 278 Ga. 598, 604 S.E.2d 789 (2004).

Conviction for criminal reproduction of recorded material in violation of O.C.G.A. § 16-8-60(b) was not time-barred under O.C.G.A. § 17-3-1(c); the defendant was observed committing the crime on May 22, 2004, when illegally recorded material was found in the defendant's car, and a superseding indictment was issued on February 7, 2006. Hayward-El v. State, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

Because DUI was a predicate offense set out in the indictment against the defendant only as an element of the offense of vehicular homicide, in violation of O.C.G.A. § 40-6-393(a), and not as a separate crime for which the defendant risked a separate criminal liability, a trial court did not err by denying the defendant's plea in bar because, as a felony offense, prosecution on the vehicular homicide counts were commenced within four years after the commission of the crime as required by O.C.G.A. § 17-3-1(c); the expiration of the limitations period for the driving under the influence counts did not preclude a prosecution for vehicular homicide. Leachman v. State, 286 Ga. App. 708, 649 S.E.2d 886, cert. denied, No. S07C1816, 2007 Ga. LEXIS 768 (Ga. 2007).

Defendant was properly denied a motion for a directed verdict of acquittal based on the expiration of the statute of limitations under O.C.G.A. § 17-3-1 as the charge of theft by deception was a felony rather than a misdemeanor under O.C.G.A. § 16-8-12 based on the evidence that more than $500 was taken and, thus, a four-year statute of limitations applied; the defendant should have made a special plea in bar prior to the trial. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Trial court did not err in granting the defendant's plea in bar based upon the running of the statute of limitations, O.C.G.A. § 17-3-1(c), because no valid indictment was filed within four years of the date the alleged victim learned of the defendant's actions when the first indictment against the defendant alleged only one crime and did not inform the defendant of all the charges the defendant had to defend against at trial and was not specific enough to protect the defendant from multiple prosecutions; the state could not allege a single defective charge of theft by taking that could have been barred by the statute of limitation and upon the statute's dismissal inflate that single, defective one count indictment to one alleging 31-counts, and the second indictment would impermissibly broaden and substantially amend the first indictment. State v. Bair, 303 Ga. App. 183, 692 S.E.2d 806 (2010).

State must commence prosecutions for theft by taking within four years of the commission of the crimes because the four-year limitation period does not include any period in which the crimes were unknown by the state, but the knowledge of someone injured by the crime may be imputed to the state for purposes of determining if the exception to the statute applies; when the state seeks to rely on an exception to the statute, the state must allege the exception in the indictment State v. Bair, 303 Ga. App. 183, 692 S.E.2d 806 (2010).

Limitation Period
Application (Cont'd)

Defendant's prosecution for the crimes of false imprisonment, O.C.G.A. § 16-5-41, and kidnapping, O.C.G.A. § 16-5-40(a), were barred by the statute of limitations, O.C.G.A. § 17-3-1, because the state did not indict the defendant on those charges until after the four-year statute of limitations ran; the state's decision to reissue the indictment to include the false imprisonment and kidnapping counts substantially amended the original charges because those offenses contained elements separate and distinct from any of the crimes charged in the original indictment. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the state failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Consequently, the trial court did not err in granting defendants' plea in bar. State v. Mullins, 321 Ga. App. 671, 742 S.E.2d 490 (2013).

Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Four-year limitation period applied to the allegations of theft and identify fraud. State v. Green, 350 Ga. App. 238, 828 S.E.2d 635 (2019).

Indictment filed within 15 year statute of limitations. — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. Duke v. State, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

Two year statute of limitations. — Prosecution of a defendant for speeding and driving with a suspended tag was not barred by the limitations period contained in O.C.G.A. § 17-3-1(d) because the prosecution was commenced under the Uniform Traffic Citations within the two-year period following the commission of the traffic offenses. Chism v. State, 295 Ga. App. 776, 674 S.E.2d 328 (2009).

State could prosecute a count of the indictment under an amended accusation because the indictment was amended before the expiration of the two-year statute of limitation, O.C.G.A. § 17-3-1(d). Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333, cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Allegation of molestation of a child under 16 sufficient to invoke tolling. — Indictment alleging the molestation of a child under the age of 16 sufficiently invoked the statute of limitation tolling provision set forth in O.C.G.A. § 17-3-2.1. Lyde v. State, 311 Ga. App. 512, 716 S.E.2d 572 (2011).

Knowledge of crimes by victims or state. — Order dismissing certain counts was vacated as to computer theft and theft by taking because no evidence was presented that the victim or the authorities knew about those crimes since no hearing was held. State v. Green, 350 Ga. App. 238, 828 S.E.2d 635 (2019).

Victim's knowledge imputable to state. — If the victim's knowledge of alleged sexual offenses committed by the defendant was imputable to the state, the statute of limitations was not tolled due to the victim's infancy, the victim's lack of awareness of the criminality of the defendant's alleged conduct, and/or the victim's purported fear of the defendant. Sears v. State, 182 Ga. App. 480, 356 S.E.2d 72 (1987), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

In a prosecution of a corrections officer

on charges of sodomy and contact with an inmate, the victim's knowledge was imputable to the state to start the running of the statute of limitations even though the victim was an inmate and was a party to the crimes by willingly participating in the activities. Lee v. State, 211 Ga. App. 112, 438 S.E.2d 108 (1993).

Because the victim's knowledge was imputed to the state and since the last act occurred on or before May 1985, defendant's indictment in 1993, when the victim was only 12 years old, was untimely and required reversal of the defendant's conviction. It is unlikely a victim that young would have any concept they were the victim of a crime and would at most understand that the defendant hurt them; yet through a legal fiction the courts must assume the state had knowledge of these crimes at that time. Johnston v. State, 213 Ga. App. 579, 445 S.E.2d 566 (1994).

Effect of subsequent reduction of offense. — Because the applicable law relevant to a crime is the law as the law existed at the time the crime occurred, and the theft of $350 was a felony with a four-year statute of limitations when the theft was committed, the crime remains such a felony with that statute of limitations despite the subsequent reduction of the offense to a misdemeanor with a two-year statute of limitations. State v. Williams, 172 Ga. App. 708, 324 S.E.2d 557 (1984).

Thirteen month preindictment delay not denial of due process. — Absent a showing of actual prejudice, a 13 month preindictment delay which caused a defendant to be unable to remember where the defendant was or what the defendant was doing on the dates of the alleged offense is insufficient to show a denial of due process. Hardwick v. State, 158 Ga. App. 154, 279 S.E.2d 253 (1981).

O.C.G.A. § 1-3-1(d)(3) did not apply in a criminal prosecution. — In a prosecution of a county deputy for sexual battery and false imprisonment, an indictment filed on May 30, 2014, two years after the incidents that took place on May 30, 2012, was filed a day after the expiration of the statute of limitation, O.C.G.A. § 17-3-1(e); O.C.G.A. § 1-3-1(d)(3) did not apply in a criminal prosecution. State v. Dorsey, 342 Ga. App. 188, 802 S.E.2d 61 (2017).

State failed to prove a tolling of the statute of limitation. — When there was no showing that the crimes charged in the earlier accusation arose out of the same conduct which gave rise to the offenses alleged in the subsequent accusation, the state failed to prove the statute of limitation was tolled by an amendment to an earlier accusation. Tarver v. State, 198 Ga. App. 634, 402 S.E.2d 365 (1991).

State argued that O.C.G.A. § 17-3-1(c), the four-year statute of limitation for conspiracy to defraud the state, O.C.G.A. § 16-10-21, and conspiracy in restraint of free and open competition, O.C.G.A. § 16-10-22, was tolled under O.C.G.A. § 17-3-2(2) until the state learned of the conspiracy. The defendants' pleas in bar were properly granted as the evidence was sufficient to establish that a defendant's supervisor, a state employee, was aware of the crimes over four years before the defendants were indicted, and the supervisor's knowledge was imputed to the state. State v. Robins, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

State argued that O.C.G.A. § 17-3-1, the statute of limitation for conspiracy charges, was tolled under O.C.G.A. § 17-3-2(2) until the state learned of the conspiracy after receiving an open records request. The defendants' pleas in bar were properly granted as the state had the burden to prove the date the state received the open records request, but failed to do so. State v. Robins, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

DNA-identification tolling provision did not apply because it expressly provided that it applied to crimes that occurred on or after July 1, 2002, and the offenses at issue occurred in 1994. Beavers v. State, 345 Ga. App. 870, 815 S.E.2d 223 (2018).

Continuation of original prosecution. — Trial court did not err in denying the defendant's plea in bar on the ground that the statute of limitation for the two amended counts for driving under the influence of alcohol expired because the amended accusations did not commence a new prosecution, but rather, constituted a continuation of the original prosecution.

Limitation Period
Application (Cont'd)

Barghi v. State, 334 Ga. App. 409, 779 S.E.2d 373 (2015), cert. denied, No. S16C0427, 2016 Ga. LEXIS 235 (Ga. 2016).

Limitations period properly tolled. — Because the statute of limitations as to two counts of theft by receiving was tolled during the period in which the person committing the crimes was unknown, and knowledge was not imputed to the state during this time, the prosecution of those counts was not time-barred. English v. State, 288 Ga. App. 436, 654 S.E.2d 150 (2007).

As the evidence established that a defendant's employer first learned of the defendant's alleged false expense reports and improper payments to the defendant's spouse in an audit conducted less than four years before the state indicted the defendant for felony theft, O.C.G.A. § 17-3-1(c)'s four-year statute of limitations was tolled by O.C.G.A. § 17-3-2(2). The tolling period ended when the employer actually learned of the crime, not when the employeer could have discovered the crime through the exercise of reasonable diligence. State v. Campbell, 295 Ga. App. 856, 673 S.E.2d 336 (2009), cert. denied, No. S09C0965, 2009 Ga. LEXIS 380 (Ga. 2009).

Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitations for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Because the tolling exception to the statute of limitation applied to the failure to disclose a financial interest charge, and the prosecution for that charge was timely commenced after the crime was discovered, the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Unknown criminal or crime tolls limitation — Prosecution of the defendant's case was not barred by the four year statute of limitations for computer theft because even if the National Guard were actually aware that the defendant entered the defendant's own grades, with or without authorization to do so; in October 2012, the undisputed evidence showed that the National Guard did not become aware that the grades entered were false until January 2015. Countryman v. State, No. A20A0556, 2020 Ga. App. LEXIS 360 (June 18, 2020).

Following the murder of the defendant's two-year-old child, hiding the body in the attic, and fleeing the country, the jury was authorized to find that the defendant had absconded and that the statute of limitation was tolled from February 4, 2007, until January 17, 2013 as the evidence established both dates on which the defendant left Georgia (February 4, 2007) and the date the defendant was returned by compulsory legal process (January 17, 2013). Vasquez v. State, 306 Ga. 216, 830 S.E.2d 143 (2019).

"Person unknown" tolling period extends until state has probable cause to arrest. — Under O.C.G.A. § 17-3-2(2), the statute of limitations on the defendant's charges of burglary and possession of a knife, O.C.G.A. § 17-3-1(c), was tolled with respect to an unknown person until the state possessed sufficient evidence to authorize the lawful arrest of that person; in other words, probable cause. Remand was required for consideration of whether tolling was proper under this new interpretation of § 17-3-2(2). Riley v. State, 305 Ga. 163, 824 S.E.2d 249 (2019).

Statute of limitations issue properly submitted to jury. — After the investigating police officer testified that they could not identify the suspect in the defendant's prosecution for rape, the trial court properly submitted a statute of limitations issue to the jury; although the defendant argued that the victim knew the defendant and that they had a consensual sexual relationship, the jury believed otherwise, as was the jury's privilege. McKeehan v. State, 274 Ga. App. 14, 616 S.E.2d 489 (2005).

Instruction on statute of limitations. — Trial counsel was ineffective in failing to request a jury instruction on the statute of limitation with regard to the child-cruelty charge because in the indictment, the state did not allege that the statute of limitation for child cruelty was tolled based on the victim being under the age of 16; thus, such proof was inadmissible at trial. Slack v. State, 354 Ga. App. 727, 841 S.E.2d 231 (2020).

Limitation period need not be alleged in indictment; Grizzard no longer applicable. — Because the seven-year period provided for by O.C.G.A. § 17-3-1(c) is a general statute of limitations governing a particular class of criminal cases — non-capital felonies committed against victims under 14 years of age — and not an exception to another statute of limitations, it need not be alleged in an indictment in order to be applicable to a particular prosecution. To the extent that the opinion in Grizzard v. State 258 Ga. App. 124, 572 S.E.2d 760, (2002), reaches a contrary conclusion, it is hereby disapproved. Tompkins v. State, 265 Ga. App. 760, 595 S.E.2d 599 (2004).

Date not specifically alleged in indictment. — In a child abuse case, trial counsel was not ineffective for failing to file a special demurrer to establish the date of the crime as a material allegation of the indictment because the exact date was not a material allegation of the indictment and the evidence showed that the victim was beaten by the defendant on October 2, 2008, that the co-defendant beat the victim with belts on other occasions, and other evidence showed that the victim's scars were a year old or less, therefore, the state proved that child cruelty occurred within the statute of limitation. Moore v. State, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

No extension of time. — Georgia Court of Appeals properly concluded that O.C.G.A. § 17-3-3 did not give the state six additional months to obtain a second indictment against the appellee for felony vehicular homicide (FVH) after the state's unsuccessful attempt to appeal the dismissal of the FVH count of the first indictment as the appeal did not stay any time limit and the FVH count of the second indictment did not relate back to the date of the first indictment since only a misdemeanor was pending at that point. State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

Dismissals due to failure to provide discovery. — Trial court's dismissal without prejudice as to 16 cases dismissed due to failure of the state to provide discovery was affirmed because the statute of limitations had not expired on the date of dismissals and the state could re-accuse those defendants. State v. Banks, 348 Ga. App. 876, 825 S.E.2d 399 (2019).

Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249

Editor's notes. — Although former Code 1933, § 27-601, was superseded and implicitly repealed in 1968 by former Code 1933, § 26-502, both sections are similar and some cases after 1968 cite both sections or § 27-601 only. Section 27-601 was explicitly repealed by amendment of the 1981 Code. Hence, cases decided after 1968 which cite § 27-601 only or with § 26-502 are included in a separate Code section.

Period of statute of limitations. — In criminal cases, the statute of limitations runs, subject to special circumstances, from the time of the criminal act to the time of indictment, not from the time of the act to time of the trial. Hall v. Hopper, 234 Ga. 625, 216 S.E.2d 839 (1975).

Burden on state to prove date or exception. — Burden is upon the state to prove that a crime occurred within the statute of limitations; or, if an exception to the statute is alleged, to prove that the case properly falls within the exception. State v. Tuzman, 145 Ga. App. 481, 243 S.E.2d 675 (1978), overruled on other grounds by State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (2011).

Statute starts to run when crime known. — Key to determining when the statute of limitation begins to run is to find when the offender or offense becomes known. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Crime known by victim. — When the offense is known to the person injured by the offense, the statute begins to run.

Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249 (Cont'd)

State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Crime known by prosecutor or interested party. — Statute of limitations does not begin to run in favor of the offender until the offense is known to the prosecutor, or to someone interested in the prosecution, or to someone injured by the offense. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Procedures for hearing pleas on statute. — Pretrial hearing on a plea in bar is an appropriate procedure for handling the plea, or statute of limitation questions may properly be submitted to the jury for resolution. State v. Tuzman, 145 Ga. App. 481, 243 S.E.2d 675 (1978), overruled on other grounds by State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (2011).

Nolle prosequi to indictment. — Fact that nolle prosequi has been entered to indictment before it has been submitted to the jury is not sufficient ground to sustain plea in bar to reindictment for same offense. Bowens v. State, 157 Ga. App. 334, 277 S.E.2d 326 (1981).

Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249

Homicide indictment must allege date of death. — Unless the common-law rules are relaxed, an indictment for homicide must allege the date of death of the victim for the reason that it must appear from the indictment that the death occurred within a year and a day from the date of the infliction of the injury. Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943).

Date must be within year and day of wound. — If it does not appear that the death of the person charged to have been killed happened within a year and a day after the wound was given, the indictment will be deemed fatally defective since when death does not ensue within such time the law presumes that death proceeded from some other cause. Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943).

Indictment stating victim killed on date is sufficient. — If the indictment alleges that a person was killed on a date specified, then the indictment alleges that the person died on that date. Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943).

Applicability of statute to receiving stolen goods. — Indictment and guilty plea of the principal thieves is by itself a sufficient allegation that the statute of limitations is not operative in a prosecution for receiving stolen goods. Sampson v. State, 60 Ga. App. 512, 4 S.E.2d 290 (1939).

State not limited to proving one transaction in offense. — When the accusation charges the offense generally, the state need not rest the state's case on proof of a single transaction, but may prove or attempt to prove any number of transactions of the character charged in the accusation and included within the indictment's terms. Drummond v. State, 87 Ga. App. 105, 73 S.E.2d 43 (1952).

State need not prove exact date in accusation. — While an allegation of time is necessary to make a valid accusation, it is the general rule that proof that the crime was committed on the day alleged is not necessary. Love v. State, 70 Ga. App. 40, 27 S.E.2d 337 (1943).

State is not confined to the date alleged in the accusation in proving the crime, but may prove it as of any date within the period of limitations. Drummond v. State, 87 Ga. App. 105, 73 S.E.2d 43 (1952).

State may prove crime occurred any time within two years before indictment. — Although an indictment charged defendant with having seduced the prosecutrix on a specific date, under such an indictment the state could prove that the act of seduction occurred at any time within two years prior to the bringing of the indictment. Martin v. State, 53 Ga. App. 213, 185 S.E. 387 (1936).

On trial of a misdemeanor, the case may be made out by proof that the accused committed the act which constitutes the offense charged at any time within two years previous to the return of the indictment. Austin v. State, 104 Ga. App. 795,

122 S.E.2d 926 (1961).

No retrial for same misdemeanor. — When an indictment is for violation of a prohibition statute, a misdemeanor, the statute of limitations governing the case is two years, and the state is not confined to the day named in the indictment, but may prove the commission of the offense at any time within two years prior to the return of the indictment, and whether acquitted or convicted, the accused cannot be tried again for such an offense committed during the period of limitation governing the case on trial. Heard v. State, 79 Ga. App. 202, 53 S.E.2d 233 (1949).

If rape shown within seven years, charge citing unlimited time harmless. — While the period of limitation for rape is seven years, and the judge erred in charging the jury that if the offense was otherwise proved it would be sufficient to show that it was committed at any time before return of the indictment, since the evidence showed clearly and without dispute that if the defendant was guilty at all, the offense was committed within less than seven years before return of the indictment, the error was harmless. Pylant v. State, 191 Ga. 587, 13 S.E.2d 380 (1941).

Court need not instruct on two-year limitation if indictment and evidence shows within two years. — When indictment charges that on a date certain an offense was committed, and uncontradicted proof shows that the offense was then committed, and the date charged and proved was, mathematically, within the statute of limitations, and no other acts or dates were involved in the evidence, it was not error for the court to fail to instruct the jury that the jury must, to convict, find that the offense was committed within two years prior to the return of the indictment. Ridley v. State, 66 Ga. App. 658, 19 S.E.2d 51 (1942).

Decisions Under Former Penal Code 1910, § 30

Retrial justified if state did not prove indictment filed within statute. — When the indictment alleged a misdemeanor, and the state failed to carry the burden of proof that the indictment was found and filed in the superior court within two years after the commission of the offense charged, the court erred in overruling the motion for a new trial. Sirmans v. State, 46 Ga. App. 784, 169 S.E. 243 (1933).

Abandonment continues if no support. — Crime of abandonment begins and continues as long as there is a failure on the part of the parent to perform the parent's duty, and consequent dependence of the child. Lomax v. State, 44 Ga. App. 500, 162 S.E. 395 (1931).

Initial abandonment date irrelevant. — If it appears that an absent father has for two years immediately preceding the finding of the accusation against him failed and refused to provide for his dependent child, the time when the original separation took place is entirely immaterial; the continuing dependency of the child vitalizes the offense, and the fact that the absence, and even the dependency, began more than two years prior to the accusation, affords no ground for the interposition of the statute of limitations. Lomax v. State, 44 Ga. App. 500, 162 S.E. 395 (1931).

Father's temporary return does not prevent accusation after two years. — Abandonment is a continuing offense, at least until the defendant has once been convicted, and the statute of limitations will not relieve a father who abandoned his child and failed to supply the child's needs more than two years prior to the date of the accusation, but who before that date temporarily returned to the child and for a time performed his parental duties, but who subsequently and before the finding of the accusation again left the child and thereafter failed to supply the child's necessities. Lomax v. State, 44 Ga. App. 500, 162 S.E. 395 (1931).

Jury determination that defendant operated lottery justified. — Jury were amply authorized to find, even though the lottery tickets bore no date, that at the time of the arrest the defendant was engaged as a banker or headquarters person in the operation and maintenance of a lottery known as the numbers game. Christian v. State, 71 Ga. App. 350, 30 S.E.2d 832 (1944).

Exception to limitation must be alleged and proved. — In a criminal case,

Decisions Under Former Penal Code 1910, § 30 (Cont'd)

when an exception is relied upon to prevent the bar of the statute of limitations, the exception must be alleged and proved. Bazemore v. State, 34 Ga. App. 773, 131 S.E. 177 (1926).

OPINIONS OF THE ATTORNEY GENERAL

Uniform traffic citation is valid as an accusation without an affidavit. — If a defendant in a traffic case charged by uniform traffic citation fails to appear for trial in a probate court, a warrant may be issued regardless of whether that citation contains an affidavit of the arresting officer. Secondly, the uniform traffic citation is valid as an accusation without an affidavit and therefore tolls the statute of limitations for the prosecution of traffic violations. 1990 Op. Att'y Gen. No. U90-2.

Prosecution of misdemeanors. — Prosecution for a violation of deposit account fraud, O.C.G.A. § 16-9-20, is commenced within the meaning of O.C.G.A. § 17-3-1 when a citation meets the requirements contained in O.C.G.A. § 15-10-202, including the signature of the judge or clerk of the magistrate court and personal service of the citation by a law enforcement officer. 1998 Op. Att'y Gen. No. 98-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 37, 144 et seq.

ALR. — Homicide as affected by time elapsing between wound and death, 20 A.L.R. 1006; 93 A.L.R. 1470.

Effect of pleading guilty after statute of limitations has run, 37 A.L.R. 1116.

Who are within statutes relating to embezzlement by trustees or other persons acting in "fiduciary capacity," 41 A.L.R. 474.

What amounts to concealment which will prevent running of limitation against prosecution for embezzlement, 110 A.L.R. 1000.

When criminal prosecution deemed pending within saving clause of statute, or principle which prevents application of statute to pending prosecution, 122 A.L.R. 670.

Construction and application of phrase "fleeing from justice" or similar phrase in exception to statutory limitation of time for criminal prosecution after commission of offense, 124 A.L.R. 1049.

Commencement of running of limitations against prosecution for embezzlement, 158 A.L.R. 1158.

Accessories to crimes enumerated in statute of limitations respecting prosecution for criminal offenses, as within contemplation of statute, 160 A.L.R. 395.

Limitations statute applicable to criminal contempt proceedings, 38 A.L.R.2d 1131.

Conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged, 47 A.L.R.2d 887.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

When statute of limitations begins to run against action for conversion of property by theft, 79 A.L.R.3d 847.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

17-3-2. Periods excluded.

The period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute does not include any period in which:

(1) The accused is not usually and publicly a resident within this state;

(2) The person committing the crime is unknown or the crime is unknown;

(3) The accused is a government officer or employee and the crime charged is theft by conversion of public property while such an officer or employee; or

(4) The accused is a guardian or trustee and the crime charged is theft by conversion of property of the ward or beneficiary.

History. — Code 1933, § 26-503, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 17.

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006).

JUDICIAL DECISIONS

Analysis

General Consideration
Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249
Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249
Decisions Under Former Penal Code 1910, § 30

General Consideration

Knowledge of victim as knowledge of state. — If a crime against the public involves also a wrong upon an individual, such as an assault or any other crime in which an individual, who is not a party to the crime suffers, the knowledge of the victim is the knowledge of the state, even though the victim does not represent the state in an official capacity. Womack v. State, 260 Ga. 21, 389 S.E.2d 240 (1990).

Knowledge placed at issue by O.C.G.A. § 17-3-2(2) is the knowledge of the state, which knowledge includes that imputed to the state through the knowledge not only of the prosecution, but also includes the knowledge of someone interested in the prosecution, or injured by the offense. Thus, the knowledge of a victim of a crime or of a law enforcement officer is imputed to the state. Duncan v. State, 193 Ga. App. 793, 389 S.E.2d 365 (1989); Greenhill v. State, 199 Ga. App. 218, 404 S.E.2d 577, cert. denied, 199 Ga. App. 906, 404 S.E.2d 557 (1991).

When the offense is known by an injured party, the statute begins to run. If a crime against the public involves also a wrong upon an individual, who is not a party to the crime, the knowledge of the victim is imputed to the state, even though the victim does not represent the state in an official capacity. Lowman v. State, 204 Ga. App. 655, 420 S.E.2d 94 (1992).

Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge

General Consideration (Cont'd)

of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Trial court did not err in granting the plea in bar as the tolling provision found in O.C.G.A. § 17-3-2(2) did not apply given that the victim testified that the defendant told the victim the defendant's name and there was some indication that the victim had been given the defendant's telephone number and, thus, the victim's knowledge of the perpetrator was imputed to the state. State v. Watson, 340 Ga. App. 678, 798 S.E.2d 295 (2017).

Unknown criminal or crime tolls limitation. — Pursuant to O.C.G.A. § 17-3-2(2), the limitation period governing a prosecution does not include any period in which the person committing the crime is unknown or the crime is unknown. The state bears the burden of proving that an otherwise time-barred allegation falls within an exception to the statute of limitation. State v. Green, 350 Ga. App. 238, 828 S.E.2d 635 (2019).

Escape and concealment before indictment tolls statute. — If after the commission of the crime the offender is arrested, and then escapes and conceals oneself before indictment and avoids arrest, such concealment still will suspend the statute of limitations. Dennard v. State, 154 Ga. App. 283, 267 S.E.2d 886 (1980).

Paragraph (2) inapplicable to acts between 1968 and November 1, 1982. — Tolling provision of O.C.G.A. § 17-3-2(2) does not apply to any acts occurring between 1968, when the statute provided for tolling only for periods when the person committing the crime was unknown and November 1, 1982, when the provision was reenacted to include the provision that the crime be unknown, because it was not in effect during this period. Adcock v. State, 194 Ga. App. 627, 391 S.E.2d 438, aff'd, 260 Ga. 302, 392 S.E.2d 886 (1990).

O.C.G.A. § 17-3-2(2) requires actual knowledge. — Constructive knowledge was not sufficient; thus, the state was not charged with knowledge of the identity of an offender who committed a crime simply because it lifted a fingerprint from the crime scene as the fingerprint was not matched to the defendant until several years later. Beasley v. State, 244 Ga. App. 836, 536 S.E.2d 825 (2000).

Prosecution barred after nolle prosequi entered and not thereafter vacated. — After the defendant's plea to various criminal charges was vacated because the defendant was found to have lacked the requisite mental capacity to have made a knowing and voluntary plea and the defendant was to be tried on those charges, it was found that the trial court lacked jurisdiction over other charges that had been nolle prossed by the state at the time of the plea entry and, accordingly, defendant could not be tried thereon; it was noted that the term of the trial court had expired, the order of nolle prosequi had not been vacated during that term, the limitations period had expired, and the state had not sought to refile those charges in a timely manner as provided for in O.C.G.A. §§ 17-3-2 and 17-3-3. Carlisle v. State, 277 Ga. 99, 586 S.E.2d 240 (2003).

State had no actual knowledge of criminal wrongdoing. — Superior court did not err in failing to grant the defendant's plea in bar, motion to dismiss, and general demurrer to prohibit prosecution of the non-murder counts in the indictment as barred by the applicable statutes of limitation because the record did not support a finding that the state had actual knowledge that there was criminal wrongdoing resulting in the fatality, much less that the defendant would be charged as the perpetrator of the victim's death, until the superseding medical examiner's report. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

Statute of limitations not tolled. — Trial court erred by denying the defendant's plea in bar because the statute of limitation was not tolled since the heirs knew as early as March 1, 1985, that the defendant in the judicial proceeding in the probate court knowingly and wilfully made false statements material to the issue before the probate court. Both the person committing the crime and the

crime were known and therefore the period of limitations was not tolled. Lowman v. State, 204 Ga. App. 655, 420 S.E.2d 94 (1992).

Trial court did not err in granting the defendant's plea in bar based on the defendant's statute of limitation argument regarding the non-murder offenses charged against the defendant as the state did not show that the applicable statutes of limitations were tolled because the state did not show that the defendant absconded from the state or hid to avoid arrest; indeed, the state admitted that the defendant was often a public resident of Georgia and that the defendant had been in jail in Georgia for part of what the state argued should have been the tolling period. Jenkins v. State, 278 Ga. 598, 604 S.E.2d 789 (2004).

Although an applicable statute of limitation was tolled in a case in which the person committing the crime was unknown, the trial court did not err in granting the defendant's plea in bar regarding the non-murder offenses charged against the defendant based on the defendant's argument that they were barred under the applicable statutes of limitations, as enough evidence existed to show that the defendant was the perpetrator of the non-murder crimes and, thus, those statutes of limitations were not tolled. Jenkins v. State, 278 Ga. 598, 604 S.E.2d 789 (2004).

State argued that O.C.G.A. § 17-3-1(c), the four-year statute of limitation for conspiracy to defraud the state, O.C.G.A. § 16-10-21, and conspiracy in restraint of free and open competition, O.C.G.A. § 16-10-22, was tolled under O.C.G.A. § 17-3-2(2) until the state learned of the conspiracy. The defendants' pleas in bar were properly granted as the evidence was sufficient to establish that a defendant's supervisor, a state employee, was aware of the crimes over four years before the defendants were indicted, and the supervisor's knowledge was imputed to the state. State v. Robins, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

State argued that O.C.G.A. § 17-3-1, the statute of limitation for conspiracy charges, was tolled under O.C.G.A. § 17-3-2(2) until the state learned of the conspiracy after receiving an open records request. The defendants' pleas in bar were properly granted as the state had the burden to prove the date the state received the open records request, but failed to do so. State v. Robins, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

Statute of limitations as to the charge brought against the defendant 17 years after the crime occurred was not tolled by the "person unknown" exception in O.C.G.A. § 17-3-2(2) because the evidence unequivocally showed that the state had actual knowledge of the defendant's identity as one of two suspects almost immediately after the crime occurred and was the prime suspect. State v. Boykin, 320 Ga. App. 9, 739 S.E.2d 16 (2013).

Trial court did not err in granting the defendant's plea in bar, because the Department of Labor's system identified the defendant as having received unemployment benefits while working more than four years before the case was filed and the period was not tolled while the Department was awaiting the employer's response to its inquiry as to whether the defendant was working during the relevant time period. State v. Bragg, 332 Ga. App. 608, 774 S.E.2d 182 (2015).

Statutory period was not tolled under the person-unknown tolling provision because the defendant was identified as the primary suspect in the immediate aftermath of the attack. Beavers v. State, 345 Ga. App. 870, 815 S.E.2d 223 (2018).

"Person unknown" tolling period extends until state has probable cause to arrest. — Under O.C.G.A. § 17-3-2(2), the statute of limitations on the defendant's charges of burglary and possession of a knife, O.C.G.A. § 17-3-1(c), was tolled with respect to an unknown person until the state possessed sufficient evidence to authorize the lawful arrest of that person; in other words, probable cause. Remand was required for consideration of whether tolling was proper under this new interpretation of § 17-3-2(2). Riley v. State, 305 Ga. 163, 824 S.E.2d 249 (2019).

Statute of limitation tolled. — Trial court did not err in denying the defendant's motion for a judgment of acquittal on the criminal charges against the defen-

General Consideration (Cont'd)

dant of concealing a death and theft by taking as the evidence showed that law enforcement officers were not aware for many months or even a couple of years that such crimes had been committed, and, thus, defendant did not show that defendant was indicted outside of the applicable statute of limitation, which only began to run at the time law enforcement officers were aware that those crimes had been committed. James v. State, 274 Ga. App. 498, 618 S.E.2d 133 (2005).

Because the statute of limitations as to two counts of theft by receiving was tolled during the period in which the person committing the crimes was unknown, and knowledge was not imputed to the state during this time, the prosecution of those counts was not time-barred. English v. State, 288 Ga. App. 436, 654 S.E.2d 150 (2007).

As the evidence established that a defendant's employer first learned of the defendant's alleged false expense reports and improper payments to the defendant's spouse in an audit conducted less than four years before the state indicted the defendant for felony theft, O.C.G.A. § 17-3-1(c)'s four-year statute of limitations was tolled by O.C.G.A. § 17-3-2(2). The tolling period ended when the employer actually learned of the crime, not when the employer could have discovered the crime through the exercise of reasonable diligence. State v. Campbell, 295 Ga. App. 856, 673 S.E.2d 336 (2009), cert. denied, No. S09C0965, 2009 Ga. LEXIS 380 (Ga. 2009).

Although an indictment was not issued until fourteen years after the crimes of rape, kidnapping, and false imprisonment were committed, pursuant to O.C.G.A. § 17-3-2(2), the limitation periods for the crimes were tolled because the defendant's identity as the perpetrator was not known either to the victim or to the state until just before the indictment was issued. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Since two clients did not discover the defendant's theft at the time the theft occurred, the statute of limitations was tolled until discovery and those counts were not barred by the limitations period. Pennington v. State, 323 Ga. App. 92, 746 S.E.2d 768 (2013).

Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitations for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Because the tolling exception to the statute of limitation applied to the failure to disclose a financial interest charge, and the prosecution for that charge was timely commenced after the crime was discovered, the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Limitations period properly tolled. — State met the state's burden of proving the applicability of the tolling statute, O.C.G.A. § 17-3-2(2), because the state filed the state's indictment against the defendant less than four years after the victim had actual knowledge of the defendant's crime, insurance fraud in violation of O.C.G.A. § 17-3-1(c); the tolling period ended when an investigator obtained first-hand knowledge of the acts forming the crimes. Royal v. State, 314 Ga. App. 20, 723 S.E.2d 118 (2012), cert. denied, No. S12C1007, 2012 Ga. LEXIS 542 (Ga. 2012).

Extension of statute of limitations. — O.C.G.A. § 17-3-3 provides an extension of the statute of limitations period and not an exception to the limitations period that must be pled in the indictment; indictment of the defendant over seven years after the commission of the crimes was proper since the charges had been nolle prossed after defendant's earlier convictions had been reversed on appeal. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Defendant's argument that the trial court erred in determining that a superceding indictment served to toll the

statutes of limitations as to Counts 2, 4, and 5 because the tolling language in those defectively referred back to Count 1, rather than the count in question, was meritless because the defendant was sufficiently apprised of all the essential elements of the charges when read as a whole, including the fact that the state intended to prove that the statutes of limitations for the crimes were tolled until 2005 pursuant to O.C.G.A. §§ 17-3-1(c.1) and 17-3-2(2) due to the fact that the defendant's identity was unknown until that time; the superfluous language "as to count one (1)" contained in Counts 2 through 6 was not enough to confuse the defendant about the offenses or the applicable exception to the statutes of limitations, which the state intended to prove at trial. Because the state was alleging an exception to the statutes of limitations, it was not barred from proceeding against the defendant under the superceding indictment. Leftwich v. State, 299 Ga. App. 392, 682 S.E.2d 614 (2009), cert. denied, No. S09C2013, 2009 Ga. LEXIS 710 (Ga. 2009), cert. denied, 559 U.S. 1019, 130 S. Ct. 1913, 176 L. Ed. 2d 386 (2010).

Limitation not tolled during pendency of previous appeal. — Running of the period of limitation was not tolled during the pendency of a previous appeal in the case sub judice since the pendency of an appeal is not among the exceptions provided by O.C.G.A. § 17-3-2. Duncan v. State, 193 Ga. App. 793, 389 S.E.2d 365 (1989).

Applicability to RICO prosecutions. — Pursuant to O.C.G.A. § 16-14-8(2), the five-year statute of limitation for criminal prosecution of RICO violations was tolled up to the time the victim and the state first learned of the predicate offenses. Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Construction with tolling provision of O.C.G.A. § 17-3-2.2. — Trial court erred by applying O.C.G.A. § 17-3-2.2 to the RICO and theft charges against the defendants because it was necessary for the state to show that the victim was over 65 years of age, was the principal stockholder of the corporation, was the owner of the property allegedly stolen, not the corporation, to determine the date the crime became known to the victim. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

Cited in Holloman v. State, 133 Ga. App. 275, 211 S.E.2d 312 (1974); State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151 (1981); State v. Stowe, 167 Ga. App. 65, 306 S.E.2d 663 (1983); State v. Benton, 168 Ga. App. 665, 310 S.E.2d 243 (1983); State v. Lowman, 198 Ga. App. 8, 400 S.E.2d 373 (1990); State v. Meredith, 206 Ga. App. 562, 425 S.E.2d 681 (1992); Hall v. State, 241 Ga. App. 454, 525 S.E.2d 759 (1999); Merritt v. State, 254 Ga. App. 788, 564 S.E.2d 3 (2002); McKinney v. State, 261 Ga. App. 218, 582 S.E.2d 463 (2003); Tompkins v. State, 265 Ga. App. 760, 595 S.E.2d 599 (2004); State v. Crowder, 338 Ga. App. 642, 791 S.E.2d 423 (2016); Jenkins v. Keown, 351 Ga. App. 428, 830 S.E.2d 498 (2019); Stubbs v. Hall, 308 Ga. 354, 840 S.E.2d 407 (2020).

Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249

Editor's notes. — Although former Code 1933, § 27-601 was superseded and implicitly repealed in 1968 by former Code 1933, § 26-503 both sections are similar and some cases after 1968 cite both sections or § 27-601 only. Section 27-601 was explicitly repealed by enactment of the 1981 Code. Hence, cases decided after 1968 which cite § 27-601 only or with § 26-503 are included in a separate Code section.

Statute of limitations starts when crime known. — Key to determining when the statute of limitations begins to run is to find when the offender or offense became known. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Offense known by victim. — When the offense is known to the person injured by the offense, the statute begins to run. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Offense known by interested party. — Statute of limitations does not begin to run in favor of the offender until the offender's offense is known to the prosecutor, or to someone interested in the prosecution, or to someone injured by the offense. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249 (Cont'd)

Statute of limitations ends at indictment, not trial. — In criminal cases, the statute of limitations runs, subject to special circumstances, from the time of the criminal act to the time of indictment, not from the time of the act or time of the trial. Hall v. Hopper, 234 Ga. 625, 216 S.E.2d 839 (1975).

State must prove crime within statute or exception. — Burden is upon the state to prove that a crime occurred within the statute of limitations; or, if an exception to the statute is alleged, to prove that the case properly falls within the exception. State v. Tuzman, 145 Ga. App. 481, 243 S.E.2d 675 (1978), overruled on other grounds by State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (2011).

Procedure for hearing statute of limitations questions. — Pretrial hearing on a plea in bar is an appropriate procedure for handling the plea, or statute of limitation questions may properly be submitted to the jury for resolution. State v. Tuzman, 145 Ga. App. 481, 243 S.E.2d 675 (1978).

Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249

State need only show prosecutor unaware of crime. — When an offense is alleged to have been unknown, the state need only show that it was unknown to the prosecutor in order to make prima facie proof of that allegation. Taylor v. State, 174 Ga. 52, 162 S.E. 504 (1931), overruled on other grounds, Wood v. State, 219 Ga. 509, 134 S.E.2d 8 (1963).

Crime presumed within statute after grand jury presentment if no prosecutor. — In those cases when the offense is against society in general, and there is no prosecutor, the return by the grand jury of a presentment containing the exception will presumptively establish that the offense or offender was unknown until within two years before the indictment unless denied by evidence of the defendant. Walton v. State, 65 Ga. App. 124, 15 S.E.2d 455 (1941).

Unknown criminal or crime tolls limitation. — Prosecution of the defendant's case was not barred by the four year statute of limitations for computer theft because even if the National Guard were actually aware that the defendant entered the defendant's own grades, with or without authorization to do so; in October 2012, the undisputed evidence showed that the National Guard did not become aware that the grades entered were false until January 2015. Countryman v. State, No. A20A0556, 2020 Ga. App. LEXIS 360 (June 18, 2020).

Decisions Under Former Penal Code 1910, § 30

Statute does not run until proper parties aware of crime. — Statute of limitations does not begin to run in favor of the offender until the offender's offense is known to the prosecutor, or to someone interested in the prosecution, or to someone injured by the offense. Kiles v. State, 48 Ga. App. 675, 173 S.E. 174 (1934).

Acquiring knowledge of bribe from official with special duty to report bribe. — State official, having refused offer of bribery, was in no way implicated criminally, or under any legal restraint from reporting the case or testifying therein. It was the official's duty in a private capacity, and in an official capacity, to report the offense; and, it being the official's duty, the official's knowledge was imputable to the state and was knowledge of the state in legal contemplation; and this knowledge of the state was a bar to the prosecution under a presentment dated seven years after the offense, a misdemeanor, was committed. Taylor v. State, 44 Ga. App. 64, 160 S.E. 667 (1931), cert. dismissed, 175 Ga. 642, 165 S.E. 733 (1932), overruled on other grounds, State v. Tyson, 544 S.E.2d 444 (Ga. 2001).

Burden on state to prove exception. — When, to relieve an accusation from the bar of the statute of limitations, a fact constituting an exception to the statute is alleged, the burden is on the state to prove the exception. Norman v. State, 44 Ga. App. 92, 160 S.E. 522 (1931).

In a criminal case, when an exception is relied upon to prevent the bar of the statute of limitations, it must be alleged

and proved. Taylor v. State, 44 Ga. App. 64, 160 S.E. 667 (1931), cert. dismissed, 175 Ga. 642, 165 S.E. 733 (1932), overruled on other grounds, State v. Tyson, 273 Ga. 690, 544 S.E.2d 444 (Ga. 2001).

Burden to show company officers unaware of misdemeanor fraud. — When from an accusation charging a misdemeanor, alleged to have been committed by defrauding a certain corporation, it appeared that the offense was committed more than two years before the date of the accusation, and it was alleged that the offense was unknown to the corporation until within the two years preceding the date of the accusation, the burden was upon the state to show that the offense was unknown until within that period to any of those officers or agents of the corporation whose knowledge would be imputable to it. Norman v. State, 44 Ga. App. 92, 160 S.E. 522 (1931).

Shifting burden to defendant. — When it is stated that the indictment was not brought within the period of time allowed by law, because the offense or the offender was unknown, the state makes a prima facie case and shifts the burden of proof to the defendant when it is shown that the prosecutor or the party most interested did not know the offense, or the offender, as the case may be. Kiles v. State, 48 Ga. App. 675, 173 S.E. 174 (1934).

Defendant may rebut with notoriety of crime. — When an offense is alleged to have been unknown, the state need only show that it was unknown to the prosecutor in order to make prima facie proof of that allegation. The defendant may rebut such proof by proving that the transaction alleged in the indictment as a violation of the law was known, and the general notoriety may be sufficient proof to establish the fact that it was not unknown. Norman v. State, 44 Ga. App. 92, 160 S.E. 522 (1931).

Rebuttal with proof victim knew of crime. — Upon proof that the offense was unknown to the person aggrieved, the defendant may either show that it was known to the aggrieved person, or the defendant may show by evidence of common notoriety that the bar of the statute of limitations has attached. Kiles v. State, 48 Ga. App. 675, 173 S.E. 174 (1934).

When it is stated that the indictment was not brought within the period of time allowed because the offense or the offender was unknown, the state makes a prima facie case and shifts the burden of proof to the defendant, when it is shown that the prosecutor or the party most interested did not know the offense, or the offender, as the case may be. Upon such proof that the offense was unknown to the person aggrieved, the defendant may either show that the offense was known to the aggrieved person, or the defendant may show by evidence of common notoriety that the bar of the statute of limitations has attached. Taylor v. State, 44 Ga. App. 387, 161 S.E. 793 (1931).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 37, 144 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ALR. — Burden on state to show that crime was committed within limitation period, 13 A.L.R. 1446.

What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 A.L.R. 1002.

What amounts to concealment which will prevent running of limitation against prosecution for embezzlement, 110 A.L.R. 1000.

When criminal prosecution deemed pending within saving clause of statute, or principle which prevents application of statute to pending prosecution, 122 A.L.R. 670.

Construction and application of phrase "fleeing from justice" or similar phrase in exception of statutory limitation of time for criminal prosecution after commission of offense, 124 A.L.R. 1049.

Accessories to crimes enumerated in statute of limitations respecting prosecution for criminal offenses, as within contemplation of statute, 160 A.L.R. 395.

Nature of property or rights other than tangible chattels which may be subject of conversion, 44 A.L.R.2d 927.

When statute of limitations begins to run against action for conversion of property by theft, 79 A.L.R.3d 847.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

17-3-2.1. Exclusions for certain offenses involving a victim under 16 years of age.

(a) For crimes committed during the period beginning on July 1, 1992, and ending on June 30, 2012, if the victim of a violation of:

(1) Cruelty to children, as defined in Code Section 16-5-70;

(2) Rape, as defined in Code Section 16-6-1;

(3) Sodomy or aggravated sodomy, as defined in Code Section 16-6-2;

(4) Statutory rape, as defined in Code Section 16-6-3;

(5) Child molestation or aggravated child molestation, as defined in Code Section 16-6-4;

(6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5; or

(7) Incest, as defined in Code Section 16-6-22,

is under 16 years of age on the date of the violation, the applicable period within which a prosecution shall be commenced under Code Section 17-3-1 or other applicable statute shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney.

(b) For crimes committed on and after July 1, 2012, if the victim of a violation of:

(1) Trafficking a person for sexual servitude, as defined in Code Section 16-5-46;

(2) Cruelty to children in the first degree, as defined in Code Section 16-5-70;

(3) Rape, as defined in Code Section 16-6-1;

(4) Aggravated sodomy, as defined in Code Section 16-6-2;

(5) Child molestation or aggravated child molestation, as defined in Code Section 16-6-4;

(6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5; or

(7) Incest, as defined in Code Section 16-6-22,

is under 16 years of age on the date of the violation and the violation is not subject to punishment as provided in paragraph (2) of subsection (b) of Code Section 16-6-4, paragraph (2) of subsection (d) of Code Section 16-6-4, or subsection (c) of Code Section 16-6-5, a prosecution may be commenced at any time.

History. — Code 1981, § 17-3-2.1, enacted by Ga. L. 1992, p. 2973, § 1; Ga. L. 2012, p. 899, § 4-2/HB 1176.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 231 (1992). For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

JUDICIAL DECISIONS

Tolling statute of limitations for offenses against minors. — O.C.G.A. § 17-3-2.1 evidences the legislature's intent that statutes of limitation for certain crimes against minors should be tolled by the infancy of the victim until such time as the victim is 16 years of age or until the violation is reported to law enforcement authorities, whichever is earlier. Johnston v. State, 213 Ga. App. 579, 445 S.E.2d 566 (1994).

In a case in which the defendant orally sodomized a child victim between 1992 and 1995 and the victim turned 16 during the 1997 trial, the evidence of aggravated child molestation fell within the applicable statute of limitation, O.C.G.A. § 17-3-2.1(a) and (b). Brock v. State, 270 Ga. App. 250, 605 S.E.2d 907 (2004).

Trial counsel was ineffective in failing to request a jury instruction on the statute of limitation with regard to the child-cruelty charge because in the indictment the state did not allege that the statute of limitation for child cruelty was tolled based on the victim being under the age of 16; thus, such proof was inadmissible at trial. Slack v. State, 354 Ga. App. 727, 841 S.E.2d 231 (2020).

Seven-year limitations period for child molestation tolled until victim was 16 years of age. — Because O.C.G.A. § 17-3-2.1(a) provides that if a victim of child molestation is under 16 years of age on the date of the offense, then the period within which the prosecution must be commenced under O.C.G.A. § 17-3-1 shall not begin to run until the victim has reached the age of 16, the seven year statute of limitations period did not run until the victim turned 16 yeas of age, and an indictment against the defendant that was returned within that seven-year period was timely. Tompkins v. State, 265 Ga. App. 760, 595 S.E.2d 599 (2004).

Seven year statute of limitations. — Because an underage sexual abuse victim did not report molestation by the defendant until December 2001, the seven-year statute of limitations did not even begin to run until that time, pursuant to O.C.G.A. §§ 17-3-1(c) and 17-3-2.1(a); further, the defendant's own statement that the defendant only knew the victim for two or three years would have been sufficient to show that the molestation took place at some point within the limitations period. Porter

v. State, 270 Ga. App. 860, 608 S.E.2d 315 (2004).

Trial court's denial of the defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, on two counts of child molestation in violation of O.C.G.A. § 16-6-4, was proper because the evidence of defendant's inappropriate sexual abuse of the victim, defendant's son, sufficiently placed the dates of the charged offenses within the seven-year limitations period of O.C.G.A. §§ 17-3-1(c) and 17-3-2.1(a)(5). Allen v. State, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Trial court did not err in granting the defendant's plea in bar to dismiss the counts of an indictment charging the defendant with child molestation and aggravated child molestation to a child under the age of 14 because the state failed to indict the defendant within the limitation period, O.C.G.A. § 17-3-1(c); because the state did not allege that the victim was under the age of 16, the tolling provision of O.C.G.A. § 17-3-2.1 was not invoked. State v. Godfrey, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Trial court erred in dismissing the counts of the indictment charging the defendant with aggravated child molestation, child molestation, and statutory rape with a child under the age of 16 because the indictment sufficiently invoked the tolling provision of O.C.G.A. § 17-3-2.1; pursuant to O.C.G.A. § 17-3-1(c), the state had seven years to indict the defendant, and the defendant was indicted within seven years. State v. Godfrey, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Pursuant to O.C.G.A. § 17-3-2.1(a), the statutory period did not begin to run, at the earliest, until November 9, 2004, when one of the victims reached 16 years of age. Further, the counts alleged that the defendant committed the offenses against a child under the age of 16, which sufficiently invoked the statute of limitation tolling provision set forth in § 17-3-2.1. Mosby v. State, 319 Ga. App. 642, 738 S.E.2d 98 (2013).

When the defendant was convicted of aggravated child molestation and child molestation, trial counsel was not ineffective for failing to file a motion to dismiss or plea in bar based on the statute of limitations as the indictment was timely because the indictment was filed within seven years of both the victim's 16th birthday and the date the victim reported the crimes to police. Leekomon v. State, 351 Ga. App. 836, 832 S.E.2d 437 (2019), cert. denied, No. S20C0283, 2020 Ga. LEXIS 412 (Ga. 2020).

Because the state indicted the defendant within seven years of both the victim's 16th birthday and the victim's outcry to police, the indictment was timely; thus, trial counsel was not ineffective for failing to object to the trial court's inaccurate jury charge regarding the statute of limitation, which failed to tell the jury that the victim's 16th birthday was a potentially relevant date for statute of limitation purposes because there was no reasonable probability that the outcome of the trial would have differed. Leekomon v. State, 351 Ga. App. 836, 832 S.E.2d 437 (2019), cert. denied, No. S20C0283, 2020 Ga. LEXIS 412 (Ga. 2020).

Indictment filed within 15 year statute of limitations. — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. Duke v. State, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the applicable statute of limitations ran on the rape offenses before the defendant was charged because in applying the 1996 amendment to O.C.G.A. § 17-3-1 and the tolling provisions of O.C.G.A. § 17-3-2.1, the limitation period for the defendant's crime ran 15 years from December 13, 1995, when the crimes were first reported to authorities. Thus, because the state had until December 13, 2010 to indict the defendant, the January 7, 2008, indict-

ment was timely and no ex post facto violation arose because the original seven-year limitation period had not expired at the time. Flournoy v. State, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Allegation of molestation of a child under 16 sufficient to invoke tolling. — Indictment alleging the molestation of a child under the age of 16 sufficiently invoked the statute of limitation tolling provision set forth in O.C.G.A. § 17-3-2.1. Lyde v. State, 311 Ga. App. 512, 716 S.E.2d 572 (2011).

State had no actual knowledge of criminal wrongdoing. — Superior court did not err in failing to grant the defendant's plea in bar, motion to dismiss, and general demurrer to prohibit prosecution of the non-murder counts in the indictment as barred by the applicable statutes of limitation because the record did not support a finding that the state had actual knowledge that there was criminal wrongdoing resulting in the fatality, much less that the defendant would be charged as the perpetrator of the victim's death, until the superseding medical examiner's report. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

Cited in State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

17-3-2.2. Statute of limitations.

In addition to any periods excluded pursuant to Code Section 17-3-2, if the victim is a person who is 65 years of age or older, the applicable period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute shall not begin to run until the violation is reported to or discovered by a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney. Except for prosecutions for crimes for which the law provides a statute of limitations longer than 15 years, prosecution shall not commence more than 15 years after the commission of the crime.

History. — Code 1981, § 17-3-2.2, enacted by Ga. L. 2000, p. 1085, § 5.

Editor's notes. — Ga. L. 2000, p. 1085, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Protection of Elder Persons Act of 2000.'"

Cross references. — Cooperative effort in development of programs relating to abuse and exploitation of persons 65 years of age or older, § 30-5-10.

Law reviews. — For note on 2000 enactment of this Code section, see 17 Ga. St. U.L. Rev. (2000).

JUDICIAL DECISIONS

Age classification does not violate equal protection. — Supreme Court of Georgia holds that the age classification chosen in the tolling statute of O.C.G.A. § 17-3-2.2 does not violate the Equal Protection clauses of Ga. Const. 1983, Art. I, Sec. I, Para. II, and U.S. Const., amend. XIV. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

Tolling requires showing victim over 65. — To apply the tolling provision of O.C.G.A. § 17-3-2.2, it must be shown that the victim of the crime is a person over the age of 65. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

Application to corporations. — O.C.G.A. § 17-3-2.2 offers no protection to the interest of any corporation or other entity which is not a person who is 65 years of age or older; that is in keeping with the principle that, generally, corporations are separate legal entities from the corporation's shareholders. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

Construction. — Trial court erred by applying O.C.G.A. § 17-3-2.2 to the RICO and theft charges against the defendants because it was necessary for the state to show that the victim was over 65 years of age, who was the principal stockholder of the corporation, was the owner of the property allegedly stolen, not the corporation, to determine the date the crime became known to the victim. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

Statute of limitations not tolled. — Trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the state failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Consequently, the trial court did not err in granting defendants' plea in bar. State v. Mullins, 321 Ga. App. 671, 742 S.E.2d 490 (2013).

Cited in State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014); Stubbs v. Hall, 308 Ga. 354, 840 S.E.2d 407 (2020).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes eliminating, extending, or tolling statute of limitations for sexual offense when DNA can provide identity of alleged perpetrator, 16 A.L.R.7th 7.

17-3-3. Other exclusions.

If an indictment is found within the time provided for in Code Section 17-3-1 or 17-3-2, or other applicable statute, and is quashed or a nolle prosequi entered, the limitation shall be extended six months from the time the first indictment is quashed or the nolle prosequi entered.

History. — Code 1933, § 26-504, enacted by Ga. L. 1968, p. 1249, § 1.

Law reviews. — For survey article on death penalty decisions from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 175 (2003). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004).

JUDICIAL DECISIONS

Analysis

General Consideration
Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249
Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249
Decisions Under Former Penal Code 1910, § 30

General Consideration

O.C.G.A. § 17-3-3 intended to function solely as a savings provision, and has no application to a prosecution in which the nolle prosequi is entered over six months before the original statute of limitations expires. Kyles v. State, 254 Ga. 49, 326 S.E.2d 216 (1985).

O.C.G.A. § 17-3-3 is a savings provision which extends the original statute of limitation for six months when a nolle prosequi is entered either after the original statute of limitation has expired, or within six months of the statute's expiration. State v. Davis, 201 Ga. App. 533, 411 S.E.2d 555 (1991).

When new indictment may be found after nolle prosequi entered. — Under O.C.G.A. §§ 17-3-3 and 17-8-3, a nolle prosequi may be entered by the prosecuting attorney with the consent of the court and in such a case a new indictment may be found within six months from the time the first indictment is quashed or the nolle prosequi entered. Not until the expiration of the six-month period within which a new indictment for the same offense may

be preferred, or some other act or declaration which amounts to abandonment, is the prosecution at an end. Bowens v. State, 157 Ga. App. 334, 277 S.E.2d 326 (1981).

When the defendant's plea to various criminal charges was vacated because the defendant was found to have lacked the requisite mental capacity to have made a knowing and voluntary plea and the defendant was to be tried on those charges, it was found that the trial court lacked jurisdiction over other charges that had been nolle prossed by the state at the time of the plea entry and, accordingly, the defendant could not be tried thereon; it was noted that the term of the trial court had expired, the order of nolle prosequi had not been vacated during that term, the limitations period had expired, and the state had not sought to refile those charges in a timely manner as provided for in O.C.G.A. §§ 17-3-2 and 17-3-3. Carlisle v. State, 277 Ga. 99, 586 S.E.2d 240 (2003).

Because the state re-indicted the defendant within six months of the entry of the nolle prosequi pursuant to O.C.G.A. § 17-3-3, the trial court did not err in denying the defendant's plea in bar. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

Second indictment did not need to allege special exception to statute of limitations. — Trial court properly denied the defendant's motion in arrest of a judgment of conviction for burglary and theft by taking because the second indictment was filed within the six-month extension authorized by O.C.G.A. § 17-3-3 and, therefore, did not need to allege an exception to the four-year statute of limitation. Johnson v. State, 335 Ga. App. 886, 782 S.E.2d 50 (2016).

First indictment, while perhaps not perfect in form, was not void; therefore, under O.C.G.A. § 17-3-3, the statute of limitation was properly extended by an additional six months after the first indictment was quashed, and the state did not need to allege any exception to the limitation period in the second indictment for burglary or theft. Johnson v. State, 335 Ga. App. 886, 782 S.E.2d 50 (2016).

Extension of statute of limitations. — O.C.G.A. § 17-3-3 provides an extension of the statute of limitations period and not an exception to the statute that must be pled in the indictment; indictment of the defendant over seven years after the commission of the crimes was proper when the charges had been nolle prossed after the defendant's earlier convictions had been reversed on appeal. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

O.C.G.A. § 17-3-3 specifies that the statute of limitations is extended six months if an indictment brought within the statute of limitations is later nolle prossed; in other words, the state may re-indict a defendant within six months after the first indictment is nolle prossed without running afoul of the statute of limitations even if the initial statute of limitations period has run. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Trial court did not err by denying the defendant's special demurrer and motion to quash the second indictment on the same charges asserted in an earlier indictment, even though the second indictment was filed outside the statute of limitations period, because the first indictment was not void as a matter of law and, therefore. O.C.G.A. § 17-3-3 applied. Pursuant to O.C.G.A. § 15-12-60(d), even though the state nolle prossed the first indictment due to the incompetency of one grand juror and the trial court granted it, the first indictment itself was not rendered void. Batten v. State, 352 Ga. App. 629, 835 S.E.2d 686 (2019).

No extension of time. — O.C.G.A. § 17-3-3 did not alter the running of the statute of limitation because the statute had no application to a prosecution in which the charge was dismissed over six months before the original statute of limitations expires. State v. Outen, 324 Ga. App. 457, 751 S.E.2d 109 (2013).

Georgia Court of Appeals properly concluded that O.C.G.A. § 17-3-3 did not give the state six additional months to obtain a second indictment against the appellee for felony vehicular homicide (FVH) after the state's unsuccessful attempt to appeal the dismissal of the FVH count of the first

General Consideration (Cont'd)

indictment as the appeal did not stay any time limit and the FVH count of the second indictment did not relate back to the date of the first indictment since only a misdemeanor was pending at that point. State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

Accusation amended before expiration of statute of limitations. — State could prosecute a count of the indictment under an amended accusation because the indictment was amended before the expiration of the two-year statute of limitation, O.C.G.A. § 17-3-1(d). Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333, cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Section inapplicable when indictment within initial limitations period. — State did not need to take advantage of the statute of limitations extension provided by O.C.G.A. § 17-3-3 because the second indictment was filed within the initial limitations period. Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Ineffective counsel not established by consenting to nolle prosequi. — Defendant's trial counsel did not render ineffective assistance by consenting to the state's nolle prosequi, rather than insisting that the trial court rule on the defendant's special demurrer, because the state could have tried the defendant on the second indictment even if the trial court had quashed the first indictment; by the statute's plain terms, the savings provision of O.C.G.A. § 17-3-3 applies when a timely indictment is quashed, as well as when a nolle prosequi is entered. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

Cited in State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151 (1981); Bouldin v. State, 179 Ga. App. 394, 346 S.E.2d 871 (1986); Danuel v. State, 262 Ga. 349, 418 S.E.2d 45 (1992); Redding v. State, 205 Ga. App. 613, 423 S.E.2d 10 (1992); Gordon v. Caldwell, 303 Ga. 715, 814 S.E.2d 680 (2018).

Decisions Under Former Code 1933, § 27-601 After Enactment of Ga. L. 1968, p. 1249

To justify conviction, state must prove commission of offense which is not barred by statute of limitations. McNabb v. State, 120 Ga. App. 577, 171 S.E.2d 655 (1969).

Usual statutory period extends from act to indictment. — In criminal cases, the statute of limitations runs, subject to special circumstances, from the time of the criminal act to the time of indictment, not from the time of the act to the time of the trial. Hall v. Hopper, 234 Ga. 625, 216 S.E.2d 839 (1975).

Except where nolle prosequi extends case six months. — When a nolle prosequi is entered, the case is still pending for a period of six months and then terminates. Courtenay v. Randolph, 125 Ga. App. 581, 188 S.E.2d 396 (1972).

Application to accusations. — Six-months limitation after the indictment was first quashed applies also to accusations. Jackson v. State, 140 Ga. App. 288, 231 S.E.2d 805 (1976).

To permit state to correct informal errors. — Plain language and purport of this section is to allow the state within a six-month period the right to correct an informal mistake in a criminal warrant or indictment or suffer a final foreclosure of the right to prosecute the alleged criminal misconduct if the criminal process is not properly reinstituted. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Statute usually starts to run when crime known. — Key to determining when the statute of limitations begins to run is to find when the offender or offense became known. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980).

Nolle prosequi prima facie termination of prosecution and starts statute. — Filing of a nolle prosequi by the prosecutor and dismissal of the action by the trial court constitutes prima facie a termination of the prosecution in favor of the

person arrested and is sufficient to commence the running of the statute of limitations subject to the right of the state to reinstate the action within the six-month period. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Nolle prosequi final if no reindictment. — If no further action is taken by the state to reinstate the indictment and toll the statute of limitations, the original nolle prosequi progresses from a prima facie termination of the action to an irrebuttable conclusion of finality. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Reindictment in half year continues prosecution. — If a nolle prosequi is entered by the solicitor (now district attorney) with the consent of the court, a new indictment may be found within six months from the time the first indictment is quashed or the nolle prosequi entered and its effect is not necessarily the ending of the prosecution, but the continuance of the prosecution. Not until the expiration of the six-months period within which a new indictment for the same offense may be preferred, or some other act or declaration which amounts to an abandonment, is the prosecution at an end. Earlywine v. Strickland, 145 Ga. App. 626, 244 S.E.2d 118 (1978).

Continuation of original prosecution. — If one arrested on a criminal warrant is discharged at the instance of the prosecution and without prejudice, the prosecution with due diligence and under the appropriate circumstances, may follow up with a new and valid prosecution, carrying the prosecution on in a court having jurisdiction to try the case upon the case's merits. This amounts to a continuation of the original prosecution. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Malicious prosecution suit brought within half year. — Net effect of the extension provision of the statute of limitation is to render dubious the practicality of bringing a malicious prosecution action within six months of the nolle prosequi of the basic criminal complaint at the instance of the state since during that six-month period the action is not yet final. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249

Five year delay between offense and new indictment. — Mere fact that some five years intervened between the dates of offenses first charged and the date when the offenses were included in a new accusation by virtue of law does not render the accusation subject to demurrer (now motion to dismiss) or motion to quash on the ground that such evidences a purpose of the prosecutor to place the defendant's character in issue or that such violates the due process clause of the United States Constitution or the State Constitution guarantees of a public and fair trial. Hodges v. State, 98 Ga. App. 97, 104 S.E.2d 704 (1958), rev'd on other grounds, 214 Ga. 614, 106 S.E.2d 795 (1959).

Nolle prosequied after five years does not bar accusation filed during year of crime. — When each count of an accusation alleges that the charge embodied therein had originally been filed in the form of an accusation in the county criminal court in the same year in which the cause of action arose, and that such original accusation had subsequently been nol prossed more than five years later, the allegations are sufficient to place the counts of the accusation within the purview of the law and neither of the counts nor the accusation as a whole is barred by the statute of limitations. Hodges v. State, 98 Ga. App. 97, 104 S.E.2d 704 (1958), rev'd on other grounds, 214 Ga. 614, 106 S.E.2d 14 (1959).

Origins of section. — Georgia Laws 1855-56, p. 233 dealt with statutes of limitations in both civil and criminal cases, but the words "suit" and "plaintiff" were used therein in reference to civil actions only, and the word "indictments" seems to have been used wherever criminal offenses are dealt with; there is accordingly no intrinsic evidence that the final sentence of this section which first appeared in the Code of 1861, has its origin with the Act of 1855-56, but neither is there any positive indication that the original codifiers did not have it in mind

Decisions Under Former Code 1933, § 27-601 Before Enactment of Ga. L. 1968, p. 1249 (Cont'd)

when the original codifiers wrote the provision in the criminal limitations statute. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499 (1961).

Section applies to accusations as well as indictments. Hodges v. State, 214 Ga. 614, 106 S.E.2d 795 (1959).

Section is a statute of limitations. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499 (1961).

Extension of statute of limitations. — This section extends the limitations fixed by other provisions of the law so that if the first indictment is returned within the time limited and thereafter quashed or a nolle prosequi entered for some informality and a second indictment is taken out within six months after such dismissal, the second indictment will be good although the offense charged would otherwise have been barred by the statute of limitations. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499 (1961).

If statute of limitations ran out at time of new indictment. — If a defendant is indicted and the indictment subsequently quashed or a nolle prosequi entered because of some informality therein, the state, if the state desires again to charge the defendant with the same offense, must do so within a period of six months after the dismissal of the first indictment, and this is so regardless of whether or not the bar of the statute of limitations as applied to criminal offenses generally has run at the time of the new indictment. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499 (1961).

Second indictment showing first one nol prossed only for informality. — In order to prevent an indictment or accusation which was returned more than two years after the commission of a known misdemeanor offense from being barred by the statute of limitations when it is returned within six months after the nolle prosequi of a former indictment, the second indictment or accusation must show that the former was not nol prossed because of a fatal defect, or because it was void, but only because of an "informality" or some other good reason which did not render it void. Hodges v. State, 214 Ga. 614, 106 S.E.2d 795 (1959).

Statute tolled if accused flees. — After an indictment or accusation has been quashed or a nolle prosequi entered for informality (assuming that the original indictment does charge an offense and is not void on its face) then the prosecution must be renewed within a six-month period unless some other reason to toll the period of limitation is in existence, such as the fact that the offender absconds from the state or so conceals so that the offender cannot be arrested. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499 (1961).

Difficulty in reconvening grand jury not grounds for interpreting section. — Mere fact that the grand jury in session at the time nolle prosequi was entered was disqualified from returning another indictment for technical reasons as a result of which the murder indictment was quashed and that it would have been necessary for the trial court to call a special session of the grand jury in order to obtain a new indictment within the six-month period, was no reason for giving the statute a different meaning than that attributable to it by its plain language and former interpretation. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499 (1961).

Accusation showing statute elapsed and no exceptions. — Since time is limited for proffering an accusation, it is essential to the validity of the accusation that the time alleged should appear to be within the maximum allotted and if the offense appears on the face of the accusation to be barred by the statute of limitations, and no exception is alleged to toll the statute, although no demurrer (now motion to dismiss) was filed and the motion in arrest of judgment was filed after the trial during the trial term, the failure to allege such exception is fatal and the motion in arrest should be sustained. Love v. State, 70 Ga. App. 40, 27 S.E.2d 337 (1943).

Court's authority. — Court has no authority, 15 months after nolle prosequi order is entered, to vacate the order of nolle prosequi and to reinstate the indictment as such court action is clearly in

contravention of the provision of this section. Jacobs v. State, 95 Ga. App. 155, 97 S.E.2d 528 (1957).

Decisions Under Former Penal Code 1910, § 30

Prosecutor can remedy minor defect within time limits. — When the prosecutor has been defeated by some matter not affecting the merits, some defect or informality which the prosecutor can remedy or avoid by new process, the statute will not prevent the prosecutor from so doing, provided the prosecutor follows it within the time allowed by law. Heaton v. State, 40 Ga. App. 87, 149 S.E. 62 (1929).

Merely voidable indictment tolls statute if timely. — When the original indictment alleged that the indictment was found within the time limit after the offense became known, and the indictment was quashed for a mere informality, and therefore was not void, but merely voidable, the indictment did toll the statute. Heaton v. State, 40 Ga. App. 87, 149 S.E. 62 (1929).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 37, 144 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ALR. — Burden on state to show that crime was committed within limitation period, 13 A.L.R. 1446.

Right of prosecution to review of decision quashing or dismissing indictment or information, or sustaining demurrer thereto, 92 A.L.R. 1137.

Nolle prosequi or discontinuance of prosecution in one court and instituting new prosecution in another court of coordinate jurisdiction, 117 A.L.R. 423.

Necessity of alleging in indictment or information limitation-tolling facts, 52 A.L.R.3d 922.

When statute of limitations begins to run against action for conversion of property by theft, 79 A.L.R.3d 847.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

CHAPTER 4

ARREST OF PERSONS

Article 1

General Provisions

Sec.
17-4-1. Actions constituting an arrest.
17-4-2. Privilege from arrest of active duty military personnel.
17-4-3. Right of forcible entry into private dwellings pursuant to execution of arrest warrant.

Article 2

Arrest by Law Enforcement Officers Generally

17-4-20. Authorization of arrests with and without warrants generally; use of deadly force; adoption or promulgation of conflicting regulations, policies, ordinances, and resolutions; authority of nuclear power facility security officer.
17-4-20.1. (For effective date, see note.) Investigation of family violence; "predominant aggressor" defined; preparation of written report; review of report by defendant arrested for family violence; compilation of statistics.
17-4-20.2. Bias Crime Report; requirements; use of reports; publication.
17-4-21. Duty of arresting officer to take arrested person before judicial officer; right of arrested person to select judicial officer.
17-4-22. Authority of peace officers to make arrests not to be denied because of race, creed, or national origin of peace officers or persons arrested.
17-4-23. Procedure for arrests by citation for motor vehicle violations; issuance of warrants for arrest for failure of persons charged to appear in court; bond.
17-4-24. Duty of law enforcement officers to execute penal warrants; summoning of posses.
17-4-25. Power to make arrests in any county; arrested persons taken before judicial officer; transportation costs; holding in county other than one in which offense committed; transport to regional jail.
17-4-25.1. Transport of arrested person to jurisdiction in which offense committed; transport of prisoner outside county or municipality.
17-4-26. Duty to bring persons arrested before judicial officer within 72 hours; notice to accused of time and place of commitment hearing; effect of failure to notify.
17-4-27. Duty to maintain information about persons arrested by law enforcement officers under their supervision; inspection of records.
17-4-28. Advising, encouraging, or procuring dismissal or settlement of warrant by arresting officer.
17-4-29. Collecting or receiving costs or other charges of prosecutor or defendant by arresting officer before warrant returned.
17-4-30. Arrest of hearing impaired persons.

Article 3

Warrants for Arrest

17-4-40. Persons who may issue warrants for arrest of offenders against penal laws; warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.
17-4-41. Contents of affidavits made or warrants issued for arrest of penal offenders.
17-4-42. Issuance of special warrants for arrest; treatment of special

Sec.
warrants as general arrest warrants.
17-4-43. Requirement by judicial officer of bond to prosecute.
17-4-44. Warrants may be issued in any county; execution of warrants without backing or endorsement of judicial officer in county where warrant is executed.
17-4-45. Form of affidavit for arrest warrant.
17-4-46. Form of warrant for arrest.
17-4-47. Issuance of warrants by video conference; testimony; initial bond hearings; oaths.

Article 4

Arrest by Private Persons

17-4-60. Grounds for arrest.
17-4-61. Taking of persons arrested before judicial officer or to peace officer; duty and liability of peace officer taking custody.
17-4-62. Taking of persons arrested before judicial officer within 48 hours of arrest.

Cross references. — Constitutional guarantee against deprivation of liberty without due process, Ga. Const. 1983, Art. I, Sec. I, Para. I. Privilege of General Assembly members from arrest, Ga. Const. 1983, Art. III, Sec. IV, Para. IX. Circumstances justifying taking of minors into custody, § 15-11-17. Privilege of voter registration officers from arrest, § 21-2-215. Prohibiting peace officer from exercising power of arrest, § 35-8-17. Apprehension of mentally ill persons for transfer to emergency receiving facilities, § 37-3-40 et seq. Apprehension of alcoholics and others for transfer to emergency receiving facilities, § 37-7-40 et seq. Exemption of members of organized militia from arrest on civil process, § 38-2-272. Arrest powers of members of militia in emergencies, § 38-2-307.

Law reviews. — For note, "The Law of Arrest," see 17 Mercer L. Rev. 300 (1965).

JUDICIAL DECISIONS

If the defendant has been indicted and convicted, an illegal arrest is not by itself grounds for reversal. Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Cited in Clarke v. State, 158 Ga. App. 749, 282 S.E.2d 1 (1981).

OPINIONS OF THE ATTORNEY GENERAL

No delegation of arrest powers to ex-military officers or rangers. — No agency of state government may delegate the government's arrest powers to retired military officers or officers of a group of horse rangers. 1969 Op. Att'y Gen. No. 69-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 544 et seq. 67 Am. Jur. 2d, Rewards, § 1 et seq.

C.J.S. — 77 C.J.S., Rewards and Bounties, § 1 et seq.

ALR. — Allowing attorney to exceed allotted time for argument as reversible error, 1 A.L.R. 1257.

Degree of force that may be employed in arresting one charged with a misdemeanor, 3 A.L.R. 1170; 42 A.L.R. 1200.

Constitutional guaranties against un-

reasonable searches and seizures as applied to search for or seizure of intoxicating liquor, 3 A.L.R. 1514; 13 A.L.R. 1316; 27 A.L.R. 709; 39 A.L.R. 811; 41 A.L.R. 1539; 74 A.L.R. 1418.

Waiver of privilege against or nonliability to arrest in civil action, 8 A.L.R. 754.

Time at which an arrest is made as affecting its legality or liability for making it, 9 A.L.R. 1350.

Necessity of showing warrant upon making arrest under warrant, 40 A.L.R. 62.

Liability for false imprisonment of officer executing warrant for arrest as affected by its being returnable to wrong court, 40 A.L.R. 290.

Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

Unlawfulness of arrest as affecting jurisdiction or power of court to proceed in criminal case, 96 A.L.R. 982.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 A.L.R.3d 1054.

Liability, for false arrest or imprisonment, of private person detaining child, 20 A.L.R.3d 1441.

Uninvited entry into another's living quarters as invasion of privacy, 56 A.L.R.3d 434.

Right to resist excessive force used in accomplishing lawful arrest, 77 A.L.R.3d 281.

Modern status: right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 A.L.R.3d 174.

Peace officer's civil liability for death or personal injuries caused by intentional force in arresting misdemeanant, 83 A.L.R.3d 238.

Knowledge of reward as condition of right thereto, 86 A.L.R.3d 1142.

Official immunity of national guard members, 52 A.L.R.4th 1095.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used, 82 A.L.R.4th 598.

ARTICLE 1

GENERAL PROVISIONS

U.S. Code. — Disposition of criminal cases, 18 U.S.C. § 3165.

17-4-1. Actions constituting an arrest.

An actual touching of a person with a hand is not essential to constitute a valid arrest. If the person voluntarily submits to being considered under arrest or yields on condition of being allowed his freedom of locomotion, under the discretion of the officer, the arrest is complete.

History. — Orig. Code 1863, § 4609; Code 1968, § 4631; Code 1873, § 4728; Code 1882, § 4728; Penal Code 1895, § 893; Penal Code 1910, § 914; Code 1933, § 27-201.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

Defendant not under arrest for constitutional purposes. — Miranda played no part in the admissibility of field sobriety test results, notwithstanding the

definition of arrest contained in O.C.G.A. § 17-4-1, as the defendant was not under arrest for constitutional purposes when the defendant failed to show any restraints comparable to those associated with formal arrest, the defendant's statement that the defendant knew the officer was going to "take her in" demonstrated the defendant's apprehension, not the fact of an arrest, the defendant was not informed that the defendant's detention would not be temporary, and the defendant's performance on the field sobriety tests did not support a claim that the defendant was exposed to custodial interrogation at the scene. Evans v. State, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Arrest occurs with any restraint of liberty. — Arrest is accomplished whenever the liberty of a person to come and go as the person pleases is restrained, no matter how slight such restraint may be. Clements v. State, 226 Ga. 66, 172 S.E.2d 600 (1970); United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973); Department of Natural Resources v. Joyner, 143 Ga. App. 868, 240 S.E.2d 114 (1977), rev'd on other grounds, 241 Ga. 390, 245 S.E.2d 644 (1978); Bowers v. State, 151 Ga. App. 46, 258 S.E.2d 623 (1979); Collier v. State, 244 Ga. 553, 261 S.E. 364 (1979); Tolbert v. Hicks, 158 Ga. App. 642, 281 S.E.2d 368 (1981); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981); Lee v. State, 222 Ga. App. 389, 474 S.E.2d 281 (1996).

Whenever a police officer accosts an individual and restrains the individual's freedom to walk away, the official has "seized" that person. Rogers v. State, 131 Ga. App. 136, 205 S.E.2d 901 (1974).

Arrest is complete whenever the liberty of a person to come and go as the person pleases is restrained, even though the arresting officer does not expressly inform the person that the person is under arrest. Williams v. State, 166 Ga. App. 798, 305 S.E.2d 489 (1983).

Advising that a person was under arrest without proceeding with any questioning or investigation, but while holding the person, is a restraint of freedom to leave constituting an arrest. McKenzie v. State, 208 Ga. App. 683, 431 S.E.2d 715 (1993).

Defendant may complete arrest by accepting other's control. — If an arresting officer, known to be such, takes charge of a person who reasonably thinks, from the conduct of the officer, that the person is under arrest, an arrest is made. Courtoy v. Dozier, 20 Ga. 369 (1856); Hines v. Adams, 27 Ga. App. 157, 107 S.E. 618 (1921).

If the person arrested understands that the person is in the power of the one arresting and submits in consequence thereof, it is sufficient to constitute an arrest. United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

When no force used. — Defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. Clements v. State, 226 Ga. 66, 172 S.E.2d 600 (1970); Department of Natural Resources v. Joyner, 143 Ga. App. 868, 240 S.E.2d 114 (1977), rev'd on other grounds, 241 Ga. 390, 245 S.E.2d 644 (1978); Bowers v. State, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

Informing defendant of arrest. — Even if the officer does not expressly inform the defendant that the defendant is under arrest nor state to the defendant the specific charges against the defendant, a defendant can recognize that the defendant is not free to depart the scene and is consequently in custodia legis. Rogers v. State, 131 Ga. App. 136, 205 S.E.2d 901 (1974).

Removal of and search of defendant at gunpoint. — Arrest is complete from the moment police officers approach the automobile which the defendant is driving and cause the defendant to alight therefrom under force and restraint of drawn guns and subject the defendant to a search even if the officer testifies that the arrest was made after the search. Clements v. State, 226 Ga. 66, 172 S.E.2d 600 (1970).

Formal arrest. — Formal arrest or statement to that effect is not a necessary element of an arrest. An arrest is accomplished whenever the liberty of another to come and go as the person pleases is restrained, no matter how slight such restraint may be. Tolbert v. Hicks, 158 Ga. App. 642, 281 S.E.2d 368 (1981).

Arrest occurs following consensual search when incriminating evidence found. — When a person granted a police officer's request to enter and search the person's home and the search revealed certain evidence relating to a recent offense, at which point the officer officially placed the person under arrest, the arrest occurred upon the discovery of the evidence and was lawful, despite the officer's testimony at a suppression hearing that the officer probably would not have allowed the defendant to have left the premises as the officer conducted the search, and when there was no evidence of the officer exercising, verbally or physically, any control over the defendant's freedom, or of the defendant submitting to being under arrest, until the search revealed the evidence. Dawson v. State, 166 Ga. App. 199, 303 S.E.2d 532 (1983).

Handcuffed prisoner was "under arrest." — Defendant, who was handcuffed and transported to the county jail in a sheriff's vehicle, led handcuffed into the jail, and left there behind locked doors, was "under arrest". State v. Nelson, 261 Ga. 246, 404 S.E.2d 112 (1991).

Cited in Barron v. State, 109 Ga. App. 786, 137 S.E.2d 690 (1964); Nicholson v. United States, 355 F.2d 80 (5th Cir. 1966); Davidson v. State, 125 Ga. App. 502, 188 S.E.2d 124 (1972); Cash v. State, 136 Ga. App. 149, 221 S.E.2d 63 (1975); Rose v. State, 249 Ga. 628, 292 S.E.2d 678 (1982); City of Marietta v. Kelly, 175 Ga. App. 416, 334 S.E.2d 6 (1985).

OPINIONS OF THE ATTORNEY GENERAL

Sheriffs are not immune to arrest, and may be treated as private citizens when implicated in criminal matters. 1973 Op. Att'y Gen. No. 73-93.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 1 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 44 et seq., 47 et seq.

ALR. — Degree of force that may be employed in arresting one charged with a misdemeanor, 42 A.L.R. 1200.

Liability, for false arrest or imprisonment, of private person detaining child, 20 A.L.R.3d 1441.

17-4-2. Privilege from arrest of active duty military personnel.

The members of the organized militia or military forces shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at drills, parades, meetings, encampments, and the election of officers and going to, during, and returning from the performance of any active duty as such members.

History. — Ga. L. 1884-85, p. 74, § 11; Penal Code 1895, § 892; Penal Code 1910, § 913; Code 1933, § 27-204.

JUDICIAL DECISIONS

Military immunity requires immediate assertion to satisfy purpose. — Legislative purpose of the immunity statute is to prevent civil interference with the military on active duty in the performance of duty. This purpose will be served only if the immunity is asserted at the earliest opportunity. The purpose is defeated if the militiaman allows oneself to be deterred from the performance of the

militiaman's duty and then raises the privilege for the sole purpose of avoiding the criminal sanctions which the militiaman faces. Sanders v. City of Columbus, 140 Ga. App. 441, 231 S.E.2d 473 (1976).

Statute appears to be a limit upon the police power to momentarily detain. Sanders v. City of Columbus, 140 Ga. App. 441, 231 S.E.2d 473 (1976).

Cited in Barnes v. State, 239 Ga. App. 495, 521 S.E.2d 425 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Arrest of sheriff. — Law allows a constable in the constable's district to arrest a sheriff under the same circumstances as the constable can arrest other persons. 1969 Op. Att'y Gen. No. 69-175.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, §§ 103 et seq., 106 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 49.

ALR. — Official immunity of national guard members, 52 A.L.R.4th 1095.

17-4-3. Right of forcible entry into private dwellings pursuant to execution of arrest warrant.

In order to arrest under a warrant charging a crime, the officer may break open the door of any house where the offender is concealed.

History. — Orig. Code 1863, § 4610; Code 1868, § 4632; Code 1873, § 4729; Code 1882, § 4729; Penal Code 1895, § 894; Penal Code 1910, § 915; Code 1933, § 27-205.

JUDICIAL DECISIONS

O.C.G.A. § 17-4-3 provides for use of force in entry in execution of arrest warrant. Anderson v. State, 249 Ga. 132, 287 S.E.2d 195 (1982).

Notice. — Police officer's knock and announcement is sufficient notice under O.C.G.A. § 17-4-3 to enter the defendant's residence and to arrest the defendant. Green v. State, 159 Ga. App. 28, 283 S.E.2d 19 (1981).

Broadscale search not authorized. — Police officers who entered a home while executing an arrest warrant for the homeowner's son had no authority to conduct a broadscale search looking into cabinets and drawers. Nash v. Douglas County, 733 F. Supp. 100 (N.D. Ga. 1989).

Cited in Harris v. State, 157 Ga. App. 367, 278 S.E.2d 52 (1981); Butler v. State, 159 Ga. App. 895, 285 S.E.2d 610 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, §§ 67 et seq., 92 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 106 et seq.

ALR. — Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty, 30 A.L.R.4th 81.

ARTICLE 2

ARREST BY LAW ENFORCEMENT OFFICERS GENERALLY

Cross references. — Arrest powers of campus police and security personnel, § 20-3-72. Failure to comply with Georgia Peace Officer Standards and Training Act, § 35-8-17. Appointment of citizen of adjoining state as peace officer, § 35-8-19.

Law reviews. — For article, "Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited," see 34 Ga. St. U.L. Rev. 513 (2018). For article, "Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases," see 54 Ga. L. Rev. 1 (2019).

For note, "You have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause," see 51 Ga. L. Rev. 607 (2017).

U.S. Code. — Disposition of criminal cases, 18 U.S.C. § 3165.

17-4-20. Authorization of arrests with and without warrants generally; use of deadly force; adoption or promulgation of conflicting regulations, policies, ordinances, and resolutions; authority of nuclear power facility security officer.

(a) An arrest for a crime may be made by a law enforcement officer:

(1) Under a warrant; or

(2) Without a warrant if:

(A) The offense is committed in such officer's presence or within such officer's immediate knowledge;

(B) The offender is endeavoring to escape;

(C) The officer has probable cause to believe that an act of family violence, as defined in Code Section 19-13-1, has been committed;

(D) The officer has probable cause to believe that the offender has violated a criminal family violence order, as defined in Code Section 16-5-95; provided, however, that such officer shall not have any prior or current familial relationship with the alleged victim or the offender;

(E) The officer has probable cause to believe that an offense involving physical abuse has been committed against a vulnerable adult, who shall be for the purposes of this subsection a person 18 years old or older who is unable to protect himself or herself from physical or mental abuse because of a physical or mental impairment; or

(F) For other cause there is likely to be failure of justice for want of a judicial officer to issue a warrant.

(b) Sheriffs and peace officers who are appointed or employed in conformity with Chapter 8 of Title 35 may use deadly force to appre-

hend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm. Nothing in this Code section shall be construed so as to restrict such sheriffs or peace officers from the use of such reasonable nondeadly force as may be necessary to apprehend and arrest a suspected felon or misdemeanant.

(c) Nothing in this Code section shall be construed so as to restrict the use of deadly force by employees of state and county correctional institutions, jails, and other places of lawful confinement or by peace officers of any agency in the State of Georgia when reasonably necessary to prevent escapes or apprehend escapees from such institutions.

(d) No law enforcement agency of this state or of any political subdivision of this state shall adopt or promulgate any rule, regulation, or policy which prohibits a peace officer from using that degree of force to apprehend a suspected felon which is allowed by the statutory and case law of this state.

(e) Each peace officer shall be provided with a copy of this Code section. Training regarding elder abuse, abuse of vulnerable adults, and the requirements of this Code section should be offered as part of at least one in-service training program each year conducted by or on behalf of each law enforcement department and agency in this state.

(f) A nuclear power facility security officer, including a contract security officer, employed by a federally licensed nuclear power facility or licensee thereof for the purpose of securing that facility shall have the authority to:

(1) Threaten or use force against another in defense of a federally licensed nuclear power facility and the persons therein as provided for under Code Sections 16-3-21 and 16-3-23;

(2) Search any person on the premises of the nuclear power facility or the properties adjacent to the facility if the facility is under imminent threat or danger pursuant to a written agreement entered into with the local enforcement agency having jurisdiction over the facility for the purpose of determining if such person possesses unauthorized weapons, explosives, or other similarly prohibited material; provided, however, that if such person objects to any search, he or she shall be detained as provided in paragraph (3) of this subsection or shall be required to immediately vacate the premises. Any person refusing to submit to a search and refusing to vacate the

premises of a facility upon the request of a security officer as provided for in this Code section shall be guilty of a misdemeanor; and

(3) In accordance with a nuclear security plan approved by the United States Nuclear Regulatory Commission or other federal agency authorized to regulate nuclear facility security, detain any person located on the premises of a nuclear power facility or on the properties adjacent thereto if the facility is under imminent threat or danger pursuant to a written agreement entered into with the local law enforcement agency having jurisdiction over the facility, where there is reasonable suspicion to believe that such person poses a threat to the security of the nuclear power facility, regardless of whether such prohibited act occurred in the officer's presence. In the event of such detention, the law enforcement agency having jurisdiction over the facility shall be immediately contacted. The detention shall not exceed the amount of time reasonably necessary to allow for law enforcement officers to arrive at the facility.

History. — Orig. Code 1863, § 4603; Code 1868, § 4626; Code 1873, § 4723; Code 1882, § 4723; Penal Code 1895, § 896; Penal Code 1910, § 917; Code 1933, § 27-207; Ga. L. 1975, p. 1209, § 1; Ga. L. 1981, p. 880, § 6; Ga. L. 1981, p. 1393, § 1; Ga. L. 1986, p. 490, § 1; Ga. L. 1986, p. 657, § 1; Ga. L. 1988, p. 1251, § 1; Ga. L. 1991, p. 624, § 1; Ga. L. 1997, p. 700, § 1; Ga. L. 2006, p. 812, § 3/SB 532; Ga. L. 2013, p. 667, § 2/SB 86.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, "18" was substituted for "eighteen" in subsection (a).

Administrative rules and regulations. — Uniform Crime Reporting, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Crime Information Center Council, Practice and Procedure, Rule 140-2-.12.

Law reviews. — For article, "Constitutional Criminal Litigation," see 32 Mercer L. Rev. 993 (1981). For article surveying developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For survey of 1995 Eleventh Circuit cases on constitutional criminal procedure, see 47 Mercer L. Rev. 765 (1996). For article, "Symposium Protect and Serve: Perspectives on 21st Century Policing January 20, 2017: State Labor Law and Federal Police Reform," see 51 Ga. L. Rev. 1209 (2017). For article, "Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation," see 52 Ga. L. Rev. 57 (2017). For article, "Symposium Protect and Serve: Perspectives on 21st Century Policing January 20, 2017: Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities," see 51 Ga. L. Rev. 1079 (2017). For article, "Symposium Protect and Serve: Perspectives on 21st Century Policing January 20, 2017: Commodifying Policing: A Recipe for Community-Police Tensions," see 51 Ga. L. Rev. 1047 (2017). For article, "Symposium Protect and Serve: Perspectives on 21st Century Policing January 20, 2017: The Problematic Prosecution of an Asian American Police Officer: Notes: From a Participant in People v. Peter Liang," see 51 Ga. L. Rev. 1023 (2017). For article, "Symposium Protect and Serve: Perspectives on 21st Century Policing January 20, 2017: Keynote Address," see 51 Ga. L. Rev. 981 (2017). For article, "Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law," see 57 Mercer

L. Rev. 511 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

Analysis

General Consideration
Grounds for Warrantless Arrest
1. In General
2. Offense Committed in Officer's Presence
3. Offender Endeavoring to Escape
4. Failure of Justice
5. Resisting Arrest
6. Consent
Authority of Local Officers
Jury Instructions

General Consideration

Section codifies common-law rule. — This section is a codification of the common-law rule of arrest with perhaps a slight enlargement of the power of arrest. Though at common law an officer might arrest for a breach of peace committed in the officer's presence without a warrant, the arrest must have been made within a reasonable time after the commission of the offense, that is, the officer must immediately set about the arrest, and follow up the effort until the arrest is made. There must be a continued pursuit and no cessation of acts tending toward the arrest from the time of the commission of the offense until the apprehension of the offender. Johnson v. Mayor of Americus, 46 Ga. 80 (1872); Yates v. State, 127 Ga. 813, 56 S.E. 1017, 9 Ann. Cas. 620 (1907).

Applicability. — O.C.G.A. § 17-4-20 applies to arrests for misdemeanors as well as for felonies. King v. State, 161 Ga. App. 382, 288 S.E.2d 644 (1982).

Defendant's argument that the defendant's motion to dismiss the citation the police officer issued to defendant for hit and run should have been dismissed because the officer did not see the defendant commit the offense had to be rejected as the statute the defendant cited for that proposition, O.C.G.A. § 17-4-20(a), only applied when a custodial arrest was involved and no custodial arrest was involved in the defendant's case. Davis v. State, 261 Ga. App. 539, 583 S.E.2d 214 (2003).

Official immunity found. — Summary judgment in favor of police personnel was proper in an action against a police chief and officers for false imprisonment under O.C.G.A. § 51-7-20 because the record did not show any support for the plaintiff's contentions that the actions of the police officers in arresting the plaintiff, following an altercation and in the absence of exigent circumstances, demonstrated the requisite malice to overcome official immunity under state law. Plaintiff's unsupported allegations of conspiracy to frame the plaintiff for an altercation are insufficient to pierce the protections of official immunity on these claims. Goree v. City of Atlanta, 276 Fed. Appx. 919 (11th Cir. 2008) (Unpublished).

In an arrest for driving under the influence, the arrestee's false imprisonment claim failed because the officer was entitled to official immunity since the officer was performing a discretionary act when the officer arrested the arrestee; the arrestee's general allegations of malice did not overcome official immunity. Bannister v. Conway, No. 1:12-CV-1487-TWT, 2013 U.S. Dist. LEXIS 152569 (N.D. Ga. Oct. 23, 2013).

Probable cause necessary. — Warrantless arrest may be made under O.C.G.A. § 17-4-20 only when the probable cause necessary for a constitutional arrest under the federal constitution is present. Glean v. State, 268 Ga. 260, 486 S.E.2d 172 (1997), cert. denied, 522 U.S. 1079, 118 S. Ct. 860, 139 L. Ed. 2d 758 (1998).

General Consideration (Cont'd)

Construed with § 17-4-23. — O.C.G.A. § 17-4-23 gives a police officer the option to issue a citation, but does not restrict the power given to police in O.C.G.A. § 17-4-20 to make custodial arrests for crimes committed in the officers' presence. Brock v. State, 196 Ga. App. 605, 396 S.E.2d 785 (1990); Polk v. State, 200 Ga. App. 17, 406 S.E.2d 548 (1991); Edwards v. State, 224 Ga. App. 332, 480 S.E.2d 246 (1997).

Construed with § 40-13-2.1. — Having elected to issue a citation, a deputy cannot make a custodial arrest of a driver when the driver refuses to sign the citation. Instead, a deputy shall follow the procedures set forth in O.C.G.A. § 40-13-2.1(a). The language of that statute makes clear that once a deputy or officer issues a citation, the deputy or officer is obligated to follow the procedures set forth in the statute. State v. Torres, 290 Ga. App. 804, 660 S.E.2d 763 (2008).

Conflict with other statutes and administrative rules. — Neither the self-defense statute nor the arrest statute automatically prohibits the discharge of a firearm if the lives of innocent people may be in danger, and when a mandatory prohibition against such an action in a police department work rule conflicted with these statutes it was invalid and could not form the basis for a police officer's suspension. Allen v. City of Atlanta, 235 Ga. App. 516, 510 S.E.2d 64 (1998).

Crimes against individual or society require warrant. — It is equally as necessary to get a warrant when an offense is committed against an individual as it is when the offense is against society as a whole. Gordy v. State, 93 Ga. App. 743, 92 S.E.2d 737 (1956).

Arrest occurs with any restraint of liberty. — When a person is in custody and is not free to leave the office of the law enforcement officer, the person is under arrest. Robinson v. State, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

False imprisonment arrest. — In a false imprisonment case, the existence of probable cause standing alone is not a complete defense because, even if probable cause to believe a crime has been committed exists, a warrantless arrest would still be illegal unless the arrest was accomplished pursuant to one of the "exigent circumstances" applicable to law enforcement officers enumerated in O.C.G.A. § 17-4-20 or applicable to private persons as set forth in O.C.G.A. § 17-4-60. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

Summary judgment was improperly granted in favor of the employer based on the employer procuring the employee's false imprisonment when the employee was arrested by a detective because, although two of the loss prevention officers both averred that neither of the officers encouraged or directed the police to arrest the employee, the officers told a third loss prevention officer that the officers were going to obtain the employee's arrest based on a videotape; there was a conflict in the evidence as to whether the employer directly or indirectly caused the police to arrest the employee; and a question of fact remained regarding whether the detective had probable cause to believe that the employee was involved in the theft or lied when denying being so involved. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Summary judgment was improperly granted to the employer because a question of fact remained as to whether the employer procured the employee's false imprisonment as there was a conflict in the evidence about whether the employer caused the detective to arrest the employee as the evidence did not show as a matter of law that the police made a sufficiently independent investigation of the theft; and because a question of fact remained as to whether the detective had probable cause to arrest the employee in connection with the theft as there was a dispute about whether the employee actually saw a person take the electronics out of a case and failed to report it, giving rise to a reasonable suspicion that the employee was working with the thieves. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Neutral magistrate determination required before warrant for seizure of pornography. — Constitution at a

minimum requires the imposition of a neutral, detached magistrate in the procedure to make an independent judicial determination of probable cause prior to issuing an arrest warrant or some other warrant authorizing the seizure of allegedly obscene material to be used as evidence. Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Unreasonable attempt to arrest with unlicensed semi-automatic weapon. — There was no evidence that the defendant, who murdered the victim with a rifle, was attempting to effect a valid citizen's arrest and, hence, the defendant was not entitled to an involuntary manslaughter charge. It was not reasonable for the defendant to attempt an arrest with a semi-automatic weapon which the defendant was not licensed to carry as deadly force in effecting an arrest is limited to self-defense or to a situation in which it is necessary to prevent a forcible felony. Hayes v. State, 261 Ga. 439, 405 S.E.2d 660 (1991).

Off-duty officer employed as security guard. — There was evidence that the off-duty officer's duties as a security guard included arresting disorderly persons to remove the persons from the premises, so it cannot be said as a matter of law that the arrest was lawful under O.C.G.A. § 17-4-20(a). Rather, whether the arrest was lawful as one made by a police officer is a jury question. Smith v. Holeman, 212 Ga. App. 158, 441 S.E.2d 487 (1994).

"Deadly force" instruction given when police prosecuted. — In a prosecution against police officers for manslaughter, arising out of the shooting of the victim in a parking lot following a report that the victim had threatened someone with a knife, the justification charge given was wholly inadequate, as it applied to ordinary citizens, not to law enforcement officers acting in the line of duty, who are allowed to use deadly force on the reasonable belief that the suspect possesses a deadly weapon. Because this omission was harmful as a matter of law, the case was reversed, notwithstanding the fact that the charge was verbally requested after the jury began deliberating. Robinson v. State, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Use of deadly force not justified if fleeing suspect wanted only for traffic offense. — Deputy sheriff who rammed a fleeing suspect's car causing injury to the suspect was not entitled to qualified immunity from suit alleging a violation of the Fourth Amendment right to be free from unlawful seizure because a reasonable officer would have known that a vehicle could be used to apply deadly force to effect a seizure, and that deadly force could not constitutionally be used to apprehend a fleeing suspect wanted only for speeding. Harris v. Coweta County, 406 F.3d 1307 (11th Cir. 2005).

Arrest of passenger on warrant authorized stop of vehicle. — Trial court properly denied a defendant's motion to suppress the evidence of drugs and a handgun found during the warrantless search of the defendant's vehicle as the arrest of the defendant's passenger on an outstanding warrant authorized the stop of the defendant's vehicle and the mobility of the car, coupled with the existence of probable cause to believe the car contained marijuana, based on the officer smelling the marijuana upon approaching the vehicle, authorized the search. Somesso v. State, 288 Ga. App. 291, 653 S.E.2d 855 (2007), cert. denied, No. S08C0505, 2008 Ga. LEXIS 281 (Ga. 2008).

Officer may arrest a suspect without an arrest warrant if an offense has been committed in the officer's presence and while an officer generally must have a search warrant or consent to enter a home to make an arrest, an officer can enter a home to arrest a suspect when the officer has followed the suspect there in "hot pursuit." A suspect may not defeat an arrest which has been set in motion in a public place … by the expedient of escaping to a private place. For Fourth Amendment purposes, one who is in the threshold of one's dwelling is in a public place and not within the dwelling. Lawson v. State, 299 Ga. App. 865, 684 S.E.2d 1 (2009), cert. dismissed, No. S10C0118, 2010 Ga. LEXIS 195 (Ga. 2010), cert. denied, No. S10C0117, 2010 Ga. LEXIS 206 (Ga. 2010).

General Consideration (Cont'd)

No grounds for challenge to arrest warrant. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the arrest warrant on the basis that the warrant was not properly sworn because the record showed that the defendant was taken into custody and arrested before the warrant was issued and there was a valid, warrantless arrest of the defendant, making the later-issued warrant superfluous; thus, any defect in the arrest warrant was moot, and a challenge to the arrest warrant would have been futile. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

Trial court required to address tainted fruit rule. — Trial court erred by granting the defendant's motion to suppress after concluding that the state failed to prove the legality of the defendant's arrest for failing to tender the open container ordinance as the trial court was required to go on to address and rule on whether the drugs discovered during the subsequent search of the backpack in the vehicle constituted tainted fruit of the arrest based on the officers' testimony regarding the smell of marijuana. State v. Alford, 347 Ga. App. 208, 818 S.E.2d 668 (2018).

Cited in Glaze v. State, 156 Ga. 807, 120 S.E. 530 (1923); Seals v. State, 33 Ga. App. 818, 128 S.E. 224 (1925); Whitfield v. State, 51 Ga. App. 439, 180 S.E. 630 (1935); Griffin v. State, 183 Ga. 775, 190 S.E. 2 (1937); Booker v. State, 183 Ga. 822, 190 S.E. 356 (1937); Sheppard v. Hale, 58 Ga. App. 140, 197 S.E. 922 (1938); Murphy v. City of Atlanta, 64 Ga. App. 752, 14 S.E.2d 232 (1941); Newmans v. State, 65 Ga. App. 288, 16 S.E.2d 87 (1941); Bentley v. State, 70 Ga. App. 494, 28 S.E.2d 658 (1944); Cawthon v. State, 71 Ga. App. 497, 31 S.E.2d 64 (1944); Smith v. Glen Falls Indem. Co., 71 Ga. App. 697, 32 S.E.2d 105 (1944); Benford v. State, 73 Ga. App. 426, 36 S.E.2d 833 (1946); Moore v. State, 205 Ga. 37, 52 S.E.2d 282 (1949); Goodwin v. Allen, 89 Ga. App. 187, 78 S.E.2d 804 (1953); Hill v. Henry, 90 Ga. App. 93, 82 S.E.2d 35 (1954); Sharpe v. Lowe, 214 Ga. 513, 106 S.E.2d 28 (1958); Crosby v. State, 100 Ga. App. 49, 110 S.E.2d 94 (1959); Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 111 S.E.2d 259 (1959); Mullins v. State, 216 Ga. 183, 115 S.E.2d 547 (1960); Collins v. United States, 289 F.2d 129 (5th Cir. 1961); Pistor v. State, 219 Ga. 161, 132 S.E.2d 183 (1963); Pugh v. State, 219 Ga. 166, 132 S.E.2d 203 (1963); Hart v. United States, 316 F.2d 916 (5th Cir. 1963); Paige v. State, 219 Ga. 569, 134 S.E.2d 793 (1964); Raif v. State, 219 Ga. 649, 135 S.E.2d 375 (1964); Barron v. State, 109 Ga. App. 786, 137 S.E.2d 690 (1964); Walker v. State, 220 Ga. 415, 139 S.E.2d 278 (1964); Graham v. State, 111 Ga. App. 542, 142 S.E.2d 287 (1965); Harris v. State, 221 Ga. 398, 144 S.E.2d 769 (1965); Bloodworth v. State, 113 Ga. App. 278, 147 S.E.2d 833 (1966); McEwen v. State, 113 Ga. App. 765, 149 S.E.2d 716 (1966); Manuel v. United States, 355 F.2d 344 (5th Cir. 1966); Lovelace v. United States, 357 F.2d 306 (5th Cir. 1966); Henderson v. United States, 405 F.2d 874 (5th Cir. 1968); Crone v. United States, 411 F.2d 251 (5th Cir. 1969); Davidson v. State, 125 Ga. App. 502, 188 S.E.2d 124 (1972); Vaughn v. State, 126 Ga. App. 252, 190 S.E.2d 609 (1972); Bradford v. State, 126 Ga. App. 688, 191 S.E.2d 545 (1972); Patterson v. State, 126 Ga. App. 753, 191 S.E.2d 584 (1972); Barnwell v. State, 127 Ga. App. 335, 193 S.E.2d 203 (1972); Traylor v. State, 127 Ga. App. 409, 193 S.E.2d 876 (1972); Blair v. State, 230 Ga. 409, 197 S.E.2d 362 (1973); Brooks v. State, 129 Ga. App. 109, 198 S.E.2d 892 (1973); Brooks v. State, 129 Ga. App. 393, 199 S.E.2d 578 (1973); Brice v. State, 129 Ga. App. 535, 199 S.E.2d 895 (1973); Ivins v. State, 129 Ga. App. 865, 201 S.E.2d 683 (1973); Caito v. State, 130 Ga. App. 831, 204 S.E.2d 765 (1974); Jones v. State, 131 Ga. App. 699, 206 S.E.2d 601 (1974); Luke v. State, 131 Ga. App. 799, 207 S.E.2d 213 (1974); Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974); Godwin v. State, 133 Ga. App. 397, 211 S.E.2d 7 (1974); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); Patterson v. State, 133 Ga. App. 742, 212 S.E.2d 858 (1975); Lawson v. State, 234 Ga. 136, 214 S.E.2d 559 (1975); Wright v. State, 134 Ga. App. 406, 214 S.E.2d 688 (1975); Sanders v. State, 235 Ga. 425, 219 S.E.2d

768 (1975); Little v. State, 136 Ga. App. 189, 220 S.E.2d 490 (1975); Lentile v. State, 136 Ga. App. 611, 222 S.E.2d 86 (1975); Mitchell v. State, 136 Ga. App. 658, 222 S.E.2d 160 (1975); Allen v. State, 137 Ga. App. 21, 222 S.E.2d 856 (1975); Pate v. State, 137 Ga. App. 677, 225 S.E.2d 95 (1976); Reeves v. State, 139 Ga. App. 214, 228 S.E.2d 201 (1976); Keating v. State, 141 Ga. App. 377, 233 S.E.2d 456 (1977); Quarles v. State, 142 Ga. App. 394, 236 S.E.2d 139 (1977); Floyd v. State, 142 Ga. App. 425, 236 S.E.2d 157 (1977); Carroll v. State, 142 Ga. App. 428, 236 S.E.2d 159 (1977); State v. Handspike, 240 Ga. 176, 240 S.E.2d 1 (1977); Johnson v. State, 143 Ga. App. 826, 240 S.E.2d 207 (1977); Smith v. State, 144 Ga. App. 785, 242 S.E.2d 376 (1978); Walker v. State, 144 Ga. App. 838, 242 S.E.2d 753 (1978); Reese v. State, 145 Ga. App. 453, 243 S.E.2d 650 (1978); Cook v. State, 145 Ga. App. 544, 244 S.E.2d 64 (1978); Dougherty v. State, 145 Ga. App. 718, 244 S.E.2d 638 (1978); State v. High, 145 Ga. App. 772, 244 S.E.2d 888 (1978); Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978); State v. Stone, 147 Ga. App. 192, 248 S.E.2d 228 (1978); Kiriaze v. State, 147 Ga. App. 832, 250 S.E.2d 568 (1978); Booker v. State, 242 Ga. 773, 251 S.E.2d 518 (1979); Parks v. State, 150 Ga. App. 446, 258 S.E.2d 66 (1979); Washington v. State, 245 Ga. 117, 263 S.E.2d 152 (1980); State v. Sanders, 154 Ga. App. 305, 267 S.E.2d 906 (1980); Baxter v. State, 154 Ga. App. 861, 270 S.E.2d 71 (1980); Starr v. State, 159 Ga. App. 386, 283 S.E.2d 630 (1981); Ellis v. State, 248 Ga. 414, 283 S.E.2d 870 (1981); Butler v. State, 159 Ga. App. 895, 285 S.E.2d 610 (1981); Nelson v. State, 160 Ga. App. 168, 286 S.E.2d 504 (1981); Blackwell v. State, 248 Ga. 138, 281 S.E.2d 599 (1981); Robertson v. State, 161 Ga. App. 715, 288 S.E.2d 362 (1982); Mobley v. State, 164 Ga. App. 154, 296 S.E.2d 617 (1982); Cornelius v. State, 165 Ga. App. 794, 302 S.E.2d 710 (1983); Collins v. Sadlo, 167 Ga. App. 317, 306 S.E.2d 390 (1983); Mines v. State, 167 Ga. App. 766, 307 S.E.2d 291 (1983); Bodiford v. State, 169 Ga. App. 760, 315 S.E.2d 274 (1984); Edwards v. State, 169 Ga. App. 958, 315 S.E.2d 675 (1984); Bowen v. State, 170 Ga. App. 49, 316 S.E.2d 33 (1984); Crews v. State, 170 Ga. App. 104, 316 S.E.2d 549 (1984); Powell v. State, 170 Ga. App. 185, 316 S.E.2d 779 (1984); Waits v. State, 172 Ga. App. 524, 323 S.E.2d 624 (1984); Parker v. State, 172 Ga. App. 540, 323 S.E.2d 826 (1984); Scott Hous. Sys. v. Hickox, 174 Ga. App. 23, 329 S.E.2d 154 (1985); Stansell v. State, 174 Ga. App. 511, 330 S.E.2d 441 (1985); Moore v. State, 174 Ga. App. 826, 331 S.E.2d 115 (1985); Ridley v. State, 176 Ga. App. 669, 337 S.E.2d 382 (1985); Rogers v. State, 256 Ga. 139, 344 S.E.2d 644 (1986); Minor v. State, 180 Ga. App. 869, 350 S.E.2d 783 (1986); Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986); Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Harley v. State, 183 Ga. App. 253, 358 S.E.2d 653 (1987); Ferguson v. City of Doraville, 186 Ga. App. 430, 367 S.E.2d 551 (1988); Roberson v. State, 186 Ga. App. 808, 368 S.E.2d 568 (1988); Dorsey v. State, 187 Ga. App. 725, 371 S.E.2d 207 (1988); Arnold v. State, 198 Ga. App. 514, 402 S.E.2d 312 (1991); Mitchell v. State, 200 Ga. App. 146, 407 S.E.2d 115 (1991); Lufburrow v. State, 206 Ga. App. 250, 425 S.E.2d 368 (1992); Watkins v. State, 206 Ga. App. 575, 426 S.E.2d 26 (1992); State v. Weathers, 234 Ga. App. 376, 506 S.E.2d 698 (1998); Schroeder v. State, 261 Ga. App. 879, 583 S.E.2d 922 (2003); Hight v. State, 293 Ga. App. 254, 666 S.E.2d 678 (2008); Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Grounds for Warrantless Arrest

1. In General

Three exceptions to having warrant for any public officer. — Only three exceptions to the general rule that the law requires a warrant in order to render an arrest legal, whether the arrest be made by a police officer or any public officer, are recognized by this section. Thomas v. State, 91 Ga. 204, 18 S.E. 305 (1892); Graham v. State, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

Arrest illegal if not under three exceptions. — Unless an arrest without a warrant falls within the three exceptions specified in this section, it is an illegal

Grounds for Warrantless Arrest (Cont'd)
1. In General (Cont'd)

arrest. Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940).

When warrantless arrest permitted. — An arrest for a crime may be made by an officer without a warrant in three instances only: (1) if the offense is committed in the official's presence; or (2) the offender is endeavoring to escape; or (3) for other cause there is likely to be a failure of justice for want of an officer to issue a warrant. Napier v. State, 200 Ga. 626, 38 S.E.2d 269 (1946); Finch v. State, 101 Ga. App. 73, 112 S.E.2d 824 (1960); Puckett v. State, 239 Ga. App. 582, 521 S.E.2d 634 (1999).

Warrantless arrest is not violative of O.C.G.A. § 17-4-20 if the officer had probable cause to make an arrest, i.e., if the officer knew facts and circumstances, based on reasonably trustworthy information, sufficient to warrant a prudent man to believe that the defendant committed an offense. Ellis v. State, 164 Ga. App. 366, 296 S.E.2d 726 (1982), appeal dismissed, 462 U.S. 1113, 103 S. Ct. 3079, 77 L. Ed. 2d 1344, cert. denied, 462 U.S. 1119, 103 S. Ct. 3087, 77 L. Ed. 2d 1348 (1983); State v. Thurmond, 203 Ga. App. 230, 416 S.E.2d 529, cert. denied, 203 Ga. App. 907, 416 S.E.2d 529 (1992).

If a police officer has probable cause to believe that the defendant made terroristic threats, the officer's arrest and pat-down search of the defendant were lawful. Medlin v. State, 168 Ga. App. 551, 309 S.E.2d 639 (1983).

Warrantless arrest of the defendant for a domestic violence act of assault, given the information provided by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, was supported by sufficient probable cause and thus upheld on appeal. Rivers v. State, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

Arresting officer's knowledge. — It is the facts and circumstances existing within the knowledge of the arresting officer at the moment arrest is made which are controlling. Barnett v. State, 204 Ga. App. 491, 420 S.E.2d 43 (1992).

Felony charges from foreign state. — General Assembly by the enactment of Ga. L. 1951, p. 726, § 14 (see O.C.G.A. 17-13-34), provided that an arrest without a warrant might be lawfully made by any peace officer upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. Fields v. State, 211 Ga. 335, 85 S.E.2d 753 (1955); Peterkin v. State, 147 Ga. App. 437, 249 S.E.2d 152 (1978).

Arrest meeting the constitutional requirements of probable cause is valid whether or not O.C.G.A. § 17-4-20 is violated. Quick v. State, 166 Ga. App. 492, 304 S.E.2d 916 (1983).

Subsequent guilt or innocence does not determine legality of arrest. — Fact that the defendant is found not guilty of a charge is immaterial as to the legality of the arrest because it is not necessary that the accused be found guilty for the arrest may still be lawful. Brooks v. State, 166 Ga. App. 704, 305 S.E.2d 436 (1983).

Warrantless search legal under federal law is legal under state law. — Warrantless arrest legal under federal law—that is, one made on the basis of probable cause—is legal under state law, and the requirements of O.C.G.A. § 17-4-20 and federal law are the same. State v. Thurmond, 203 Ga. App. 230, 416 S.E.2d 529, cert. denied, 203 Ga. App. 907, 416 S.E.2d 529 (1992).

Person under investigation subject to arrest without warrant on probable cause. — When the offender knows that the offender is under investigation, a police officer, once the officer finds probable cause for arrest, is justified in proceeding directly to arrest the offender without first obtaining a warrant. Fitzgerald v. State, 166 Ga. App. 307, 304 S.E.2d 114 (1983).

Arrest inside suspect's home. — Warrantless arrest may be made inside a suspect's home only with the suspect's consent or under exigent circumstances. Mincey v. State, 251 Ga. 255, 304 S.E.2d 882, cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

When a suspect is telephonically requested to exit the suspect's home and voluntarily does so, the suspect's ar-

rest, outside the suspect's home, by officers who have probable cause to believe that the suspect has participated in a felony is constitutionally valid. Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

Probable cause for an arrest without a warrant exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a belief by a person of reasonable caution that a crime has been committed. Cornelius v. State, 165 Ga. App. 794, 302 S.E.2d 710 (1983).

When at the time the defendant was arrested one officer had been told by the victim what happened and that the officer radioed other officers to alert the officers to look for the defendant and the defendant's vehicle, based on that information, another officer properly placed the defendant under arrest. Gilbert v. State, 209 Ga. App. 483, 433 S.E.2d 664 (1993).

Grounds must be more than arbitrary harassment. — What is a reasonable articulable ground for the detention may be less than probable cause to make an arrest or conduct a search, but must be more than mere caprice or arbitrary harassment. State v. Thurmond, 203 Ga. App. 230, 416 S.E.2d 529, cert. denied, 203 Ga. App. 907, 416 S.E.2d 529 (1992).

Probable cause that an act of family violence had been committed. Clark v. State, 180 Ga. App. 280, 348 S.E.2d 916 (1986).

Uncontradicted testimony of the police witness concerning the victim's statement accusing the victim's spouse of stabbing the victim, the presence of a stab wound on the victim's back, the presence of several weapons, and the disordered condition of the scene clearly established that the officers had probable cause to believe that an act of family violence had occurred. Watkins v. State, 183 Ga. App. 778, 360 S.E.2d 47 (1987).

Wife's statement to officers that her husband had struck her provided probable cause to arrest the defendant, and since the offense which the officers had probable cause to believe had been committed was an act of family violence, a warrantless arrest was authorized. McCauley v. State, 222 Ga. App. 600, 475 S.E.2d 669 (1996).

Victim's on-the-scene accusations against the defendant, along with "visible bodily harm" to the victim's face, provided sufficient probable cause to believe that the defendant had committed battery, and it was unnecessary for the officer to investigate the defendant's explanation of the domestic dispute as required by O.C.G.A. § 17-4-20.1. McCracken v. State, 224 Ga. App. 356, 480 S.E.2d 361 (1997).

There was no error in the trial court's conclusion that the defendant's warrantless arrest after being found at the home of a friend was justified under O.C.G.A. § 17-4-20(a) as another friend of the defendant had been found shot at the defendant's home, and by the time of the arrest the police knew that the defendant's spouse was missing, that the defendant and the defendant's spouse were estranged, and that the defendant had stalked and threatened the defendant's spouse, such that the police had probable cause to believe that an act of family violence had occurred, and the possibility that the spouse was still alive was an exigent circumstance which authorized the entry into the friend's home to arrest the defendant. Wright v. State, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Probable cause not found. — Powell v. State, 163 Ga. App. 801, 295 S.E.2d 560 (1982); State v. Gunter, 249 Ga. App. 802, 549 S.E.2d 771 (2001).

Trial court properly granted the defendant's motion to suppress evidence obtained after the defendant's car was impounded during a traffic stop because, even though the officer had reasonable articulable suspicion to initiate the traffic stop based on criminal database search results that the defendant's car was not insured, once the defendant provided proof of insurance in an acceptable manner, the officer did not have probable cause to arrest the defendant or issue the defendant a citation; and, without probable cause to issue the citation, the officer had no basis for impounding the defendant's vehicle. State v. Lewis, 344 Ga. App. 630, 811 S.E.2d 436 (2018).

Probable cause found. — Defendant's arrival with a police suspect at a hidden

Grounds for Warrantless Arrest (Cont'd)
1. In General (Cont'd)

drug transaction location and the defendant's attempt to leave the scene at the time of the suspect's arrest supported a finding that the police had probable cause on which to arrest the defendant. Fowler v. State, 201 Ga. App. 417, 411 S.E.2d 335 (1991).

Since police officers knew that a fatal stabbing and robbery had occurred that morning, that the defendant had been at or near the scene of the murder, that the defendant had threatened the victim only a week before, and that the defendant had been treated that morning for a wound, the protective search for weapons made by the police officers was constitutionally permissible. Further, as the search was proper, the police were also authorized to arrest the defendant when the police found a pistol concealed on defendant's person. Edwards v. State, 264 Ga. 615, 449 S.E.2d 516 (1994).

Probable cause from videotape identification and commercial transactions. — Probable cause for warrantless arrest of the defendant as the defendant left the defendant's home was properly established through the defendant's identification from videotapes by bank coworkers and by a police officer who had known the defendant for 25 years, and by the defendant's payments in cash to four financial institutions. Brown v. State, 262 Ga. 728, 425 S.E.2d 856, cert. denied, 510 U.S. 998, 114 S. Ct. 565, 126 L. Ed. 2d 465 (1993).

Officers justified in arresting defendant for DUI. — Officers were justified in arresting the defendant for driving under the influence and operating a vehicle after being declared a habitual violator since once the defendant had been stopped, the officers observed that the defendant appeared to be intoxicated, and the defendant admitted being a habitual violator. Cheatham v. State, 204 Ga. App. 483, 419 S.E.2d 920 (1992).

Persons entitled to arrest probation violators. — Power to make a warrantless arrest of a known probation violator is not limited to the probation supervisor, under O.C.G.A. § 42-8-38, but also includes a law enforcement officer with general arrest powers who has trustworthy information as to the probation violation. Battle v. State, 254 Ga. 666, 333 S.E.2d 599 (1985).

Suspect found wearing incriminating type of shoe justified warrantless arrest. Clinkscale v. State, 158 Ga. App. 597, 281 S.E.2d 341 (1981).

Defendant's appearance, a cut in defendant's jacket shoulder, defendant's proximity to the burglary site, the observation of a running person believed by the officer to be the same one stopped pursuant to the officer's description by the other officer a few minutes later, the short time between the report of the burglar alarm and the apprehension of the defendant, the absence of anyone else in the area matching the suspect's description, the defendant's nervousness, and the deputy's knowledge of the defendant's prior record of burglary and escape, added up to probable cause to arrest the defendant. State v. Wilson, 179 Ga. App. 334, 346 S.E.2d 111 (1986).

Officer must reveal the officer's police status. — It is the duty of an officer to disclose the officer's official character to the person whom the officer is arresting. Douglas v. State, 152 Ga. 379, 110 S.E. 168 (1921).

Officer must reveal charge. — Officer who arrests an alleged offender must also inform the accused of the nature of the charge. Dorsey v. State, 7 Ga. App. 366, 66 S.E. 1096 (1910).

Illegal arrest is tort. — Arrest without a warrant, unless made under circumstances declared by statute to permit an arrest without a warrant, is illegal and is a tort for which an action will lie as well as when arrest is under process of law but without probable cause and maliciously made. Standard Sur. & Cas. Co. v. Johnson, 74 Ga. App. 823, 41 S.E.2d 576 (1947).

Liability for false imprisonment. — To avoid liability for false imprisonment, it must be shown not only that the arrest was valid but also that the arresting officer had probable cause to believe the charged offense had been committed. Amason v. Kroger Co., 204 Ga. App. 695,

420 S.E.2d 314 (1992).

Burden on arrester to show exception to warrant requirement. — Whoever arrests or imprisons a person without a warrant is guilty of a tort, unless the arrestor can justify under some of the exceptions in which arrest and imprisonment without a warrant are permitted by law; and the burden of proving the existence of the facts raising the exception is upon the person making the arrest or inflicting the imprisonment. Vlass v. McCrary, 60 Ga. App. 744, 5 S.E.2d 63 (1939); Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Plaintiff held for payment without warrant justified false imprisonment action. — Under allegations that the plaintiff was arrested without a warrant when the plaintiff was not guilty of any offense under the state laws or under any city ordinance and, without being carried before a committing magistrate, was held under arrest and deprived of liberty until the plaintiff and the plaintiff's brother paid to the defendant a sum of money, whereupon the defendant accepted the money and caused or permitted the plaintiff to be released from custody, the arrest and detention of the plaintiff were clearly illegal, and a cause of action for false imprisonment was set out. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Information suggesting why officer believed plaintiff inebriated admissible. — If, in a false imprisonment action there is evidence from which the jury would be authorized to find that the defendant in good faith and with probable cause arrested the prosecutor for drunkenness, any facts, circumstances, or information on which the defendant officer acted in making the arrest are admissible, not as proof of the facts, but as evidence that the officer in making the arrest did so upon a reasonable ground of suspicion. Henderson v. State, 95 Ga. App. 830, 99 S.E.2d 270 (1957).

Evidence affirming details of an informant's tip. — That the defendant matched the description of a drug dealer and that the defendant had "a large bulge" in the area of the defendant's pants where the informant had seen defendant conceal contraband was sufficient to verify the tipster's veracity and support the trial court's finding that the police had probable cause on which to arrest the defendant. Manzione v. State, 194 Ga. App. 227, 390 S.E.2d 121 (1990).

Conflicting testimony. — Court found no impermissible conduct that would taint the subsequent arrest when the police and the defendant offered conflicting testimony regarding events which led to the defendant's arrest. State v. Thurmond, 203 Ga. App. 230, 416 S.E.2d 529, cert. denied, 203 Ga. App. 907, 416 S.E.2d 529 (1992).

Conviction of police officer for involuntary manslaughter was proper. O'Conner v. State, 64 Ga. 125, 37 Am. R. 58 (1879).

2. Offense Committed in Officer's Presence

Words "in the presence" and "within his immediate knowledge" are synonymous; to justify the arrest without a warrant, the officer need not see the act which constitutes the crime taking place if by any of the officer's senses the officer has personal knowledge of the crime's commission. Marsh v. State, 182 Ga. App. 892, 357 S.E.2d 325 (1987); State v. Carranza, 217 Ga. App. 431, 457 S.E.2d 699 (1995), rev'd in part on other grounds, 266 Ga. 263, 467 S.E.2d 315 (1996); Youhoing v. State, 226 Ga. App. 475, 487 S.E.2d 86 (1997); Watson v. State, 243 Ga. App. 636, 534 S.E.2d 93 (2000).

Constitutionality of warrantless arrest depends on officer having probable cause. — Constitutional validity of an arrest without a warrant depends upon whether the arresting officer has probable cause to believe the defendant is committing or has committed, an offense in the officer's presence. Brooks v. State, 166 Ga. App. 704, 305 S.E.2d 436 (1982).

Constitutional validity of an arrest without a warrant depends upon whether, at the moment the arrest was made, the officers had probable cause to make the arrest — whether at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that

Grounds for Warrantless Arrest (Cont'd)

2. Offense Committed in Officer's Presence (Cont'd)

the (suspect) had committed or was committing an offense. Davis v. State, 203 Ga. App. 227, 416 S.E.2d 771, cert. denied, 203 Ga. App. 905, 416 S.E.2d 771 (1992).

If any crime is committed in the arresting officer's presence, a warrantless arrest is legal. Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967), cert. denied, 390 U.S. 911, 88 S. Ct. 839, 19 L. Ed. 2d 885 (1968).

Offense committed in defendant's home. — When an individual commits an offense in his or her home and that offense is committed in the presence of a law enforcement officer, the officer is authorized to arrest the individual in the home without a warrant only when the officer's entry into the home is by consent or when there are exigent circumstances. Carranza v. State, 266 Ga. 263, 467 S.E.2d 315 (1996).

Arrest is officer's duty. — When a crime is committed in the presence of an officer, it is not only the officer's right then and there to arrest without a warrant, but it is the officer's duty to do so. Yancy v. Fidelity & Cas. Co., 96 Ga. App. 476, 100 S.E.2d 653 (1957), appeal dismissed, 213 Ga. 903, 102 S.E.2d 497 (1958).

Discretion of officer to issue citation or make arrest. — Although O.C.G.A. § 17-4-23(a) gives a police officer the option of issuing a citation, it does not restrict the power given to police in O.C.G.A. § 17-4-20 to make custodial arrests for crimes committed in the officers' presence. Consequently, after a driver is arrested for a traffic violation, a police officer can lawfully search the interior of the driver's car. State v. Lowe, 263 Ga. App. 1, 587 S.E.2d 169 (2003).

Because an officer was authorized to arrest the defendant for weaving, a decision to impound the vehicle the defendant was driving was not unreasonable, and an inventory search of the vehicle was authorized; thus, the trial court did not err in denying the defendant's motion to suppress the evidence seized as a result of the search. Lopez v. State, 286 Ga. App. 873, 650 S.E.2d 430 (2007).

Officers who see persons acting suspiciously may investigate, including "stop and frisk." Clark v. State, 131 Ga. App. 583, 206 S.E.2d 717 (1974).

If officer believes crime occurred or will occur. — Officers have ample authority to investigate if the officers believe a crime has occurred or is about to occur in the officers' presence. Clark v. State, 131 Ga. App. 583, 206 S.E.2d 717 (1974).

Police officer had probable cause to make a warrantless arrest of a defendant for misdemeanor obstruction when the defendant, after being told not to move a car belonging to the defendant's girlfriend because the officer needed to check the car's registration to complete a shoplifting investigation of the girlfriend, the defendant disobeyed the officer and had a friend remove the car from a store lot. Stryker v. State, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

Officer observed fight but not the instigator. — In an arrestee's action under 42 U.S.C. § 1983 for arresting the arrestee without probable cause, given the circumstances known to the officers as the officers observed a physical scuffle between the arrestee and another officer in an extremely crowded venue just before midnight on New Year's Eve, the officers had probable cause to arrest for simple battery. Robinson v. MARTA, 334 Ga. App. 746, 780 S.E.2d 400 (2015).

Random search of automobile's occupants unjustified. — While a police officer may arrest for a crime committed in the officer's presence, that is, of which the officer is aware through the use of the officer's senses, and while there are circumstances under which the officer may momentarily detain and question a citizen, if the officer is acting upon reasonable and articulable suspicion which may yet not amount to probable cause to believe a crime is being committed, this gives the officer no right, where a crime is not being committed in the officer's presence in such manner that it is known to the officer by the use of the officer's senses, to stop a vehicle and search the occupants, and calling the search a "frisk" in no way ameliorates the situation. A "frisk," if legal at all, is such only in exceptional circumstances and only for the very limited pur-

pose of assuring the officer that the suspect whom the officer must accost is not going to turn upon the officer with a weapon. L.B.B. v. State, 129 Ga. App. 163, 198 S.E.2d 895 (1973).

No right to arrest and search for weapons on mere suspicion. — Under this section, an officer has no authority, upon bare suspicion or upon mere information derived from others, to arrest a citizen and search the citizen's person in order to ascertain whether or not the citizen is carrying a concealed weapon in violation of law. Pickett v. State, 99 Ga. 12, 25 S.E. 608 (1896).

Arrest on suspicion of unknown crime. — There is no authority under which a citizen may be arrested without a warrant and held for investigation to determine if the citizen has committed some crime merely because the person making the arrest has a suspicion that the person arrested may have committed some then unknown crime. Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

Because arrest requires offense. — To justify a police officer in making an arrest without a warrant, there must be an offense committed by the party arrested. O'Conner v. State, 64 Ga. 125, 37 Am. R. 58 (1879); Holliday v. Coleman, 12 Ga. App. 779, 78 S.E. 482 (1913).

Articulable suspicion based on senses. — In determining whether a suspicious situation should be further investigated or an arrest based on probable cause made, an officer may rely upon information acquired through any of the officer's senses. Perry v. State, 204 Ga. App. 643, 419 S.E.2d 922 (1992).

Detective reasonably could conclude at that time that an exigent situation was at hand after the detective received complaints regarding loud noise from a certain vicinity; proceeding to that vicinity and after the officer observed through the officer's sense of hearing, while on a public road, screaming, hollering, and music. Perry v. State, 204 Ga. App. 643, 419 S.E.2d 922 (1992).

Officer has authority to arrest anyone of whom the officer has reasonable suspicion that the person has committed a felony without waiting first to procure a warrant. Chaney v. State, 133 Ga. App. 913, 213 S.E.2d 68 (1975); Elders v. State, 149 Ga. App. 139, 253 S.E.2d 817 (1979).

Detective employed by county sheriff's office may make arrest. — County police, including the county sheriff, have general police power to investigate and make arrests as other law enforcement officials. Thus, a detective employed by the county sheriff's office may make an arrest without a warrant if a criminal offense is committed in the officer's presence or within the officer's knowledge. Perry v. State, 204 Ga. App. 643, 419 S.E.2d 922 (1992).

If facts give police reasonable grounds to believe defendant criminal. — Crucial question is whether the knowledge of the related facts and circumstances give the police officer cause and reasonable grounds to believe that the defendant committed an offense. If it did, an arrest without a warrant is legal. Creamer v. State, 150 Ga. App. 458, 258 S.E.2d 212 (1979).

What constitutes "reasonable grounds of suspicion" for warrantless arrest is generally to be determined under facts of individual case. Chaney v. State, 133 Ga. App. 913, 213 S.E.2d 68 (1975).

Middle ground of probable cause needed between suspicion and certainty. — There must be a middle ground between proof to a mathematical certainty that what one thinks one sees happening is in fact a violation of law, and mere suspicion that it may be a criminal act; it is frequently defined as probable cause. Harris v. State, 128 Ga. App. 22, 195 S.E.2d 262 (1973).

Arrest for offenses committed in officer's presence meets constitutional requirement of probable cause for arrest. Hunter v. Clardy, 558 F.2d 290 (5th Cir. 1977).

State courts require probable cause for warrantless arrest. — Georgia courts have equated this section with the probable cause standard or engrafted a probable cause provision on that section. Nicholson v. United States, 355 F.2d 80 (5th Cir.), cert. denied, 384 U.S. 974, 86 S. Ct. 1866, 16 L. Ed. 2d 684 (1966).

Georgia has apparently engrafted a

Grounds for Warrantless Arrest (Cont'd)
2. Offense Committed in Officer's Presence (Cont'd)

probable cause requirement onto this section. United States v. Romano, 482 F.2d 1183 (5th Cir. 1973), cert. denied, 414 U.S. 1129, 94 S. Ct. 866, 38 L. Ed. 2d 753 (1974).

Arrest may be made without warrant. — Police officer has a right to arrest without a warrant when the officer has probable cause to believe a crime is being committed in the officer's presence. Anderson v. State, 123 Ga. App. 57, 179 S.E.2d 286 (1970).

When knowledge of the related facts and circumstances gives police officers probable cause and reasonable grounds to believe that a person has committed an offense, an arrest, even without a warrant, is legal. Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975).

If an officer has probable cause to believe that the defendant has committed a felony, an arrest is authorized. Arnsdorff v. State, 152 Ga. App. 515, 263 S.E.2d 176 (1979).

When the police officer observed the driver of the car travelling at a high rate of speed through the motel parking lot, probable cause existed to stop the driver and make a warrantless arrest of the driver for driving too fast for conditions. Sanders v. State, 204 Ga. App. 545, 419 S.E.2d 759 (1992).

Probable cause does not require certainty. — When dealing with probable cause, as the name implies, one deals with probabilities, not certainty, and the quantum of proof necessary to establish probable cause is not that level which is necessary for proof of guilt in a trial. Bradford v. State, 149 Ga. App. 839, 256 S.E.2d 84, cert. denied, 444 U.S. 936, 100 S. Ct. 285, 62 L. Ed. 2d 195 (1979).

Probable cause does require reasonable grounds rather than rumor. — In exigent circumstances such as the imminent removal or destruction of contraband, a police officer may arrest without a warrant, but there must be probable cause. Probable cause means reasonable grounds, and is that apparent state of facts which seem to exist after reasonable and proper inquiry. Rumor, suspicion, speculation, or conjecture is not sufficient and it is axiomatic that an incident search may not precede an arrest and serve as part of its justification. Kelly v. State, 129 Ga. App. 131, 198 S.E.2d 910 (1973).

Probable cause requires reasonably trustworthy information which convinces prudent person. — Whether or not the arrest violated this section, the constitutional validity of the arrest without a warrant depends upon whether, at the moment the arrest was made, the officers had probable cause to make the arrest — whether at that moment the facts and circumstances within the officers' knowledge and of which the officers had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. Peters v. State, 114 Ga. App. 595, 152 S.E.2d 647 (1966); Rockholt v. State, 129 Ga. App. 99, 198 S.E.2d 885 (1973); Lynn v. State, 130 Ga. App. 646, 204 S.E. 346 (1974); Bradford v. State, 149 Ga. App. 839, 256 S.E.2d 84 (1979); State v. Thomason, 153 Ga. App. 345, 265 S.E.2d 312 (1980), overruled on other grounds, State v. Stilley, 261 Ga. App. 868, 584 S.E.2d 9 (2003); Watson v. State, 153 Ga. App. 545, 265 S.E.2d 871 (1980); Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Probable cause exists when the facts and circumstances within the officers' knowledge, and of which the officers had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263 (1974).

Reasonable police officer standard based on officer's background. — Standard of probable cause is that of "a reasonable, cautious, and prudent peace officer" and must be judged in the light of the officer's experience and training. Harris v. State, 128 Ga. App. 22, 195 S.E.2d 262 (1973).

When police officer is informant, the reliability of the informant is presumed as a matter of law. Quinn v.

State, 132 Ga. App. 395, 208 S.E.2d 263 (1974).

Phrases "in his presence" and "within his immediate knowledge." — Words "in his presence" in former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) and "within his immediate knowledge" in former Code 1933, § 27-211 (see O.C.G.A. § 17-4-60) are synonymous. Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51 (1911); Novak v. State, 130 Ga. App. 780, 204 S.E.2d 491 (1974); Forehand v. State, 130 Ga. App. 801, 204 S.E.2d 516 (1974); Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975).

Terms "within the presence of the officers," and "within their immediate knowledge," are synonymous. Harris v. State, 128 Ga. App. 22, 195 S.E.2d 262 (1973).

An offense is committed in the presence of an officer when the senses of the officer gave the knowledge the offense is being committed. Novak v. State, 130 Ga. App. 780, 204 S.E.2d 491 (1974); Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975).

Offense within officer's immediate knowledge. — Because the defendant was arrested immediately after the defendant admitted to the police officer that the defendant threatened the victims, therefore, even though the initial threat was made outside of the officer's presence, it was within the defendant's immediate knowledge and justified the arrest. Brown v. State, 246 Ga. App. 517, 541 S.E.2d 112 (2000).

When officer sees crime. — Crime is committed in the presence of an officer if the officer sees the crime committed, or by the exercise of any of the officer's senses the officer has knowledge, together with what the officer sees, that a crime is being committed by the person sought to be arrested. Forehand v. State, 130 Ga. App. 801, 204 S.E.2d 516 (1974); Humphrey v. State, 231 Ga. 855, 204 S.E.2d 603, cert. denied, 419 U.S. 839, 95 S. Ct. 68, 42 L. Ed. 2d 66 (1974).

Probable cause was a complete defense to an arrestee's false imprisonment claim because the arrest for burglary was made pursuant to exigent circumstances as the suspected offense was committed in the officers' presence or within the officers' immediate knowledge; the officers found the arrestee inside a vacant home and saw that the back door appeared to have been forced open. Gray v. Ector, 541 Fed. Appx. 920 (11th Cir. 2013) (Unpublished).

Arrest for observed traffic violation. — Under O.C.G.A. § 17-4-20(a), an officer has probable cause to arrest for a traffic violation committed in the officer's presence. State v. Goolsby, 262 Ga. App. 867, 586 S.E.2d 754 (2003).

Warrantless arrest of the defendant was authorized on the ground that a sale of cocaine was committed in the officers' presence, and after the defendant retreated into a motel room, the exigencies of the situation demanded and excused an immediate entry into the room for the officer to arrest the defendant without a warrant; hence, suppression of the evidence seized thereafter would not have been granted. Fortson v. State, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Appeals court rejected the defendant's contention that the arrest was made without probable cause as the evidence sufficiently showed that the defendant's presence at the scene of an alleged robbery, coupled with the defendant's flight from police, justified the arrest. McCoy v. State, 285 Ga. App. 246, 645 S.E.2d 728 (2007).

Burglary tools and contraband in plain view. — Evidence adduced on a motion to suppress is sufficient to authorize the arrest without a warrant as well as the search of the automobile when the burglar's tools and stolen merchandise are viewed and seen without a search of the automobile. Bass v. State, 123 Ga. App. 705, 182 S.E.2d 322 (1971).

Defendant close to burglary scene. — Subsequent search of a bag containing items stolen in a burglary was a lawful search incident to the arrest as: defendant was stopped a half mile from the burglary scene; defendant was sweating heavily, carrying a pair of leather gloves on a summer night; and was carrying a bag which the arresting officer testified to observing as loaded with numerous items including a checkbook bearing the address of the burglarized residence. Davis v.

Grounds for Warrantless Arrest (Cont'd)
2. Offense Committed in Officer's Presence (Cont'd)

State, 203 Ga. App. 227, 416 S.E.2d 771, cert. denied, 203 Ga. App. 905, 416 S.E.2d 771 (1992).

When officers recognize defendant. — Defendant was driving an automobile at a time when the officers knew the defendant's driver's license had been suspended and subsequently arrested the defendant; thus, the evidence found in the accompanying search of the car was admissible. Jackson v. United States, 352 F.2d 490 (5th Cir. 1965), cert. denied, 385 U.S. 825, 87 S. Ct. 55, 17 L. Ed. 2d 62 (1966).

Police may detect crime with senses other than sight. — To justify an arrest without a warrant an officer need not see the act which constitutes the crime take place if by any of the officer's senses the officer has personal knowledge of the crime's commission. Forehand v. State, 130 Ga. App. 801, 204 S.E.2d 516 (1974); State v. Greene, 178 Ga. App. 875, 344 S.E.2d 771 (1986).

Officer hearing cries of victim. — When a breach of the peace is committed, it is to be regarded as in the officer's presence, so far as to authorize an arrest without a warrant, if the officer hears the noise of the disturbance and the outcries of the person assaulted, whether the officer sees the act itself or not. Ramsey v. State, 92 Ga. 53, 17 S.E. 613 (1893).

Officer detecting marijuana. — When the crime of possessing marijuana is being committed in the presence of police officers, the arrest of a defendant without a warrant is permissible. Williams v. State, 129 Ga. App. 103, 198 S.E.2d 683 (1973).

When a police officer, upon observing a person smoking what the officer believes to be a marijuana cigarette and upon discovering a partially smoked cigarette in the same area, clearly has probable cause to believe the officer has witnessed the person possessing less than one ounce of marijuana, a misdemeanor (O.C.G.A. § 16-13-2(b)), thus authorizing a warrantless arrest. Corbitt v. State, 166 Ga. App. 311, 304 S.E.2d 123 (1983).

Possession of suspected drugs authorized the arrest of the defendant. Allison v. State, 188 Ga. App. 460, 373 S.E.2d 273 (1988); Watson v. State, 190 Ga. App. 696, 379 S.E.2d 817 (1989), overruled on other grounds, Berry v. State, 248 Ga. App. 874, 547 S.E.2d 664 (2001), overruled on other grounds, Bius v. State, 254 Ga. App. 634, 563 S.E.2d 527 (2002).

"Valid intrusion" onto defendant's property. — Having seen the defendant commit the offense of marijuana possession during a "valid intrusion" into the defendant's yard, the officer needed no warrant to arrest the defendant. Jenkins v. State, 223 Ga. App. 486, 477 S.E.2d 910 (1996).

Hot pursuit into home. — Officer who entered a home in hot pursuit of the defendant who had committed a traffic violation in the officer's presence was authorized to make a warrantless arrest. State v. Nichols, 225 Ga. App. 609, 484 S.E.2d 507 (1997).

Where crime not in officer's senses but offender admits fact. — An offense is within the presence of the arresting party when, although the arresting party cannot be cognizant of the offense by means of the arresting party's own senses, the defendant actually admits that the offense is in fact being so committed. Moore v. State, 128 Ga. App. 20, 195 S.E.2d 275 (1973).

Arrest for offense committed outside presence. — Fourth Amendment does not prohibit arrests for offenses committed outside the presence of the arresting state officer. Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975).

O.C.G.A. § 17-4-20(a) provides that an officer may arrest a suspect without a warrant in limited situations, including when the offense is committed in such officer's presence or within such officer's immediate knowledge; or for other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant. However, § 17-4-20(a) only applies to cases in which a custodial arrest is made and not when a private citizen reports an erratic driver who subsequently exits the vehicle outside of the officer's presence and then is arrested. State v.

Cooper, 271 Ga. App. 771, 611 S.E.2d 90 (2005).

Extra-jurisdictional arrest. — Law enforcement officer may make an arrest without a warrant for an offense committed in the officer's presence, even if the arrest is outside the officer's jurisdiction. Wells v. State, 206 Ga. App. 513, 426 S.E.2d 231 (1992), overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019).

Authority to arrest outside of jurisdiction. — Trial court did not err in granting police officers summary judgment in a citizen's action alleging false imprisonment, assault and battery, and intentional infliction of emotional distress in connection with the defendant's arrest because the arrest was lawful under O.C.G.A. § 17-4-20 since the obstruction occurred in the officers' presence; even if the officers did not have probable cause to arrest the defendant, the officers had the authority and discretion to arrest outside the officers' jurisdiction for offenses committed in the officers' presence and, therefore, the officers' immunity could not be defeated by the officers' decision to arrest outside of the officers' jurisdiction. Taylor v. Waldo, 309 Ga. App. 108, 709 S.E.2d 278 (2011).

Hostility of defendant and victim's injury indicating battery. — Upon arriving at the scene, an officer observed the reported victim bleeding from the head and saw the defendant outside the victim's shop, and since the defendant became hostile when the officer attempted to ask the defendant what had happened, the officer had probable cause to arrest the defendant for a battery upon the victim as well as a battery upon the officer in that the defendant acted in a hostile manner and resisted arrest. Newsome v. State, 149 Ga. App. 415, 254 S.E.2d 381 (1979).

Hearsay possible basis of probable cause. — Hearsay is admissible only to explain the officer's conduct, but not in proof of the fact, and hearsay statements may serve as the foundation for probable cause. Bradford v. State, 149 Ga. App. 839, 256 S.E.2d 84, cert. denied, 444 U.S. 936, 100 S. Ct. 285, 62 L. Ed. 2d 195 (1979).

Officer may testify to reasons for arrest or warrant. — Officer is entitled to explain the basis for making an arrest and to testify as to all of the facts in connection with the arrest; the officer may testify relative to information which the officer obtained from others which afforded the basis for obtaining a warrant, or for making an arrest without a warrant. Bradford v. State, 149 Ga. App. 839, 256 S.E.2d 84, cert. denied, 444 U.S. 936, 100 S. Ct. 285, 62 L. Ed. 2d 195 (1979).

Arrest for crime in presence made beyond time to procure warrant. — Officer has a right to arrest for a crime committed in the officer's presence; but the rule does not apply if the officer does not act on the occasion the officer sees the crime committed, but delays and seeks to make the arrest after the officer had ample time and opportunity to procure a warrant. Yancey v. Fidelity & Cas. Co., 96 Ga. App. 476, 100 S.E.2d 653 (1957), appeal dismissed, 213 Ga. 903, 102 S.E.2d 653 (1958).

Right to make a warrantless arrest for a crime for an offense committed in the officer's presence does not extend beyond a reasonable time and opportunity to procure a warrant. Williams v. State, 133 Ga. App. 66, 209 S.E.2d 729 (1974).

Arrest on mere oral complaint of another illegal. — When officers attempted, without a warrant, to arrest the defendant upon the mere oral complaint of another, and seize the defendant's person, the arrest was illegal. Porter v. State, 124 Ga. 297, 52 S.E. 283, 2 L.R.A. (n.s.) 730 (1905); Dorsey v. State, 7 Ga. App. 366, 66 S.E. 1096 (1910).

Arrest on information from another officer valid. — When the detective unquestionably had reasonable and articulated cause to believe the driver of a blue and white Cadillac had committed an armed robbery, the police of another city were authorized to act upon the information supplied by the detective and make a warrantless arrest. Knighton v. State, 166 Ga. App. 390, 304 S.E.2d 512 (1983).

Arrests by police officer on authority of card signed by sheriff are illegal. Gordon v. Hogan, 114 Ga. 354, 40 S.E. 229 (1901); Cuddens v. State, 152 Ga. 195, 108 S.E. 788 (1921).

Officer's arrest of restaurant invitee. — Summary judgment was prop-

Grounds for Warrantless Arrest (Cont'd)
2. Offense Committed in Officer's Presence (Cont'd)

erly granted to a police officer on a restaurant invitee's false imprisonment claim under O.C.G.A. § 51-7-20. The officer, who was told by the restaurant manager that the invitee refused an order to leave the premises, had probable cause to arrest the invitee without a warrant for criminal trespass under O.C.G.A. § 16-7-21. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Hotel guest properly arrested for criminal trespass. — Exigent circumstances authorized an officer's warrantless arrest of a hotel guest for criminal trespass because the offense was committed in the officer's presence when the guest refused the officer's request to leave the hotel. Thus, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Arrest cannot justify search when no crime in police officer's presence. — Search cannot be incident to an arrest if the officer has no reason to believe that the appellant committed a crime in the officer's presence. Brown v. State, 133 Ga. App. 500, 211 S.E.2d 438 (1974).

Since the defendant has committed no crime in the presence of the arresting officer, and the latter has no valid warrant, the arrest without a warrant will not justify a search, the result of which forms the basis of the charge. Harper v. State, 135 Ga. App. 924, 219 S.E.2d 636 (1975).

Arrest cannot justify search when no city ordinance violation. — If there is no cause for arrest within the purview of a city ordinance, then a warrantless search and seizure is not legally supportable. Harper v. State, 135 Ga. App. 924, 219 S.E.2d 636 (1975).

Unlawful arrest not legalized by finding criminal evidence. — Except for the exceptions of this section, a warrant is required to make an arrest legal, and if the arrest so measured is not legal when made, the arrest cannot be legitimated by fruit of a subsequent search. Grant v. State, 152 Ga. App. 258, 262 S.E.2d 553 (1979).

Evidence procured in connection with search made under illegal warrant is inadmissible unless it appears that a crime was being committed in the presence of the officer and that the search was incidental to an arrest therefor. Grant v. State, 152 Ga. App. 258, 262 S.E.2d 553 (1979).

Officer cannot determine obscenity and make warrantless arrest. — Ability to make a warrantless arrest for an offense committed in an officer's presence contemplates the officer's ability to determine that an offense has actually been committed; the officer was incorrect in the officer's belief that the officer or the officer's agents may properly make the initial determination concerning the obscenity of a publication and that the officer may make a warrantless arrest if the officer determines that the subject matter of a publication is obscene. Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Officer cannot regularly arrest and harass magazine retailers. — When the officer's activities constituted a calculated scheme of warrantless arrests and harassing visits to retailers of publications, the substance of the procedures resulted in a "constructive seizure" of magazines from the shelves of the retail establishments and created an informal system of prior restraint in violation of U.S. Const., amends. 1, and 14. Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Public indecency. — Defendant who committed the offense of public indecency in the presence of a police officer was subject to warrantless arrest, and the officer was not required to obtain a warrant simply because the defendant was sitting on the defendant's porch. Collins v. State, 191 Ga. App. 289, 381 S.E.2d 430 (1989).

There was no excessive force sufficient to indicate an officer violated any clearly established constitutional right when a plaintiff, a woman in her eighth month of pregnancy, passed a road block without permission which provided the

officer with arguable probable cause since the plaintiff drove away from the scene, where she then parked and ran into a building, and since the officer only firmly held her and contacted her abdomen in the process; the act of physically holding back a misdemeanor suspect who was attempting to leave the scene, even given her pregnant condition, was not disproportionate although the woman later miscarried. Moore v. Gwinnett County, 967 F.2d 1495 (11th Cir. 1992), cert. denied, 506 U.S. 1081, 113 S. Ct. 1049, 122 L. Ed. 2d 357 (1993).

Officer that shot and killed a suspect was entitled to qualified immunity as to an excessive force claim because an objective officer in the officer's situation could have believed reasonably that the suspect posed an immediate threat to the officer's safety; the officer was acting inside the scope of the officer's discretionary authority when the shooting occurred because even if the officer was outside the officer's jurisdiction, the officer was authorized by Georgia law to conduct a warrantless arrest since the suspect was committing an offense, public indecency, within the officer's presence. Wilson v. Miller, 650 Fed. Appx. 676 (11th Cir. 2016) (Unpublished).

Battery of officers after illegal stop justifies arrest. — Though evidence would not have been admissible if discovered as the result of the police officers' unconstitutional roadblock and illegal Terry-stop of the defendant's car before the defendant reached the roadblock, the defendant's gratuitous shoving of police was an aggravated battery, which justified the officers arresting the defendant then and there, even if the defendant was not subsequently charged with the offense of battery. The discovery of drugs the defendant threw while fleeing from that battery meant the discovery of the evidence was sufficiently attenuated from the illegal stop to justify its admission into evidence and denial of the defendant's motion to suppress. Strickland v. State, 265 Ga. App. 533, 594 S.E.2d 711 (2004).

3. Offender Endeavoring to Escape

Flight is ground for arrest without a warrant when there is reasonable cause to believe the fugitive is the offender and the flight itself makes it impracticable to go elsewhere in search of a warrant. Garrison v. State, 122 Ga. App. 757, 178 S.E.2d 744 (1970).

Running is not grounds for arrest. — As no criminal activity was observed by police, the mere fact that (according to police) defendant "ran" inside the apartment when the police drove up did not provide probable cause and/or exigent circumstances authorizing the police to enter the defendant's girlfriend's sister's apartment to arrest the defendant without a warrant. State v. Brown, 212 Ga. App. 800, 442 S.E.2d 818 (1994).

Escape if less than felony committed. — Under this section, an officer can arrest without a warrant "an offender who is endeavoring to escape," even if the offense was less than a felony. Brooks v. State, 114 Ga. 6, 39 S.E. 877 (1901); Maughon v. State, 7 Ga. App. 660, 67 S.E. 842 (1910).

Illegal distillery. — Under this section, an officer can arrest without a warrant "an offender who is endeavoring to escape" even if the offense is merely distilling illicit liquor. Williams v. State, 148 Ga. 310, 96 S.E. 385 (1918).

Burglary. — Under this section, an officer can arrest without a warrant "an offender who is endeavoring to escape" even if the offense was merely burglary. Jackson v. State, 7 Ga. App. 414, 66 S.E. 982 (1910).

Flight of misdemeanor convict. — Misdemeanor convict who has escaped lawful confinement may be recaptured by any peace officer without a warrant. Williford v. State, 121 Ga. 173, 48 S.E. 962 (1904).

Insufficient evidence in flight from unmarked vehicle. — Because the circumstances of the defendant's low-speed flight from an uniformed detective, who was driving an unmarked vehicle, were insufficient to present law enforcement with evidence of a particular crime, the defendant could not be charged with the crime of attempting to elude an officer, and police lacked the probable cause sufficient to warrant an arrest for the offense; thus, the search incident to the arrest was invalid, warranting suppression of the evidence seized. Stephens v. State, 278 Ga.

Grounds for Warrantless Arrest (Cont'd)
3. Offender Endeavoring to Escape (Cont'd)

App. 694, 629 S.E.2d 565 (2006).

Right to arrest suspected person without warrant is broader in felony than in misdemeanor cases. Chaney v. State, 133 Ga. App. 913, 213 S.E.2d 68 (1975).

Using force to make arrest. — Even though an officer may have a legal right to make an arrest, still the officer can use no more force than is reasonably necessary under the circumstances, and cannot use unnecessary violence disproportionate to the resistance offered. When the offense is a felony, a greater force even to the extent of slaying the offender in order to prevent the offender's escape may, when sufficient circumstances so indicate, be justified. But if the arrest is only for a misdemeanor, such extreme and deadly force merely to effect the arrest and prevent escape is not justified. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

Using force when arresting for misdemeanor. — Reason for limiting the powers of a peace officer in making an arrest for a person committing or attempting to commit a public offense of the grade of misdemeanor is that organized society will suffer less by the temporary escape of such person than it would if the officer should be permitted to take the person's life, or inflict upon the person great bodily harm, to prevent the person's escape. Palmer v. Hall, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

No general right to shoot fleeing misdemeanant. — Notion that a peace officer may, in all cases, shoot one who flees from the officer when about to be arrested is unfounded. Officers have no such power, except in cases of a felony, and then as a last resort, after all other means have failed. It is never allowed when the offense is only a misdemeanor. Palmer v. Hall, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

Deadly force used in pursuing fleeing suspected felon. — Officers, who shot and killed a fleeing suspected felon armed with a knife, were entitled to official immunity because it was a discretionary act, during pursuit a bystander twice identified the suspect, and the suspect slashed a knife at one officer, posing an immediate threat of physical violence. Williams v. Boehrer, 530 Fed. Appx. 891 (11th Cir. 2013) (Unpublished).

Except in self-defense, an officer has no right to proceed to the extremity of shedding blood in arresting, or in preventing the escape of one whom the officer has arrested, for an offense less than a felony, even though the offender cannot be taken otherwise. Palmer v. Hall, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

4. Failure of Justice

Phrase "likely to be a failure of justice" means probable ground for believing that there will be failure of justice. Mitchell v. State, 226 Ga. 450, 175 S.E.2d 545 (1970), cert. denied, 400 U.S. 1024, 91 S. Ct. 585, 27 L. Ed. 2d 637 (1971).

Failure of justice may occur if suspect is mobile and leaving area. — When a suspect is mobile and is seen leaving an area after having negotiated a sale with suspected stolen coins, a warrantless arrest is both reasonable and necessary to prevent a failure of justice. Williams v. State, 166 Ga. App. 798, 305 S.E.2d 489 (1983).

Failure of justice when grounds for arrest develop after entry. — Justification for a warrantless arrest, that there is likely to be a failure of justice for want of a judicial officer to issue a warrant, cannot be extended to excuse an illegal entry, especially when police officers did not decide to arrest until after the entry and the interrogation of the defendant. Griffith v. State, 172 Ga. App. 255, 322 S.E.2d 921 (1984).

For other cause when there is likely to be failure of justice for want of officer to issue warrant includes a situation when a police officer, knowing that a warrant has been issued for a felony, and with probable cause to believe that if the officer takes the time to procure the warrant the offender will escape, makes the arrest legal although the warrant is not in close

physical proximity at the time. Croker v. State, 114 Ga. App. 492, 151 S.E.2d 846 (1966).

Possible failure of justice alone does not justify warrantless misdemeanor arrest. — Mere possibility of there being a failure of justice does not authorize an officer to attempt an arrest for a misdemeanor without a warrant. Giddens v. State, 152 Ga. 195, 108 S.E. 788 (1921).

Failure of justice when no one to issue warrant tested by probable cause. — This section has been equated with the probable cause test, or at least whether there was likely to be a failure of justice for want of an officer to issue a warrant was tested by the presence or absence of probable cause. Paige v. Potts, 354 F.2d 212 (5th Cir. 1965).

Otherwise constructive possession of warrant necessary. — When a lawful arrest cannot be made except under a warrant, it must, at the time of making the arrest, be in the possession of the arresting officer, or of another in the neighborhood with whom the officer is acting in concert. Adams v. State, 121 Ga. 163, 48 S.E. 910 (1904); Maughon v. State, 7 Ga. App. 660, 67 S.E. 842 (1910).

Illegal warrantless arrest not excused by probable cause. — If the arrest is without a warrant and is illegal, no amount of good faith or probable cause will excuse the defendants who were police officers. Vlass v. McCrary, 60 Ga. App. 744, 5 S.E.2d 63 (1939).

Detention arrest without valid warrant. — Arrest without a valid warrant to detain the defendant places the detention in the same category as an arrest without a warrant. Grant v. State, 152 Ga. App. 258, 262 S.E.2d 553 (1979).

Driving under the influence. — When obtaining a warrant to arrest the defendant for driving under the influence would have required at least two hours, during which time physical evidence of the defendant's alleged intoxication would dissipate, the warrantless arrest was proper under O.C.G.A. § 17-4-20 (a). State v. Fleming, 202 Ga. App. 774, 415 S.E.2d 513 (1992).

Since evidence of the defendant's intoxication would have dissipated during the time it would have taken for the officer to obtain a warrant for the defendant's arrest, the warrantless arrest was proper under O.C.G.A. § 17-4-20. Wadsworth v. State, 209 Ga. App. 333, 433 S.E.2d 419 (1993).

5. Resisting Arrest

Every person has the right to resist an illegal arrest, and may use, in resisting the illegal arrest, such force as is necessary for the purpose. Ronemous v. State, 87 Ga. App. 588, 74 S.E.2d 676 (1953).

Person may use force proportional to amount used against the person. — One upon whom an arrest is unlawfully being made by an officer has the right to resist such arrest, force with force, proportionate to that being used by those detaining the person. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943); Smith v. State, 84 Ga. App. 79, 65 S.E.2d 709 (1951).

Arrest for prior spouse beating. — Fact that the defendant's wife told the officers in the defendant's presence that he had beat her and she wanted him locked up did not render legal the arrest without a warrant of the defendant who was at home doing nothing when the police arrived, and the defendant was within his rights in resisting such arrest. Ronemous v. State, 87 Ga. App. 588, 74 S.E.2d 676 (1953).

Arrestee who knows of felony charge cannot resist. — It is the duty of an officer, when authorized to arrest, but when the circumstances afford reason to believe that the officer's object and official character are unknown to the person whom the officer seeks to arrest, so to inform the person; but an omission to do so will not justify the person arrested, or sought to be arrested, in resisting the arrest if the person in fact already knows, or on reasonable and probable grounds believes, that the person is under a charge of felony for which an arrest is being attempted. Morton v. State, 190 Ga. 792, 10 S.E.2d 836 (1940).

Right to kill if arrestee fears felony by officer. — If, during an unlawful arrest, the officer commits, or reasonably appears about to commit a felony upon the arrestee, such as an assault with intent to

Grounds for Warrantless Arrest (Cont'd)
5. Resisting Arrest (Cont'd)

kill, using a weapon likely to produce death, or if the officer's violent behavior is enough to frighten a reasonable person into expecting a felony and causes the detainee to act from fear rather than for revenge, the detainee may protect oneself without being guilty of a crime, even if the person slays the officer. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

No right to killing mere unlawful arrest without felony. — Mere fact of unlawful arrest, in the absence of an application of unlawful force amounting to or reasonably appearing to amount to a felony, will not authorize the killing of the officer. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

Killing officer is manslaughter if injury less than felony feared. — If an officer does not attempt or reasonably appear to attempt a felony, but only the misdemeanor of an unlawful arrest, or if the person arrested is only put in fear of a lesser injury than that of a felony, killing of the officer would be manslaughter. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

Killing officer without cause to know official status. — To slay an officer to avoid being taken into custody, while having reasonable grounds of belief that the person is an arresting officer, and that the person's object is to make a lawful arrest for a felony, is murder. If the homicide is committed without reasonable cause to know the person's official character or purpose, and without malice, the homicide is manslaughter. Morton v. State, 190 Ga. 792, 10 S.E.2d 836 (1940).

Killing known officer to prevent capture is murder. — When a person is lawfully arrested and has notice or knowledge, or by belief or reasonable grounds for belief has the equivalent of knowledge, that the person making the arrest is an officer, it is the duty of the person arrested to submit quietly. If, under such circumstances and merely to prevent the officer from lawfully arresting the person in a lawful way, the person kills the officer, the crime is murder. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

Use of force when arresting criminal who knows status as police officer. — If an offender has the equivalent of knowledge that the person making the arrest is an arresting officer, it is the duty of such person to submit quietly to arrest; and in case the person refuses to submit, the officer has the right to use such force as is reasonably necessary to accomplish the arrest. Morton v. State, 190 Ga. 792, 10 S.E.2d 836 (1940).

Use of deadly force when officer's life is in peril. — Officer was entitled to qualified immunity for an excessive force claim in a Bivens action because the officer was standing in a narrow space between two vehicles, the decedent was disobeying the officer's orders to put the decedent's hands up, and the decedent's car suddenly moved forward; in a split second decision, it was reasonable under the Fourth Amendment and O.C.G.A. § 17-4-20 to use deadly force when the officer had probable cause to believe that the officer's life was in peril. Robinson v. Arrugueta, 415 F.3d 1252 (11th Cir. 2005), cert. denied, 546 U.S. 1109, 126 S. Ct. 1063, 163 L. Ed. 2d 887 (2006).

Right to prevent unlawful arrest of another. — No person should be punished for resisting or obstructing the illegal arrest of another. Prichard v. State, 160 Ga. 527, 128 S.E. 655 (1925).

Unauthorized physical resistance to warrantless arrest. — Whether a warrantless arrest violates the statutory authorization depends upon whether at the time of the arrest the officer had probable cause to make an arrest; when the officer was assaulted while in the execution of the officer's office, and when making the arrest was in the lawful discharge of the officer's office, physical resistance to the legal arrest was not authorized. Veit v. State, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

Misdemeanor obstruction conviction was proper despite acquittal on original charge. — Because the police officer had grounds to arrest the defendant for public drunkenness and was in the process of making the arrest when the defendant shouted at the officer and attempted to walk away, conviction of the

defendant for misdemeanor obstruction was proper even though the defendant was acquitted of the charge of public drunkenness. Williams v. State, 228 Ga. App. 698, 492 S.E.2d 708 (1997).

6. Consent

Probable cause and a warrant are not required for a search and seizure which is conducted pursuant to consent. Dawson v. State, 166 Ga. App. 199, 303 S.E.2d 532 (1983).

Mere acquiescence to authority of officer did not substitute for free and voluntary consent. — Despite the fact that the trial court concluded that the second of two defendant's warrantless arrest was unauthorized under O.C.G.A. § 17-4-20(a), because mere acquiescence to the authority asserted by a police lieutenant by both the defendants could not substitute for a free and voluntary consent to search, the trial court erred in finding that the acquiescence granted valid consent to the officer. Thus, the trial court's grant of the motions to suppress was reversed, in part. Hollenback v. State, 289 Ga. App. 516, 657 S.E.2d 884 (2008).

Authority of Local Officers

This section applied to violations of municipal ordinances. State v. Koon, 133 Ga. App. 685, 211 S.E.2d 924 (1975); Whaley v. State, 175 Ga. App. 493, 333 S.E.2d 691 (1985).

Applied to state and municipal officers. — This section was applicable alike to state and municipal arresting officers. Faulkner v. State, 166 Ga. 645, 144 S.E. 193 (1928).

City police officer may arrest without warrant for city ordinance violation. — Police officer under city ordinance is as much under the protection of the law in making an arrest as any public officer, such as sheriff, bailiff, or constable; therefore, a town police officer has the right to arrest a defendant, without a warrant, for a violation in the police officer's presence of a town ordinance. Palmer v. State, 195 Ga. 661, 25 S.E.2d 295 (1943).

No duty to arrest for purposes of tort action. — Authority to arrest provided by O.C.G.A. § 17-4-20 does not create a duty to arrest for purposes of a tort action. Landis v. Rockdale County, 212 Ga. App. 700, 445 S.E.2d 264 (1994).

State statute violation in officer's presence. — Police officer of a city, in making an arrest for an offense against state law, or for a violation of an ordinance of the municipality, committed in the city limits, fell within the protection of this section. Thus, a city police officer had authority to arrest without a warrant one who violates a state statute in the officer's presence, or to arrest within the city one who violates a city ordinance in the officer's presence. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

Where no local ordinance violation. — In the absence of any evidence as to a warrant or as to any municipal ordinance that was violated, the burden was on the state to show that the defendant violated some law of the state in the presence of the deceased police officer. Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943).

State may justify city police officer's attempted arrest by showing ordinance. — When a military police officer has lawful custody of a soldier under arrest for violation of military orders, and the soldier is violently and turbulently resisting the arrest, and when several civilians go to the assistance of the military police officer, and under such circumstances, a city police officer comes to the place and attempts to arrest the soldier, and is killed by the soldier, it is proper for the state to introduce in evidence the city ordinance defining "disorderly conduct," as illustrating the legality of the arrest, or attempt to arrest, by the city police officer. Reed v. State, 195 Ga. 842, 25 S.E.2d 692 (1943).

Arrest not unlawful although car not entirely within jurisdiction. — Warrantless arrest which was otherwise authorized under this section was not rendered illegal merely because the arrest was effected while the individual arrested was in a vehicle not completely situated within the officer's jurisdictional limits. Rick v. State, 152 Ga. App. 519, 263 S.E.2d 213 (1979).

Officer need not show insufficient time to procure warrant. — If a municipal ordinance or a state law has been

Authority of Local Officers (Cont'd)

violated in the presence of a municipal police officer, it is not only the right but the duty of the officer to immediately make an arrest of the violator; under such circumstances it is not necessary, in order to establish the legality of the arrest, to show that the officer did not have the time and opportunity to procure a warrant. Reed v. State, 195 Ga. 842, 25 S.E.2d 692 (1943).

Sheriff may arrest without warrant if offense in sheriff's presence. — Like other police officers or private persons, a sheriff has the power to arrest an offender without a warrant if the offense is committed in the sheriff's presence. Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622 (1942).

Seizure without warrant of illegal items in plain view in business place. — Sheriff may seize unlawfully kept property without a warrant for search, seizure, or arrest of the offender when the sheriff lawfully enters a place of business open to the sheriff as well as other members of the public under an implied invitation to enter, and finds in such place of business "slot machines" illegally kept by the owner or operation of such place of business. But, the sheriff has no authority to search private premises of the owner to find slot machines in the absence of a warrant. Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622 (1942).

Inspectors of roads and bridges sworn in as deputy sheriffs may arrest for the violation of the criminal laws of this state. Earl v. State, 124 Ga. 28, 52 S.E. 78 (1905).

Probation officers arresting probationer when not present during offense. — While the jurisdiction of probation officers to arrest offenders is limited to one class of persons, the probationers under their supervision, their power of arrest is broader with regard to that class of persons than is the general power of arrest by officers since the probation officer may arrest a probationer without a warrant for the alleged violation of any condition of the offender's probation, which might be the commission of a felony or misdemeanor, or a mere violation of some rule prescribed for the offender's conduct, even though such violation of the conditions of the offender's probation was not committed in the probation officer's presence. Vandiver v. Manning, 215 Ga. 874, 114 S.E.2d 121 (1960).

Violation of state arrest law creates no federal liability if no federal Constitution violation. — Even when a police officer violates a state arrest statute, the officer is not liable under the federal Civil Rights Act (42 U.S.C. § 1983) unless the officer also violated federal constitutional law governing warrantless arrests. Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975).

Statute did not apply to rules governing suspects already in custody. — Police officer was properly suspended for using a choke-hold on a handcuffed suspect in violation of department rules; O.C.G.A. § 17-4-20(d), prohibiting local rules that limited an officer's abilities to apprehend suspects, did not apply because the officer was not apprehending the suspect, but was trying to recover evidence from the defendant's mouth. Mercure v. City of Atlanta Civil Service Board, 327 Ga. App. 840, 761 S.E.2d 393 (2014).

Jury Instructions

Justification for warrantless arrest province of jury. — Whether, under all the circumstances of the case, including the facilities for obtaining a warrant according to the spirit of this section, there was or was not cause for attempting the arrest without a warrant is a question for the jury. Thomas v. State, 91 Ga. 204, 18 S.E. 305 (1892).

Error not to charge jury on trooper's probable cause. — When, on the trial of a state trooper for false imprisonment, it appears from the evidence that the trooper's sole defense was that the trooper made the arrest for drunkenness upon the public highway without a warrant when the trooper in good faith had probable cause to believe that such offense was being committed in the trooper's presence, it is error requiring the grant of a new trial for the trial court to fail to instruct the jury on this defense. Henderson v. State, 95 Ga. App. 830, 99 S.E.2d 270 (1957).

Error to cite exceptions if arrest illegal in any case. — Absent any evidence to show that an arrest without a warrant would have been authorized, the court erred in charging the jury that part of this section which declared the circumstances under which an arrest may be lawfully made without a warrant, since the jury was not also instructed that under the evidence the arrest would have been illegal. McIntosh v. State, 191 Ga. 736, 13 S.E.2d 770 (1941).

Charge differentiating arrests by citizens and police harmless as authority same. — When the arrest was made without a warrant, and the only basis for the arrest was that the crime was being committed in the presence of the person making the arrest, whether the defendant acted as an officer or as a private citizen was immaterial, since the person's authority as either was the same; therefore, the charge injecting this issue in the case could not have been confusing to the jury or harmful to the defendant. Atlantic Coast Line R.R. v. Wenger, 90 Ga. App. 267, 83 S.E.2d 58 (1954).

Charging exact language of section unnecessary. — Charge in entire harmony but not in exact language is neither a misstatement of law nor misleading. Cobb v. Bailey, 35 Ga. App. 302, 133 S.E. 42 (1926).

Proper charge. Alexander v. State, 160 Ga. 769, 129 S.E. 102 (1925).

OPINIONS OF THE ATTORNEY GENERAL

This section applied to both state and local officers. 1972 Op. Att'y Gen. No. U72-127.

General arrest powers of sheriff with or without warrant. — Sheriff, as a law enforcement officer, may effect an arrest either under a warrant, or without a warrant if the offense is committed in the sheriff's presence, or the offender is endeavoring to escape, or for other cause when there is likely to be a failure of justice for want of an officer to issue a warrant. 1972 Op. Att'y Gen. No. 72-24.

Extent of city police officer's right to warrantless arrests. — City police officer has authority to arrest without a warrant one who violates a state statute in the officer's presence, or to arrest within the city one who violates a city ordinance in the officer's presence. 1958-59 Op. Att'y Gen. p. 74.

Police officer of a city, in making an arrest for an offense against state law, or for a violation of an ordinance of the municipality committed in the city limits, falls within the protection of this section; thus, a city police officer has authority to arrest without a warrant one who violates a state statute in the officer's presence, or to arrest within the city one who violates a city ordinance in the officer's presence. 1960-61 Op. Att'y Gen. p. 581.

Municipal arresting officer has authority to arrest person, including even the sheriff of the county, within the corporate limits of the city, on a charge of violation of city ordinances, including the charge of public drunkenness. 1962 Op. Att'y Gen. p. 335.

If ordinance offender within city. — Any warrantless arrest made for violation of a city ordinance would have to be within the corporate limits of the city. 1958-59 Op. Att'y Gen. p. 74.

City police officer may not make arrests outside city limits without warrant. 1958-59 Op. Att'y Gen. p. 74.

Municipal officer may chase intoxicated speeder beyond city. — If a person is driving an automobile while under the influence of intoxicating drink or at a greater speed than 55 miles per hour in the presence of a city police officer, the police officer would be authorized to pursue the person beyond the city limits and make the arrest for violating a state law; a city police officer would have no authority to go beyond the city limits and arrest a person for the violation of a city ordinance. 1952-53 Op. Att'y Gen. p. 48.

Officer from other state cannot arrest for city violations. — Officer from another state may proceed across the state line into Georgia in hot pursuit of an offender, but when the officer does so the officer assumes the character of a private individual and the officer is not clothed with the authority to make arrest for infractions of municipal ordinances. 1958-59 Op. Att'y Gen. p. 72.

Foreign bail bondsman cannot enlist local sheriff's aid. — When a bondsman from another state requested a Georgia law enforcement officer to aid the bondsman in capturing the bond jumper from that foreign state, such a request would not meet any of the requirements of this section, which gave the sheriff the authority to arrest. 1972 Op. Att'y Gen. No. 72-24.

Campus security guards not given police officer's arrest powers. — Power of a public officer to make arrests under former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) can be conferred solely by law and the State Board of Education is not possessed of any lawful power to make its security guards "officers" within the meaning of that section, or to otherwise confer upon them the arrest powers of a peace officer; the only power to arrest which a security guard employed by the State Board of Education would or could possess under law would be that limited power possessed by a private citizen under former Code 1933, § 27-211 (see O.C.G.A. § 17-4-60). 1978 Op. Att'y Gen. No. 78-3.

Constable without full weapon rights. — Constable was grouped with other "officers" as to arrest powers under former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) and was required to execute all warrants directed to the constable by lawful authority under former Code 1933, § 24-817 (see O.C.G.A. § 15-10-102); logically, the constable would be authorized to use such force as is necessary to carry out duties to the same extent as are other officers when serving arrest warrants or lawfully making an arrest without a warrant, but the constable does not possess general police powers, and may carry a pistol only if licensed to do so by the procedure set forth in former Code 1933, §§ 26-2901, 26-2902, 26-2903, and 26-2906 (see O.C.G.A. §§ 16-11-126 and 16-11-127). 1978 Op. Att'y Gen. No. U78-30.

Private citizen cannot serve arrest warrant. — While it is true that a private citizen may effect an arrest under former Code 1933, § 27-211 (see O.C.G.A. § 17-4-60), only a peace officer has the authority to make an arrest by serving a warrant. 1973 Op. Att'y Gen. No. 73-93.

Coroner limited to private citizen's rights in arresting sheriff. — Under former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20), a peace officer could arrest a sheriff with or without a warrant; however, coroners did not fall within the aegis of "peace officers," under former Code 1933, § 21-101 et seq. (see O.C.G.A. § 16-1-3) and, consequently, cannot arrest a sheriff in circumstances when a peace officer would be able to, but a private citizen would not. 1973 Op. Att'y Gen. No. 73-93.

Insufficient time justifies failure to obtain warrant. — Lack of sufficient time to obtain a warrant fell within the "likely to be failure of justice" language of this section. 1978 Op. Att'y Gen. No. U78-30.

Effect of illegal warrantless arrest on otherwise valid conviction. — Warrantless arrests may be legally effectuated by law enforcement officers under one of the exceptions to O.C.G.A. § 17-4-20 or when arresting officers have probable cause to believe that a crime has been, is being, or is about to be committed; however, an illegal arrest alone will not be sufficient cause to vacate an otherwise valid conviction, and will not result in suppression of evidence absent a judicial determination that the arresting officer lacked probable cause in making the arrest. 1982 Op. Att'y Gen. No. U82-34.

Sheriff liable for false imprisonment for arrests beyond authority. — If the sheriff, in the sheriff's capacity as a law enforcement officer, undertakes to arrest an individual under circumstances which do not give the sheriff the authority to make arrests, it is an illegal arrest and as such may subject the sheriff to liability for false imprisonment. 1972 Op. Att'y Gen. No. 72-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 13 et seq.

Am. Jur. Proof of Facts. — Police Officer's Use of Excessive Force in Making Arrest, 9 POF2d 363.

Lack of Probable Cause for Warrantless Arrest, 44 POF2d 229.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 53 et seq.

ALR. — Constitutionality of statute or ordinance authorizing an arrest without a warrant, 1 A.L.R. 585.

Degree of force that may be employed in arresting one charged with a misdemeanor, 3 A.L.R. 1170; 42 A.L.R. 1200.

Necessity of showing warrant upon making arrest under warrant, 40 A.L.R. 62.

Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor, 44 A.L.R. 132.

Arrest, or search and seizure, without warrant on suspicion or information as to unlawful possession of weapons, 92 A.L.R. 490.

Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace, 58 A.L.R.2d 1056.

Police officer's power to enter private house or enclosure to make arrest, without a warrant, for a suspected misdemeanor, 76 A.L.R.2d 1432.

Modern status of rules as to right to forcefully resist illegal arrest, 44 A.L.R.3d 1078.

What amounts to violation of drunken-driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 A.L.R.3d 1138.

Concern for possible victim (rescue doctrine) as justifying violation of Miranda requirements, 9 A.L.R.4th 595.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.

Validity of arrest made in reliance upon outdated warrant list or similar police records, 45 A.L.R.4th 550.

Application of "fireman's rule" to preclude recovery by peace officer for injuries inflicted by defendant in resisting arrest, 25 A.L.R.5th 97.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

Propriety of police action involving application of choke hold, constriction of throat, or the like to prevent accused from swallowing evidence — state cases, 64 A.L.R.5th 741.

17-4-20.1. (For effective date, see note.) Investigation of family violence; "predominant aggressor" defined; preparation of written report; review of report by defendant arrested for family violence; compilation of statistics.

(a) Whenever a law enforcement officer responds to an incident in which an act of family violence, as defined in Code Section 19-13-1, has been committed, the officer shall not base the decision of whether to arrest and charge a person on the specific consent of the victim or on a request by the victim solely or on consideration of the relationship of the parties. No officer investigating an incident of family violence shall threaten, suggest, or otherwise indicate the arrest of all parties for the purpose of discouraging requests for law enforcement intervention.

(b)(1) (For effective date, see note.) As used in this subsection, the term "predominant aggressor" means the individual who poses the most serious, ongoing threat, which may not be the initial aggressor in a specific incident.

(2) When complaints of family violence are received from two or more opposing parties, or if both parties have injuries, the officer shall evaluate each complaint separately to attempt to determine who was the predominant aggressor. Such officer shall not threaten, suggest, or otherwise indicate that all parties will be arrested. If such officer determines that one of the parties was the predominant physical aggressor, that person may be arrested. Such officer shall not be required to arrest any other person believed to have committed an act of family violence during the incident. In determining whether a person is a predominant physical aggressor, an officer shall consider all of the following:

(A) Prior family violence involving either party;

(B) The relative severity of the injuries inflicted on each person, including whether the injuries are offensive versus defensive in nature;

(C) Threats that created the fear of physical injury;

(D) The potential for future injury;

(E) Whether one of the parties acted in self-defense or in defense of a third party;

(F) Prior complaints of family violence; and

(G) Whether the person had reasonable cause to believe he or she was in imminent danger of becoming a victim of any act of family violence.

(c) Whenever a law enforcement officer investigates an incident of family violence, whether or not an arrest is made, the officer shall prepare and submit to the supervisor or other designated person a written report of the incident entitled "Family Violence Report." Forms for such reports shall be designed and provided by the Georgia Bureau of Investigation. The report shall include the following:

(1) Name of the parties;

(2) Relationship of the parties;

(3) Sex of the parties;

(4) Date of birth of the parties;

(5) Time, place, and date of the incident;

(6) Whether children were involved or whether the act of family violence was committed in the presence of children;

(7) Type and extent of the alleged abuse;

(8) Existence of substance abuse;

(9) Number and types of weapons involved;

(10) Existence of any prior court orders;

(11) (For effective date, see note.) Type of police action taken in disposition of case, the reasons for the officer's determination that one party was the predominant physical aggressor, and mitigating circumstances for why an arrest was not made;

(12) Whether the victim was apprised of available remedies and services; and

(13) Any other information that may be pertinent.

(d) The report provided for in subsection (c) of this Code section shall be considered as being made for statistical purposes only and where no arrests are made shall not be subject to the provisions of Article 4 of Chapter 18 of Title 50. However, upon request, a defendant who has been arrested for an act of family violence or the victim shall be entitled to review and copy any report prepared in accordance with this Code section relating to the defendant.

(e) Each police department, including local precincts and county sheriff departments, shall report, according to rules and regulations of the Georgia Crime Information Center, all family violence incidents, both arrests and nonarrests, to the Georgia Bureau of Investigation, which shall compile and analyze statistics of family violence crimes and cause them to be published annually in the Georgia Uniform Crime Reports. An offense shall be counted for each incident reported to the police. A zero shall be reported if no incidents have occurred during the reporting period.

History. — Code 1981, § 17-4-20.1, enacted by Ga. L. 1991, p. 1778, § 1; Ga. L. 1992, p. 2939, § 1; Ga. L. 1995, p. 1186, § 1; Ga. L. 2020, p. 741, § 1/SB 477.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section in effect until January 1, 2021, see the 2020 amendment note.

The 2020 amendment, effective January 1, 2021, rewrote subsection (b), which read: "Where complaints of family violence are received from two or more opposing parties, the officer shall evaluate each complaint separately to attempt to determine who was the primary aggressor. If the officer determines that one of the parties was the primary physical aggressor, the officer shall not be required to arrest any other person believed to have committed an act of family violence during the incident. In determining whether a person is a primary physical aggressor, an officer shall consider:

"(1) Prior family violence involving either party;

"(2) The relative severity of the injuries inflicted on each person;

"(3) The potential for future injury; and

"(4) Whether one of the parties acted in self-defense."; and substituted "predominant" for "primary" in the middle of paragraph (c)(11).

Administrative rules and regulations. — Uniform Crime Reporting, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Crime Information Center Council, Practice and Procedure, Rule 140-2-.12.

Law reviews. — For annual survey of local government law, see 56 Mercer L. Rev. 351 (2004).

For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 43 (1992).

JUDICIAL DECISIONS

Immunity not granted to officers. — Officers' duty to investigate a report of family violence pursuant to O.C.G.A. § 17-4-20.1(c) was ministerial and, accordingly, official immunity did not apply as such immunity was only applicable to performance of discretionary functions, unless those functions were undertaken with malice or intent to cause injury pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d). Meagher v. Quick, 264 Ga. App. 639, 594 S.E.2d 182 (2003).

Officer entitled to immunity for suicide of prisoner. — In a suit against a county police officer following the suicide death of a prisoner, the appellate court properly reversed the denial of summary judgment to the officer because the officer was entitled to qualified immunity with respect to the screening claim of the prisoner for any mental health issues since compliance with the policy and completion of the screening form was ministerial in nature. Pearce v. Tucker, 299 Ga. 224, 787 S.E.2d 749 (2016).

Investigation was unnecessary when the victim's on-the-scene accusations against the defendant, along with "visible bodily harm" to the victim's face, provided sufficient probable cause to believe that the defendant committed battery. McCracken v. State, 224 Ga. App. 356, 480 S.E.2d 361 (1997).

Failure to file report. — Officers who investigated a claim of possible child abuse failed in the officers' obligation to file a Family Violence Report, as required by O.C.G.A. § 17-4-20.1(c), and the trial court properly denied a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 by the officers and others in a wrongful death claim on behalf of a deceased child as genuine issues of material fact existed as to whether the officers' failure to investigate and file the necessary report proximately resulted in the child's injuries and death; the definition of "family violence" was broad under O.C.G.A. § 19-13-1, and although "reasonable discipline" was excepted thereunder, the officers had an obligation to investigate allegations that a child was being whipped. Meagher v. Quick, 264 Ga. App. 639, 594 S.E.2d 182 (2003).

Jury instruction based on subsections (a) and (b) was reversible error. — Jury charge based on O.C.G.A. § 17-4-20.1(a) and (b) was not supported by the evidence because only one of the two parties involved in a domestic dispute reported the incident to law enforcement, and the error was not harmless because the error could have led the jury to conclude that the defendant, who was arrested, was the primary aggressor, and undermined the defense of self-defense, which was not permitted under O.C.G.A. § 16-3-21 if the defendant was the aggressor. Dean v. State, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Cited in Heller v. City of Atlanta, 290 Ga. App. 345, 659 S.E.2d 617 (2008); Wyno v. Lowndes County, 305 Ga. 523, 824 S.E.2d 297 (2019).

17-4-20.2. Bias Crime Report; requirements; use of reports; publication.

(a) Whenever a law enforcement officer investigates an incident of a crime in which it appears that the defendant intentionally selected any victim or group of victims or any property as the object of the offense because of such victim's or group of victims' actual or perceived race, color, religion, national origin, sex, sexual orientation, gender, mental disability, or physical disability, whether or not an arrest is made, the officer shall prepare and submit to the law enforcement officer's

supervisor or other designated person a written report of the incident entitled "Bias Crime Report." Forms for such reports shall be designed and provided by the Georgia Bureau of Investigation. The report shall include:

(1) Names of the parties;

(2) Relationship of the parties;

(3) Sex and gender of the parties;

(4) Race of the parties;

(5) Religion of the parties;

(6) Dates of birth of the parties;

(7) Time, place, and date of the incident;

(8) Whether there is evidence to indicate that the incident occurred because of a person's actual or perceived attributes as specified by subsection (a) of this Code section;

(9) Type and extent of the alleged violation;

(10) Existence of any objects or symbols associated with the terrorizing of persons based upon actual or perceived race, religion, or sex;

(11) Number and types of weapons involved, if any;

(12) Existence of any prior difficulties between the parties;

(13) Type of police action taken in disposition of case;

(14) Whether the victim was apprised of available remedies and services; and

(15) Any other information the officer deems pertinent.

(b) The report provided for in subsection (a) of this Code section shall be considered for statistical purposes only and, where no arrests are made, shall not be subject to the provisions of Article 4 of Chapter 18 of Title 50. However, upon request, a defendant who has been arrested for a criminal violation subject to Code Section 17-10-17 and the victim shall be entitled to review and copy any report prepared in accordance with this Code section relating to the defendant.

(c) Each police department, including local precincts and county sheriff departments, shall report, according to rules and regulations of the Georgia Crime Information Center, all incidents involving alleged criminal violations subject to the provisions of this Code section, both arrests and nonarrests, to the Georgia Bureau of Investigation, which shall compile and analyze statistics of such crimes and cause them to be

published annually in the Georgia Uniform Crime Reports. An offense shall be counted for each incident reported to the police. A zero shall be reported if no incidents have occurred during the reporting period.

History. — Code 1981, § 17-4-20.2, enacted by Ga. L. 2020, p. 10, § 2/HB 426.

Effective date. — This Code section became effective July 1, 2020.

17-4-21. Duty of arresting officer to take arrested person before judicial officer; right of arrested person to select judicial officer.

The arresting officer shall take the arrested person before the most convenient and accessible judicial officer authorized to hear the case unless the arrested person requests otherwise, in which case, if there is no suspicion of improper motive, the arresting officer shall take him before some other judicial officer. An arrested person has no right to select the judicial officer before whom he shall be tried.

History. — Orig. Code 1863, § 4599; Code 1868, § 4621; Code 1873, § 4718; Code 1882, § 4718; Penal Code 1895, § 897; Penal Code 1910, § 918; Code 1933, § 27-208.

Cross references. — Delivery of mentally ill persons, alcoholics, and others to emergency receiving facilities upon apprehension by peace officer, §§ 37-3-41, 37-3-42, 37-7-41, 37-7-42. Initial appearance hearing in magistrate court, Uniform Rules for the Magistrate Courts, Rule 13.

JUDICIAL DECISIONS

Duty of custodians. — Although the plain language of O.C.G.A. §§ 17-4-21 and 17-4-26 directs the "arresting" officer to bring the detainee before a judicial officer, but omits any similar directive for custodians or third party entities entrusted with incarcerating the arrestee, the court was unwilling to allow Burke County, Georgia, to hide behind a technicality. However, whether the county's inaction amounted to a constitutional violation could not be resolved until the facts surrounding the agreement between the City of Midville and Burke County and the relationship between the Midville Police Department and the Burke County Sheriff's Department were more fully developed. Bunyon v. Burke County, 306 F. Supp. 2d 1240 (S.D. Ga. 2004).

Discretion of arresting officer. — Arresting officer has discretion to take arrested person before most convenient and accessible judicial officer authorized to hear the cause. Gill v. Decatur County, 129 Ga. 697, 201 S.E.2d 21 (1973).

Justice of peace cannot become a court when the warrant was not returnable to that justice of the peace. Ormond v. Ball, 120 Ga. 916, 48 S.E. 383 (1904).

Rights not violated. — Although the state failed to carry the state's burden of proving that the defendants knowingly and voluntarily waived the defendants' right to a first appearance hearing under O.C.G.A. § 17-4-62, the defendants were not entitled to immediate release on the defendants' own recognizance, regardless of whether the defendants had first appearance and bail hearings within the time allowed by law because: (1) a magistrate issued arrest warrants for two of the defendants within 48 hours of their arrest, satisfying § 17-4-62; and (2) the state obtained valid arrest warrants for the remaining two defendants either within or outside of the 48 hours after the defendants were arrested, and the remedy for a violation was only available during the period of illegal detention, which

ended when the state obtained valid arrest warrants from a neutral and detached magistrate. Capestany v. State, 289 Ga. App. 47, 656 S.E.2d 196 (2007).

Cited in Fox v. State, 34 Ga. App. 74, 128 S.E. 222 (1925); Harris v. Norris, 188 Ga. 610, 4 S.E.2d 840 (1939).

OPINIONS OF THE ATTORNEY GENERAL

Justice of peace cannot order commitment hearing when police officer set bond. — Since a justice of the peace cannot issue a special warrant for arrest returnable only to the justice, it follows that the justice cannot order a commitment hearing when the arresting officer has purported to personally set bond. 1970 Op. Att'y Gen. No. U70-152.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 8 et seq.

ALR. — Unlawfulness of arrest as affecting jurisdiction or power of court to proceed in criminal case, 96 A.L.R. 982.

17-4-22. Authority of peace officers to make arrests not to be denied because of race, creed, or national origin of peace officers or persons arrested.

No peace officer of this state or of any political subdivision thereof shall be denied the authority to arrest any person because of the race, creed, or national origin of the peace officer nor because of the race, creed, or national origin of the person who is being arrested.

History. — Ga. L. 1969, p. 732, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 16B Am. Jur. 2d, Constitutional Law, § 922 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 264 et seq.

17-4-23. Procedure for arrests by citation for motor vehicle violations; issuance of warrants for arrest for failure of persons charged to appear in court; bond.

(a)(1) A law enforcement officer may arrest a person accused of violating any law or ordinance enacted by local law governing the operation, licensing, registration, maintenance, or inspection of motor vehicles or violating paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23 by the issuance of a citation, provided that such offense is committed in his or her presence or information constituting a basis for such arrest was received by the arresting officer from a law enforcement officer observing such offense being committed, except that, when such offense results in an accident, an investigating officer may issue citations regardless of whether the offense occurred in the presence of a law enforcement officer.

(2) A law enforcement officer may arrest a person accused of any misdemeanor violation of Code Section 16-7-21, 16-8-14, 16-8-14.1, or 16-13-30 by the issuance of a citation, provided that such offense is committed in his or her presence or information constituting a basis for such arrest was received by the arresting officer or an investigating officer from another law enforcement officer or other individual observing or aware of such offense being committed. When an arrest is made for such offense, prior to releasing the accused on citation, the arresting law enforcement officer shall review the accused's criminal record as such is on file with the Federal Bureau of Investigation and the Georgia Crime Information Center within the Georgia Bureau of Investigation and ensure that the accused's fingerprints are obtained.

(3) The arresting officer shall issue a citation to the accused which shall enumerate the specific charges and the date upon which he or she is to appear and answer the charges or a notation that he or she will be later notified of the date upon which he or she is to appear and answer the charges. When an arresting officer makes an arrest concerning the operation of a motor vehicle based on information received from another law enforcement officer who observed the offense being committed, the citation shall list the name of each officer and each officer must be present when the charges against the accused are heard.

(b) If the accused fails to appear as specified in the citation, the judicial officer having jurisdiction of the offense may issue a warrant ordering the apprehension of the accused and commanding that he or she be brought before the court to answer the charge contained within the citation and the charge of his or her failure to appear as required. The accused shall then be allowed to make a reasonable bond to appear on a given date before the court.

(c) Notwithstanding subsection (b) of this Code section, when an accused was issued a citation for a violation of Code Section 16-7-21, 16-8-14, 16-8-14.1, or 16-13-30, and the accused fails to appear as specified in the citation, the judicial officer having jurisdiction of the offense, absent a finding of sufficient excuse to appear at the time and place specified in the citation, shall issue a warrant ordering the apprehension of the accused and commanding that he or she be brought before the court to answer the charge contained within the citation and the charge of his or her failure to appear as required. The accused shall then be allowed to make a reasonable bond to appear on a given date before the court.

History. — Ga. L. 1969, p. 759, § 1; Ga. L. 1975, p. 874, §§ 1-4; Ga. L. 2015, p. 1212, § 2/SB 160; Ga. L. 2018, p. 550, § 2-3/SB 407.

The 2018 amendment, effective July 1, 2018, substituted the present provisions of subsection (a) for the former provisions, which read: "A law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance, or inspection of motor vehicles or violating paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23 by the issuance of a citation, provided that the offense is committed in his presence or information constituting a basis for arrest concerning the operation of a motor vehicle or a violation of paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23 was received by the arresting officer from a law enforcement officer observing the offense being committed, except that, where the offense results in an accident, an investigating officer may issue citations regardless of whether the offense occurred in the presence of a law enforcement officer. The arresting officer shall issue to such person a citation which shall enumerate the specific charges against the person and the date upon which the person is to appear and answer the charges or a notation that the person will be later notified of the date upon which the person is to appear and answer the charges. Whenever an arresting officer makes an arrest concerning the operation of a motor vehicle based on information received from another law enforcement officer who observed the offense being committed, the citation shall list the name of each officer and each must be present when the charges against the accused person are heard."; in subsection (b), deleted "person" following "If the accused" near the beginning, substituted "accused" for "person" near the middle of the first sentence and near the beginning of the second sentence, inserted "or she" in the middle of the first sentence, and inserted "or her" near the end of the first sentence; and added subsection (c).

Cross references. — Uniform traffic citation and complaint form, and prosecution of traffic offenses generally, T. 40, C. 13.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 45 (2018). For annual survey on criminal law, see 70 Mercer L. Rev. 63 (2018).

JUDICIAL DECISIONS

Construed with § 40-13-2.1. — Having elected to issue a citation, a deputy cannot make a custodial arrest of a driver when the driver refuses to sign the citation. Instead, a deputy shall follow the procedures set forth in O.C.G.A. § 40-13-2.1(a). The language of that statute makes clear that once a deputy or officer issues a citation, the deputy or officer is obligated to follow the procedures set forth in the statute. State v. Torres, 290 Ga. App. 804, 660 S.E.2d 763 (2008).

When physical arrest permitted. — Georgia traffic offender may only be physically arrested if, following citation for the offense, the offender fails to appear in court under O.C.G.A. § 17-4-23(b), if the arresting officer has personal knowledge that the offender was intoxicated to the extent that the offender was incapable of driving safely, or if one of the other factors of O.C.G.A. § 17-4-20 is present. Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986).

Because an officer was authorized to arrest the defendant for weaving, a decision to impound the vehicle the defendant was driving was not unreasonable, and an inventory search of the vehicle was authorized; thus, the trial court did not err in denying the defendant's motion to suppress the evidence seized as a result of the search. Lopez v. State, 286 Ga. App. 873, 650 S.E.2d 430 (2007).

Trial court did not err by refusing to suppress the defendant's blood-test results based on not being under arrest prior to being read Georgia's Implied Consent notice because although the defendant's recollection differed from that of the law-enforcement officer, and although defense counsel cross-examined the officer extensively as to alleged inconsistencies in the chronology of events, the officer testified that the officer issued citations to the defendant before reading Georgia's Implied Consent notice. Chernowski v.

State, 330 Ga. App. 702, 769 S.E.2d 126 (2015).

Probable cause to arrest. — Officer need not personally be aware of all the facts which would support a probable cause determination so long as it can be established by evidence that the officer's actions were the end result of a chain of information-sharing, one link of which is an officer in possession of probable cause. Waldrop v. State, 205 Ga. App. 864, 424 S.E.2d 31, cert. denied, 205 Ga. App. 901, 424 S.E.2d 31 (1992).

Trial court properly granted the defendant's motion to suppress evidence obtained after the defendant's car was impounded during a traffic stop because, even though the officer had reasonable articulable suspicion to initiate the traffic stop based on criminal database search results that the defendant's car was not insured, once the defendant provided proof of insurance in an acceptable manner, the officer did not have probable cause to arrest the defendant or issue the defendant a citation; and, without probable cause to issue the citation, the officer had no basis for impounding the defendant's vehicle. State v. Lewis, 344 Ga. App. 630, 811 S.E.2d 436 (2018).

Depositing driver's license in lieu of bail. — Any person arrested for a traffic violation, except a violation for which a license may be suspended for a first offense, may deposit that person's driver's license with the arresting officer in lieu of bail or incarceration. Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986).

Municipal officer had authority to arrest the defendant under O.C.G.A. § 17-4-23(a) because, after observing the defendant operating the defendant's motorcycle, the officer had a reasonable suspicion that defendant had been driving under the influence and the defendant admitted that the defendant had been driving. Duprel v. State, 301 Ga. App. 469, 687 S.E.2d 863 (2009), overruled on other grounds by Zilke v. State, 299 Ga. 232, 787 S.E.2d 745 (2016).

Discretion to issue citations. — Use of the term "may arrest" in O.C.G.A. § 17-4-23 merely provides law enforcement officers with the discretion to issue citations rather than make custodial arrests for traffic offenses and does not restrict the officers' arrest authority to the issuance of citations. United States v. Wilson, 853 F.2d 869 (11th Cir. 1988), cert. denied, 488 U.S. 1041, 109 S. Ct. 866, 102 L. Ed. 2d 990 (1989).

O.C.G.A. § 17-4-23 gives a police officer the option to issue a citation but does not restrict the power given to police in O.C.G.A. § 17-4-20 to make custodial arrests for crimes committed in the officers' presence. Brock v. State, 196 Ga. App. 605, 396 S.E.2d 785 (1990); Polk v. State, 200 Ga. App. 17, 406 S.E.2d 548 (1991); Edwards v. State, 224 Ga. App. 332, 480 S.E.2d 246 (1997).

O.C.G.A. § 17-4-23 gives the officer the option of issuing a citation rather than going through the time-consuming ordeal of a custodial arrest, but does not mandate a citation. Baker v. State, 202 Ga. App. 73, 413 S.E.2d 251 (1991).

Option of issuing citation is not a restriction on police. — Although O.C.G.A. § 17-4-23(a) gives a police officer the option of issuing a citation, the statute does not restrict the power given to police in O.C.G.A. § 17-4-20 to make custodial arrests for crimes committed in the officers' presence. Consequently, after a driver is arrested for a traffic violation, a police officer can lawfully search the interior of the driver's car. State v. Lowe, 263 Ga. App. 1, 587 S.E.2d 169 (2003).

Authority of DOT enforcement officer. — Department of Transportation enforcement officer has authority to enforce travel restrictions in high occupancy vehicle lanes. Edge v. State, 226 Ga. App. 559, 487 S.E.2d 117 (1997), overruled on other grounds by Zilke v. State, 299 Ga. 232, 787 S.E.2d 745 (2016).

Listing names of officers on citation. — Interest protected by the requirement that certain law enforcement witnesses be identified on the traffic citation is a criminal defendant's "reasonable pretrial" access to evidence. Minicucci v. State, 214 Ga. App. 468, 448 S.E.2d 34 (1994).

Failure to list the names of law enforcement officers on a traffic citation did not entitle the defendant to dismissal of the citation since the defendant did not claim

unfair surprise from the testimony of the unlisted officers nor seek a continuance or mistrial. Minicucci v. State, 214 Ga. App. 468, 448 S.E.2d 34 (1994).

Failure to observe driving under the influence. — When a citizen reported that the defendant was driving erratically, but no officer observed the defendant driving, defendant's arrest for driving under the influence of alcohol to the extent that it was less safe to drive was invalid; under O.C.G.A. § 17-4-23(a), an officer had to observe the defendant operating a motor vehicle, and neither the exception for arrest if an accident occurred nor O.C.G.A. § 17-4-20(a), allowing custodial arrests when an offense was committed within an officer's knowledge, applied as there was no accident and no transcript of the trial court proceedings was furnished to the appellate court to determine whether the defendant was subjected to a custodial arrest. State v. Cooper, 271 Ga. App. 771, 611 S.E.2d 90 (2005).

Juvenile charged under delinquency petition. — When a juvenile was found guilty of reckless driving in a proceeding on a juvenile delinquency petition in the juvenile court, the fact that the police officer who drew up the traffic citation, and later the petition, did not personally observe the juvenile's driving, as required by O.C.G.A. § 17-4-23, did not require reversal because the court action was based on the petition, not on the reckless driving citation. In re J.J.H., 218 Ga. App. 557, 462 S.E.2d 449 (1995).

Officer's presence at trial. — Defendant's argument that the citation the police officer issued to defendant for hit and run had to be dismissed because the officer was not present at the defendant's bench trial had to be rejected as the statute the defendant cited for that proposition, O.C.G.A. § 17-4-23(a), only applied when the officer relied on information supplied by another officer, and not if the information was supplied by a citizen, as it was in the defendant's case. Davis v. State, 261 Ga. App. 539, 583 S.E.2d 214 (2003).

Cited in State v. Swift, 232 Ga. 535, 207 S.E.2d 459 (1974); Hyatt v. State, 134 Ga. App. 703, 215 S.E.2d 698 (1975); Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975); Parks v. State, 150 Ga. App. 446, 258 S.E.2d 66 (1979); Baxter v. State, 154 Ga. App. 861, 270 S.E.2d 71 (1980); Thompson v. State, 175 Ga. App. 645, 334 S.E.2d 312 (1985); Williams v. State, 190 Ga. App. 361, 378 S.E.2d 886 (1989); Dickerson v. State, 193 Ga. App. 605, 388 S.E.2d 736 (1989); Lufburrow v. State, 206 Ga. App. 250, 425 S.E.2d 368 (1992); Sanders v. State, 247 Ga. App. 170, 543 S.E.2d 452 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Defendant in traffic case charged by uniform traffic citation. — If a defendant in a traffic case charged by a uniform traffic citation fails to appear for trial in a probate court, a warrant may be issued regardless of whether that citation contains an affidavit of the arresting officer. Secondly, the uniform traffic citation is valid as an accusation without an affidavit and therefore tolls the statute of limitations for the prosecution of traffic violations. 1990 Op. Att'y Gen. No. U90-2.

Park ranger may regulate traffic. — Park ranger may legally be invested with power by the commissioner of natural resources to regulate traffic within a state park. 1971 Op. Att'y Gen. No. U71-2.

Warrant for failure to appear for traffic violation. — Named probate court may issue a warrant ordering apprehension of an individual charged with violating traffic laws of this state who fails to appear in court on the date and at the time specified in the citation upon which he or she was arrested. 1980 Op. Att'y Gen. No. U80-58.

What costs applicable to traffic cases in probate courts. — Cost applicable to traffic cases brought in probate courts pursuant to O.C.G.A. § 40-13-21, or when the judge of the probate court issues a warrant in traffic cases pursuant to O.C.G.A. § 17-4-23, are those enumerated in former paragraph (a)(27) of § 15-9-60 for public safety patrol trials, plus costs allowed for other services actually performed. 1981 Op. Att'y Gen. No. U81-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 921 et seq.

C.J.S. — 8 C.J.S., Bail: Release and Detention Pending Proceedings, § 136 et seq. 61A C.J.S. (Rev), Motor Vehicles, §§ 1504 et seq., 1514 et seq., 1522 et seq.

ALR. — Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona, 25 A.L.R.3d 1076.

What amounts to violation of drunken-driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 A.L.R.3d 1138.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

Authority of public official, whose duties or functions generally do not entail traffic stops, to effectuate traffic stop of vehicle, 18 A.L.R.6th 519.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where no warrant involved, 71 A.L.R.6th 1.

17-4-24. Duty of law enforcement officers to execute penal warrants; summoning of posses.

Every law enforcement officer is bound to execute the penal warrants given to him to execute. He may summon to his assistance, either in writing or orally, any of the citizens of the neighborhood or county to assist in the execution of such warrants. The acts of the citizens formed as a posse by such officer shall be subject to the same protection and consequences as official acts.

History. — Orig. Code 1863, § 4602; Code 1868, § 4625; Code 1873, § 4722; Code 1882, § 4722; Penal Code 1895, § 895; Penal Code 1910, § 916; Code 1933, § 27-206; Ga. L. 1997, p. 143, § 17.

JUDICIAL DECISIONS

City court sheriff may execute processes only from own court. — Sheriff of a city court may execute processes of that court; but the sheriff cannot lawfully execute processes issued from other courts. Vince v. State, 113 Ga. 1068, 39 S.E. 313 (1901).

Posse member protected as officer even without sheriff. — Member of a posse aiding in the execution of a warrant is protected, as an officer, even though the member does not remain in the actual presence of the sheriff. Robinson v. State, 93 Ga. 77, 18 S.E. 1018, 44 Am. St. R. 127 (1893).

Member of posse should give notice of the member's authority when making an arrest. Robinson v. State, 93 Ga. 77, 18 S.E. 1018, 44 Am. St. R. 127 (1893).

Refusal to execute warrant and interference indictable. — Refusal by an officer to execute a warrant, and any person interfering with an officer while attempting to execute a warrant are indictable. Ormond v. Ball, 120 Ga. 916, 48 S.E. 383 (1904).

Common-law offense of refusal by an officer to execute a warrant delivered to the officer for the purpose is indictable. Newkirk v. State, 57 Ga. App. 803, 196 S.E. 911 (1938).

Definition of resisting arrest. — Resistance to an arrest may begin in the use of words which import defiance and indicate a purpose to use violence if necessary. Newkirk v. State, 57 Ga. App. 803, 196 S.E. 911 (1938).

Officer may not injure fleeing misdemeanant. — Officer may not, in the execution of a legal criminal warrant, when the charge is a misdemeanor, proceed to the extremity of shedding blood or killing, when the accused is attempting to avoid arrest by flight, even though the offender cannot be taken otherwise. Newkirk v. State, 57 Ga. App. 803, 196 S.E. 911 (1938).

Misdemeanant may not violently resist arrest. — When the law places a duty on an officer to serve a penal warrant and makes the officer indictable for neglect to serve the warrant, even though for a misdemeanor offense, the accused may not arm oneself with deadly weapons and, in company with others, by threats and a show of force prevent such arrest, and then claim protection because the offense charged is a misdemeanor, when the officer uses only such force as is necessary to overcome the resistance offered. Newkirk v. State, 57 Ga. App. 803, 196 S.E. 911 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Emergency squads. — Multi-government emergency squads may combat common disaster, civil disorder, riot, and other emergency situations. 1969 Op. Att'y Gen. No. 69-473.

Police intelligence unit should provide that members of emergency squads be qualified as de jure deputy sheriffs in all counties in which they intend to operate. 1969 Op. Att'y Gen. No. 69-473.

Deputy and posse may act as sheriffs. — Regularly appointed deputy sheriff and persons lawfully performing the duties incumbent upon a posse comitatus may perform such acts as may lawfully be performed by a sheriff. 1969 Op. Att'y Gen. No. 69-75.

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 31 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 103, 104.

17-4-25. Power to make arrests in any county; arrested persons taken before judicial officer; transportation costs; holding in county other than one in which offense committed; transport to regional jail.

(a) Under a warrant issued by a judicial officer, an arresting officer may, in any county without regard to the residence of the arresting officer, arrest any person charged with a crime. It is the duty of the arresting officer to take the accused, with the warrant under which he was arrested, to the county in which the offense is alleged to have been committed, for examination before any judicial officer of that county.

(b) The county where the offense is alleged to have been committed shall pay the expenses of the arresting officer in taking the arrested person to the county. The arresting officer may hold or imprison the arrested person in a county other than the county in which the offense is alleged to have been committed long enough to enable him to prepare to take the arrested person to the county in which the offense is alleged to have been committed.

(c) Should the county in which the offense is alleged to have been committed be a member of a regional jail authority created under Article 5 of Chapter 4 of Title 42, known as the "Regional Jail Authorities Act," the arresting officer shall transport the prisoner to the regional jail. The judicial officer of the county in which the offense is alleged to have been committed may conduct the examination of the accused required by subsection (a) of this Code section in the county in which the offense is alleged to have been committed or in facilities available at the regional jail or by audio-visual communication between the two locations and between the accused, the court, the attorneys, and the witnesses.

History. — Orig. Code 1863, § 4607; Ga. L. 1865-66, p. 38, §§ 1, 2; Code 1868, § 4624; Code 1873, § 4721; Code 1882, § 4721; Ga. L. 1895, p. 34, § 1; Penal Code 1895, § 898; Penal Code 1910, § 919; Code 1933, § 27-209; Ga. L. 1996, p. 742, § 1.

Cross references. — Initial appearance hearing in magistrate court, Uniform Rules for the Magistrate Courts, Rule 13.

JUDICIAL DECISIONS

Officer must see enough to convince oneself and judge of crime. — What the officer sees or apprehends through the officer's senses must be sufficient to convince the officer as a fact that a violation exists, and to enable the judge when challenge is made to agree that such conviction is justified by what the observer has seen, heard, or otherwise ascertained. Harris v. State, 128 Ga. App. 22, 195 S.E.2d 262 (1973).

Statements made outside of county of crime admissible. — Valid statements by a defendant should not be rejected merely because the statements were obtained in a county other than that where the offenses were committed. Echols v. State, 231 Ga. 633, 203 S.E.2d 165 (1974).

No bail in lieu of return of prisoner to other county. — Officials of a county in which one is arrested on a bench warrant issued from another county have no authority to admit to bail the person arrested. Weatherly v. Beavers, 139 Ga. 122, 76 S.E. 853 (1912).

Officer may not release prisoner on other county's bond. — Arresting officer cannot accept a bond issued in another county and discharge the prisoner. Lamb v. Dillard, 94 Ga. 206, 21 S.E. 463 (1894); Burrow v. Southern Ry., 139 Ga. 733, 78 S.E. 125 (1913).

Officer must return felon to county of crime where judge sets bail. — Arresting officer has no authority to accept bond from one arrested under a warrant for a felony, but should return the party arrested to the county in which the crime was alleged to have been committed for examination before a judicial officer of that county and the fixing of bail by such officer in case of commitment. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

County liable for expenses in returning prisoner. — County where an alleged offense was committed is liable to suit for the expenses of an arresting officer in carrying a prisoner to such county. Harris County v. Brady, 115 Ga. 767, 42 S.E. 71 (1902).

Warrantless arrest outside territorial limits. — Deputy sheriff had authority to make a warrantless arrest beyond the territorial limits of the deputy's own county. Watkins v. State, 207 Ga. App. 766, 430 S.E.2d 105 (1993), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Service of warrant outside territorial limits. — City police officer has no authority to serve a warrant in a county outside the municipality. Coker v. State, 14 Ga. App. 606, 81 S.E. 818 (1914).

Sheriff of a city court was not an arresting officer within the meaning of

this section. Vince v. State, 113 Ga. 1068, 39 S.E. 313 (1901).

Cited in McFarlin v. Board of Drainage Comm'rs, 153 Ga. 766, 113 S.E. 447 (1922); Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951); Croker v. State, 114 Ga. App. 492, 151 S.E.2d 846 (1966).

OPINIONS OF THE ATTORNEY GENERAL

Section applies to state, not city officers. — This section was intended to embrace such officers only as are authorized under the state law to execute warrants, and was not intended to embrace such officers as were constituted arresting officers by virtue of the laws of a municipality. 1958-59 Op. Att'y Gen. p. 73.

Duties of emergency squads. — Multi-government emergency squads may combat common disaster, civil disorder, riot, and other emergency situations. 1969 Op. Att'y Gen. No. 69-473.

Emergency squads. — Police intelligence unit should provide that members of emergency squads be qualified as de jure deputy sheriffs in all counties in which the members intend to operate. 1969 Op. Att'y Gen. No. 69-473.

Proper way to organize an emergency squad is to require that each member qualify as a deputy sheriff in each county of anticipated service. 1969 Op. Att'y Gen. No. 69-473.

County officers may retrieve arrestee from other county. — County police under former Code 1933, § 23-1403 (see O.C.G.A. § 36-8-5) were authorized to go from the county of appointment to another county within the limits of the state to receive a prisoner who was under arrest and detention and return such prisoner to the county of appointment according to former Code 1933, § 27-209 (see O.C.G.A. § 17-4-25). 1958-59 Op. Att'y Gen. p. 73.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 23 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 124 et seq.

ALR. — Liability for false imprisonment of officer executing warrant for arrest as affected by its being returnable to wrong court, 40 A.L.R. 290.

Degree of force that may be employed in arresting one charged with a misdemeanor, 42 A.L.R. 1200.

Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

17-4-25.1. Transport of arrested person to jurisdiction in which offense committed; transport of prisoner outside county or municipality.

(a) As provided in subsection (e) of this Code section, a sworn law enforcement officer from a county or municipality in which an offense is alleged to have been committed shall be authorized to transport an arrested person, with the warrant under which such person was arrested, from one jurisdiction to the county or municipality in which the offense is alleged to have been committed for examination before any judicial officer of that county or municipality.

(b) Unless otherwise provided by contract, the agency requesting the transportation of the arrested person pursuant to subsection (a) of this Code section shall be responsible for all costs associated with the transport. Such officer may hold or imprison the arrested person in a jurisdiction other than where the offense is alleged to have been committed long enough to enable such officer to prepare to take the arrested person to the jurisdiction in which the offense is alleged to have been committed.

(c) A sworn law enforcement officer from a county or municipality shall be authorized to transport a prisoner who is lawfully in the custody of such officer to a medical facility, juvenile detention facility as defined in Code Section 49-4A-1, or court appearance outside such county or municipality or to transport such prisoner to a location outside such county or municipality for any lawfully required or necessary purpose.

(d) This Code section shall not be construed to provide any general state-wide police powers or authority for county or municipal law enforcement officers or expand the arrest powers of such officers outside their properly authorized jurisdiction.

(e) Sheriffs and, with the approval of its governing authority, municipal or other law enforcement agency heads are authorized to enter into a contract for the purposes of transporting arrested individuals from the jurisdiction of the arrest to an appropriate detention facility where the alleged crime is to have occurred. In the absence of a written contract between the sheriff and municipal or other law enforcement agency head, the sheriff or his or her designee has the right of first refusal, as evidenced in writing, of transporting persons arrested on a warrant to an appropriate detention facility where the crime is alleged to have occurred. Any responsibility arising as a result of the transportation of an arrested individual as authorized in this Code section shall be that of the agency whose employee is transporting the arrested individual.

History. — Code 1981, § 17-4-25.1, enacted by Ga. L. 1993, p. 710, § 1; Ga. L. 2013, p. 294, § 4-14/HB 242.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

17-4-26. Duty to bring persons arrested before judicial officer within 72 hours; notice to accused of time and place of commitment hearing; effect of failure to notify.

Every law enforcement officer arresting under a warrant shall exercise reasonable diligence in bringing the person arrested before the judicial officer authorized to examine, commit, or receive bail and in any event to present the person arrested before a committing judicial officer within 72 hours after arrest. The accused shall be notified as to when and where the commitment hearing is to be held. An arrested person who is not notified before the hearing of the time and place of the commitment hearing shall be released.

History. — Orig. Code 1863, § 4606; Code 1868, § 4629; Code 1873, § 4726; Code 1882, § 4726; Penal Code 1895, § 899; Penal Code 1910, § 920; Code 1933, § 27-210; Ga. L. 1956, p. 796, § 1; Ga. L. 1995, p. 932, § 1.

Cross references. — Delivery of mentally ill persons, alcoholics, and others to emergency receiving facilities upon apprehension by peace officer, §§ 37-3-41, 37-3-42, 37-7-41, 37-7-42. Bail in magistrate court felony cases, Uniform Rules for the Magistrate Courts, Rule 23.2. Initial appearance hearing in magistrate court, Uniform Rules for the Magistrate Courts, Rule 13.

Law reviews. — For article discussing preliminary hearings in felony cases as necessary to satisfy due process requirements, see 12 Ga. St. B.J. 207 (1976).

For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971). For note, "A 'Critical' Question of State Law: Georgia's Ambiguous Treatment of Initial Appearance Hearings and the Implications of Bail Reform," see 54 Ga. L. Rev. 363 (2019).

JUDICIAL DECISIONS

Analysis

General Consideration
Limitations on Release for Delay

General Consideration

Person who is arrested and released within the time prescribed by law on an appearance bond is not entitled to a commitment hearing. Watts v. Pitts, 253 Ga. 501, 322 S.E.2d 252 (1984).

Time for holding commitment hearing. — O.C.G.A. § 17-4-26 requires that a person arrested be brought before a committing judicial officer within 72 hours after arrest, but the statute does not require a commitment hearing within that time; to the extent that the language in footnote 3 of Boyd v. St. Lawrence, 281 Ga. 300 n. 3 (2006), conflicts with this holding, it is hereby disapproved. Tidwell v. Paxton, 282 Ga. 641, 651 S.E.2d 714 (2007).

Failure to hold commitment hearing. — There was no constitutional error after a magistrate failed to hold a commitment hearing when an accused was brought before the magistrate within 72 hours of arrest. State v. Godfrey, 204 Ga. App. 58, 418 S.E.2d 383, cert. denied, 204 Ga. App. 922, 418 S.E.2d 383 (1992).

Sanction for violating O.C.G.A. § 17-4-62 is that the defendant shall be released and does not require suppression of evidence gathered in the interim. Chisholm v. State, 231 Ga. App. 835, 500 S.E.2d 14 (1998).

Duty of custodians. — Although the plain language of O.C.G.A. §§ 17-4-21 and 17-4-26 directs the "arresting" officer to bring the detainee before a judicial officer, but omits any similar directive for

General Consideration (Cont'd)

custodians or third party entities entrusted with incarcerating the arrestee, the court was unwilling to allow Burke County, Georgia, to hide behind a technicality. However, whether the county's inaction amounted to a constitutional violation could not be resolved until the facts surrounding the agreement between the City of Midville and Burke County and the relationship between the Midville Police Department and the Burke County Sheriff's Department were more fully developed. Bunyon v. Burke County, 306 F. Supp. 2d 1240 (S.D. Ga. 2004).

Cited in Johnson v. Plunkett, 215 Ga. 353, 110 S.E.2d 745 (1959); McCranie v. Mullis, 221 Ga. 617, 146 S.E.2d 723 (1966); Jackson v. State, 225 Ga. 39, 165 S.E.2d 711 (1968); Blair v. State, 230 Ga. 409, 197 S.E.2d 362 (1973); Gill v. Decatur County, 129 Ga. App. 697, 201 S.E.2d 21 (1973); Thomas v. State, 233 Ga. 237, 210 S.E.2d 675 (1974); State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975); Tarpkin v. State, 236 Ga. 67, 222 S.E.2d 364 (1976); Lewis v. State, 246 Ga. 101, 268 S.E.2d 915 (1980); Lang v. Baker, 248 Ga. 431, 286 S.E.2d 433 (1982); Tucker v. State, 249 Ga. 323, 290 S.E.2d 97 (1982); Jones v. State, 252 Ga. 385, 313 S.E.2d 103 (1984).

Limitations on Release for Delay

It was not the intent of this section to require a useless act. Johnson v. State, 215 Ga. 839, 114 S.E.2d 35 (1960), cert. denied, 368 U.S. 849, 82 S. Ct. 81, 7 L. Ed. 2d 47 (1961).

Indictment of defendant in capital case within three days. — After a defendant was indicted in a capital case within 72 hours after the defendant's arrest, the incarceration was by reason of the indictment and not the warrant; this section could have no application since a committal court would have no jurisdiction to determine whether or not there was probable cause for indictment after the indictment had already been returned. Johnson v. State, 215 Ga. 839, 114 S.E.2d 35 (1960), cert. denied, 368 U.S. 849, 82 S. Ct. 81, 7 L. Ed. 2d 47 (1961).

Failure to bring defendant to magistrate not unconstitutional. — Though this section required that an officer arresting under a warrant bring the person arrested before a committing officer within 72 hours after arrest, failure to take an arrestee before a magistrate was not a federal constitutional issue. Stephenson v. Gaskins, 539 F.2d 1066 (5th Cir. 1976).

Requirement for hearing within three days. — Defendant arrested on a warrant must be taken before the committing magistrate within 72 hours after the defendant's arrest but this means that the defendant must be presented to the committing magistrate and notified as to when and where the committal hearing is to be held, not that the hearing itself must be within the 72-hour period. Whitfield v. State, 115 Ga. App. 231, 154 S.E.2d 294 (1967).

Release not required if hearing not within three days. — First sentence of this section imposed no penalty if the arresting officer failed to take the accused before a committing officer within 72 hours, nor was there any provision that the offender was to be released if no committal hearing was held within 72 hours. Pennaman v. Walton, 220 Ga. 295, 138 S.E.2d 571 (1964).

Detention illegal without hearing in three days. — When the facts show that the arresting officers did bring the defendant before the magistrate within 72 hours after the arrest, the fact that the magistrate set the committal hearing more than 72 hours after the arrest does not make the defendant's detention illegal. Dodson v. Grimes, 220 Ga. 269, 138 S.E.2d 311 (1964).

There is no requirement for a hearing within 72 hours after the arrest and the fact that one is not set until more than 72 hours after such arrest would not make the prisoner's detention illegal. Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

Denial of hearing ground for preindictment habeas corpus. — Although not ground for post-conviction habeas corpus due to mootness, denial of a commitment hearing would be ground for a preindictment habeas corpus. McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975).

Failure to conduct commitment hearing moot after grand jury indictment. — Issue of whether the defendant was entitled to habeas relief on the ground that the defendant was denied the defendant's right to a commitment hearing prior to the indictment was moot after the defendant had been indicted by the grand jury. Spears v. Johnson, 256 Ga. 518, 350 S.E.2d 468 (1986).

Court still has jurisdiction despite illegal detention. — Although an arresting officer may be liable in damages for false arrest and imprisonment when the officer detains the defendant in an illegal manner, this is ordinarily immaterial so far as the jurisdiction of the court over the defendant is concerned after jurisdiction has been acquired by accusation or indictment, and appearance and pleading by the defendant, in a criminal case. French v. State, 99 Ga. App. 149, 107 S.E.2d 890 (1959).

Delay does not invalidate trial and judgment. — Delay in the holding of the commitment hearing within the requirements of this section in no way vitiated the indictment, trial, verdict, and judgment of conviction and sentence. Heard v. State, 126 Ga. App. 62, 189 S.E.2d 895 (1972); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987).

Arrestee misbehavior may justify delay. — What is reasonable diligence depends upon the peculiar facts of each case; the conduct of the prisoner may excuse the delay. Blocker v. Clark, 126 Ga. 484, 54 S.E. 1022, 7 L.R.A. (n. s.) 268, 8 Ann. Cas. 31 (1906).

OPINIONS OF THE ATTORNEY GENERAL

Probation violators. — O.C.G.A. § 17-4-26 applies equally to probation violators who are arrested under warrants secured at the instance of probation supervisors. 1988 Op. Att'y Gen. No. U88-14.

Magistrate court may, sua sponte, order the release of arrestees who have been arrested without a warrant and when no warrant has been procured as required by O.C.G.A. § 17-4-26, and also when an individual has been arrested with a warrant, but has not been afforded a first appearance hearing within 72 hours of arrest as required by that section. 1988 Op. Att'y Gen. No. U88-14.

Waiver. — While it is possible for an individual to waive the individual's statutory right to a "first appearance," in writing, it would be necessary in every instance for a court to ensure that such a waiver is intelligently and competently made, and that the court's findings be made a part of the record of the case. 1988 Op. Att'y Gen. No. U88-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 75 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 21 et seq.

ALR. — Civil liability of officer making arrest under warrant as affected by his failure to exhibit warrant, or to state fact of, or substance of, warrant, 100 A.L.R. 188.

Liability of governmental unit or its officers for injury to innocent pedestrian or occupant of parked vehicle, or for damage to such vehicle, as result of police chase, 100 A.L.R.3d 815.

17-4-27. Duty to maintain information about persons arrested by law enforcement officers under their supervision; inspection of records.

It shall be the duty of all sheriffs, chiefs of police, and the heads of any other law enforcement agencies of this state to obtain, or cause to be obtained, the name, address, and age of each person arrested by law enforcement officers under the supervision of such sheriffs, chiefs of

police, or heads of any other law enforcement agencies of this state, when any such person is charged with an offense against the laws of this state, any other state, or the United States. The information shall be placed on appropriate records which each law enforcement agency shall maintain. The records shall be open for public inspection unless otherwise provided by law.

History. — Ga. L. 1967, p. 839, § 1.

JUDICIAL DECISIONS

Completion of standard form after invoking right to counsel. — When a suspect in custody invoked the right to counsel, and the officer proceeded to complete a standard form used by the department as an arrest record, which inquired as to names and addresses of family members, this inquiry was normally attendant to arrest and custody, and had absolutely nothing to do with interrogation regarding the criminal offense under investigation. Thus, the defendant's subsequent, self-initiated statement was not unlawfully obtained. Hibbert v. State, 195 Ga. App. 235, 393 S.E.2d 96 (1990).

Cited in Cherokee County v. North Cobb Surgical Assocs., P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 31 et seq.

ALR. — Privilege of custodian, apart from statute or rule, from disclosure in civil action of official police records and reports, 36 A.L.R.2d 1318.

Burden of proof of defendant's age in prosecution where attainment of particular age is statutory requisite of guilt, 49 A.L.R.3d 526.

17-4-28. Advising, encouraging, or procuring dismissal or settlement of warrant by arresting officer.

Any arresting officer who advises or encourages the dismissal or settlement of any criminal warrant placed in his hands for execution, either before or after an arrest is made on the warrant, or who procures or encourages the dismissal or settlement of such warrants by threats, duress, intimidation, promises, or any other artifice or means shall be guilty of a misdemeanor.

History. — Ga. L. 1897, p. 98, § 1; Penal Code 1910, § 923; Code 1933, § 27-9901.

JUDICIAL DECISIONS

Cited in Fox v. State, 34 Ga. App. 74, 128 S.E. 222 (1925).

RESEARCH REFERENCES

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 275 et seq. 67 C.J.S., Officers and Public Employees, § 437 et seq.

17-4-29. Collecting or receiving costs or other charges of prosecutor or defendant by arresting officer before warrant returned.

(a) Any arresting officer who collects or receives any costs or other charges of a prosecutor or defendant in a case made on a state's warrant, or of anyone acting in the interest of either of them, before the warrant is returned to the court to which it is made returnable, shall be guilty of a misdemeanor.

(b) Nothing in this Code section or in Code Section 17-4-28 shall be construed as prohibiting arresting officers from receiving from prosecutors sums of money sufficient to defray their expenses in going beyond the limits of the jurisdiction of such arresting officer to search for or to make the arrest of the accused person.

History. — Ga. L. 1897, p. 98, § 2; Penal Code 1910, § 924; Code 1933, § 27-9902.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 19, 20. 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2059 et seq. 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 41 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2059 et seq. 67 C.J.S., Officers and Public Employees, § 437 et seq.

17-4-30. Arrest of hearing impaired persons.

In the event a hearing impaired person is arrested for any alleged violation of a criminal law of this state, the arresting officer shall comply with the provisions of Article 3 of Chapter 6 of Title 24.

History. — Code 1981, § 17-4-30, enacted by Ga. L. 2011, p. 99, § 27/HB 24.

Cross references. — Use of sign language and intermediary interpreter in administrative and judicial proceedings, § 24-6-650 et seq. Hearing impaired person defined, § 30-1-5.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — Am. Jur. 2d, Americans with Disabilities Act: Analysis and Implications, § 697.

ARTICLE 3

WARRANTS FOR ARREST

U.S. Code. — Arrest warrants, Federal Rules of Criminal Procedure, Rule 4. Grand juries, Federal Rules of Criminal Procedure, Rule 6.

17-4-40. Persons who may issue warrants for arrest of offenders against penal laws; warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.

(a) Any judge of a superior, city, state, or magistrate court or any municipal officer clothed by law with the powers of a magistrate may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge's or officer's own knowledge or on the information of others given to the judge or officer under oath. Any retired judge or judge emeritus of a state court may likewise issue arrest warrants if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

(b)(1) If application is made for a warrant by a person other than a peace officer or law enforcement officer and the application alleges the commission of an offense against the penal laws, the judge or other officer shall schedule a warrant application hearing as provided in this subsection unless the person accused has been taken into custody by a peace officer or law enforcement officer or except as provided in paragraph (6) of this subsection; provided, however, that a warrant may be denied without the notice required in paragraph (2) of this subsection where the application form and any testimony from the affiant provided at the time of the application do not demonstrate probable cause for issuing a warrant.

(2) Except as otherwise provided in paragraph (6) of this subsection, a warrant application hearing shall be conducted only after attempting to notify the person whose arrest is sought by any means approved by the judge or other officer which is reasonably calculated to apprise such person of the date, time, and location of the hearing.

(3) If the person whose arrest is sought does not appear for the warrant application hearing, the judge or other officer shall proceed to hear the application and shall note on the warrant application that such person is not present.

(4) At the warrant application hearing, the rules of evidence at a commitment hearing shall apply as set forth in paragraph (1) of subsection (d) of Code Section 24-1-2. The person seeking the warrant shall have the customary rights of presentation of evidence and cross-examination of witnesses. The person whose arrest is sought may cross-examine the person or persons applying for the warrant and any other witnesses testifying in support of the application at the hearing. The person whose arrest is sought may present evidence that probable cause does not exist for his or her arrest. The judge or other officer shall have the right to limit the presentation of evidence and the cross-examination of witnesses to the issue of probable cause.

(5) At the warrant application hearing, a determination shall be made whether or not probable cause exists for the issuance of a warrant for the arrest of the person whose arrest is sought. If the judge or other officer finds that probable cause exists, the warrant may issue instanter.

(6) Nothing in this subsection shall be construed as prohibiting a judge or other officer from immediately issuing a warrant for the arrest of a person upon application of a person other than a peace officer or law enforcement officer if the judge or other officer determines from the application or other information available to the judge or other officer that:

(A) An immediate or continuing threat exists to the safety or well-being of the affiant or a third party;

(B) The person whose arrest is sought will attempt to evade arrest or otherwise obstruct justice if notice is given;

(C) The person whose arrest is sought is incarcerated or otherwise in the custody of a local, state, or federal law enforcement agency;

(D) The person whose arrest is sought is a fugitive from justice;

(E) The offense for which application for a warrant is made is deposit account fraud under Code Section 16-9-20, and the person whose arrest is sought has previously been served with the ten-day notice as provided in paragraph (2) of subsection (a) of Code Section 16-9-20; or

(F) The offense for which application for the warrant is made consists of an act of family violence as defined in Code Section 19-13-1.

In the event that the judge or officer finds such circumstances justifying dispensing with the requirement of a warrant application hearing, the judge or officer shall note such circumstances on the face of the warrant application.

(7) No warrant shall be quashed nor evidence suppressed because of any irregularity in proceedings conducted pursuant to this subsection not affecting the substantial rights of the accused under the Constitution of this state or of the United States.

(8) Nothing contained in this subsection shall prohibit a judge from denying a warrant based upon the application and testimony heard at the time such application is made without requiring notice to the person whose arrest is sought.

(c) Any warrant for the arrest of a peace officer, law enforcement officer, teacher, or school administrator for any offense alleged to have been committed while in the performance of his or her duties may be issued only by a judge of a superior court, a judge of a state court, or a judge of a probate court.

History. — Orig. Code 1863, § 4595; Code 1868, § 4616; Code 1873, § 4713; Code 1882, § 4713; Penal Code 1895, § 882; Penal Code 1910, § 903; Code 1933, § 27-102; Ga. L. 1974, p. 1230, § 1; Ga. L. 1983, p. 884, § 3-17; Ga. L. 1985, p. 1105, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 2000, p. 1702, § 1; Ga. L. 2010, p. 313, § 1/HB 199; Ga. L. 2011, p. 99, § 28/HB 24.

Cross references. — Compliance with this Code section in violations of public records inspection provisions, § 50-18-74. Dismissal and return of warrants in magistrate court, Uniform Rules for the Magistrate Courts, Rule 12.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Should Georgia Change Its Misdemeanor Arrest Laws to Authorize Issuing More Field Citations? Can Alternative Arrest Process Help Alleviate Georgia's Jail Overcrowding and Reduce the Time Arresting Officers Expend Processing Nontraffic Misdemeanor Offenses?," see 22 Ga. St. U.L. Rev. 313 (2005). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 21-102 are included in the annotations for this Code section.

Oath needed to make affidavit basis of trial. — Before an alleged affidavit can become the basis of a legal proceeding it must appear that an oath was actually administered to the affiant, or that something was done by the affiant "signifying that he consciously took upon himself the obligation of an oath." J.C. Penney Co. v. Green, 108 Ga. App. 155, 132 S.E.2d 83 (1963).

Affiant's belief equivalent to swearing of facts. — Often times affiant's knowledge of matters stated in the affidavit must, of necessity, rest upon information derived from others; and when this is the case it is generally sufficient if the affiant avers that such matters are true to the best of the affiant's knowledge and belief. Belief is to be considered an absolute term in this connection; hence to swear that one believes a thing to be true is equivalent to swearing that it is true, and perjury may be assigned on such affidavit. Hutto v. State, 116 Ga. App. 140, 156 S.E.2d 498 (1967).

Signatures. — It was sufficiently clear that a reasonable officer would have understood that the affidavit or other statement that formed the basis for an arrest

warrant had to be made under oath; therefore, summary judgment as to plaintiff's 42 U.S.C. § 1983 claims against the arresting officer in the arresting officer's individual capacity was denied. Perrin v. City of Elberton, No. 3:03-CV-106 (CDL), 2005 U.S. Dist. LEXIS 13230 (M.D. Ga. July 1, 2005).

Justice of peace issuing warrant judicial act, but not act of court. — Issuing of a criminal warrant by a justice of the peace is a judicial act, the beginning of a judicial proceeding, but it is not the act of a court. Ormond v. Ball, 120 Ga. 916, 48 S.E. 383 (1904).

Mayor may issue a warrant against an ordinance violator. Williams v. Sewell, 121 Ga. 665, 49 S.E. 732 (1905).

Judge of small claims court has power to issue criminal warrants for offenses committed in that county. Bush v. Wilcox, 223 Ga. 89, 153 S.E.2d 701 (1967).

Clerk of courts can issue a warrant upon receipt of an affidavit. Wadley v. McCommon, 154 Ga. 420, 114 S.E. 357 (1922).

Deputy clerk of a city court cannot issue a warrant, even upon receipt of an affidavit. Cox v. Perkins, 151 Ga. 632, 107 S.E. 863, 16 A.L.R. 918 (1921).

Warrant application hearing not required. — Record supported a district court's decision granting summary judgment in favor of sheriff's deputies in an action an arrestee filed under 42 U.S.C. § 1983 alleging, inter alia, that the deputies violated the arrestee's constitutional rights by procuring an arrest warrant without probable cause and in violation of O.C.G.A. § 17-4-40, and using excessive force during an illegal arrest; because a deputy who obtained the arrest warrant was a law enforcement officer, the official who issued the warrant was not required to hold a preliminary warrant application hearing pursuant to § 17-4-40. Smith v. Mercer, 572 Fed. Appx. 676 (11th Cir. 2014) (Unpublished).

Arrest warrant for murder supported by probable cause. — Arrest warrant for murder was supported by probable cause as the record clearly showed that the magistrate issuing the warrant was provided the officer's affidavit and was informed by the same officer that a surviving victim had identified the appellant from a photographic line-up as one of the shooters and the appellant's identification and use of a gun during the shooting were corroborated by the facts and circumstances officers had gathered from witnesses and evidence at the scene of the shooting. Williams v. State, 298 Ga. 538, 783 S.E.2d 594 (2016).

Mandamus would not lie to compel a magistrate to issue an arrest warrant against an individual for false swearing in a notary public application when no abuse of discretion was shown. Chisholm v. Cofer, 264 Ga. 512, 448 S.E.2d 369 (1994).

When a city council member issued a warrant for a citizen's arrest for a state criminal offense the warrant was void because issuance was an unauthorized application of a city ordinance. Kelly v. City of Marietta, 253 Ga. 579, 322 S.E.2d 885 (1984).

Any citizen may procure warrant. — Procurement of an arrest warrant is not peculiar to the official duties of a peace officer. Any private citizen may do so and the procedure followed is the same. Cleland v. U.S. Fid. & Guar. Ins. Co., 99 Ga. App. 130, 107 S.E.2d 904 (1959) (decided under former Code 1933, § 21-102).

Wife accusing other woman of adultery with husband. — Wife cannot make out an affidavit, or sign an accusation, which furnishes the basis for a warrant charging another woman with adultery committed with the complainant's husband. Smith v. State, 14 Ga. App. 614, 81 S.E. 912 (1914).

Husband accusing other man of adultery with wife. — Husband is not competent to make out an affidavit to support an accusation charging another man with adultery with the first man's wife. Batchelor v. State, 41 Ga. App. 843, 155 S.E. 58 (1930).

Civil protective custody did not constitute a criminal arrest. — Custody authorized by an order to apprehend a defendant for a mental health evaluation pursuant to O.C.G.A. §§ 37-3-41(a) and 37-7-41(b) is plainly civil protective custody, not a criminal arrest, and a peace officer executing such an order does not thereby arrest the person to be examined

such that a search incident to an arrest under O.C.G.A. § 17-5-1(a) is authorized; the common thread running through statutes addressing criminal arrests such as O.C.G.A. §§ 17-4-1, 17-4-40, and 17-4-60 is that authority to make a criminal arrest arises from a determination that there is probable cause to believe the person is an offender against the Georgia penal laws, and under Georgia's Mental Health Code, by contrast, taking a person into civil custody is not an arrest of a criminal offender based on probable cause. Lindsey v. State, 282 Ga. App. 644, 639 S.E.2d 584 (2006).

Challenge to arrest warrant unwarranted. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the arrest warrant on the basis that it was not properly sworn because the record showed that the defendant was taken into custody and arrested before the warrant was issued and there was a valid, warrantless arrest of defendant, making the later-issued warrant superfluous; thus, any defect in the arrest warrant was moot, and a challenge to the arrest warrant would have been futile. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

Cited in Creamer v. State, 150 Ga. App. 458, 258 S.E.2d 212 (1979); Scott v. Dixon, 720 F.2d 1542 (11th Cir. 1983); City of Marietta v. Kelly, 169 Ga. App. 927, 315 S.E.2d 659 (1984); Sheffield v. Futch, 354 Ga. App. 661, 839 S.E.2d 294 (2020).

OPINIONS OF THE ATTORNEY GENERAL

Judges who may issue warrants to arrest peace officer. — Warrant for the arrest of a peace officer may be issued by a judge of the superior court, a judge of the state court, or a judge of the probate court, in the alternative, and the power of a probate judge to issue such a warrant is not dependent upon the absence of the superior court and state court judges from the county where the offense is alleged to have occurred. 1975 Op. Att'y Gen. No. U75-48.

Probate judges may issue arrest warrants only in certain traffic cases and for peace officers accused of any offense in the performance of the officers' duties. 1983 Op. Att'y Gen. No. U83-13.

Justice of the peace may issue warrants. — Under former Code 1933, § 27-102 (see O.C.G.A. § 17-4-40), the power of ex officio justice of the peace includes the authority to issue warrants for the arrest of offenders against the penal laws of this state. 1960-61 Op. Att'y Gen. p. 96.

Special small claims court judges and mayors may issue warrants. — Both a judge of the small claims court created under a special Act and a mayor who has the duty of seeing that the ordinances of the town are faithfully executed have the power to issue warrants for arrest. 1969 Op. Att'y Gen. No. 69-198.

Arrest warrants for persons under 17 years. — Magistrate may issue arrest warrants for persons under the age of 17. 1984 Op. Att'y Gen. No. U84-30.

Dismissal of warrant. — Arrest warrant may be dismissed by the issuing judicial officer at the request of the prosecutor prior to the warrant's execution, and need not be dismissed by the court having jurisdiction over the trial of the case. 1985 Op. Att'y Gen. No. U85-27.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 13.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 47 et seq.

17-4-41. Contents of affidavits made or warrants issued for arrest of penal offenders.

(a) An affidavit made or warrant issued for the arrest of a person who is accused of violating the penal laws of this state shall include, as nearly as practicable, the following facts:

(1) The offense, including the time, date, place of occurrence, against whom the offense was committed, and a statement describing the offense; and

(2) The county in which the offense was committed.

(b) When the offense charged is theft, the affidavit made or warrant issued shall state, in addition to the requirements of subsection (a) of this Code section, the following facts:

(1) Name of the property alleged to have been stolen, with a description thereof, including its value; and

(2) Name of the owner of the property and the person from whose possession such property was taken.

(c) It is the intent of these requirements that the accused person shall be informed of the specific charge against him and of all basic pertinent particulars pertaining thereto.

History. — Ga. L. 1865-66, p. 235, § 1; Code 1868, § 4617; Code 1873, § 4714; Code 1882, § 4714; Penal Code 1895, § 883; Penal Code 1910, § 904; Code 1933, § 27-103; Code 1933, § 27-103.1, enacted by Ga. L. 1962, p. 668, § 1.

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006).

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements for Affidavit or Warrant

General Consideration

Even if the arrest warrant is invalid, if an arrest is plainly supported by probable cause, the arrest is nonetheless legal. Roberts v. State, 252 Ga. 227, 314 S.E.2d 83, cert. denied, 469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984).

Mistake in citation of statute irrelevant. — Affidavit given in support of an arrest warrant for the defendant contained all of the required information and was valid; the fact that the affidavit mis-cited the statute that the defendant was accused of violating was irrelevant. Golden v. State, 299 Ga. App. 407, 683 S.E.2d 618 (2009), cert. denied, No. S09C1904, 2010 Ga. LEXIS 56 (Ga.), cert. denied, 560 U.S. 941, 130 S. Ct. 3358, 176 L. Ed. 2d 1250 (2010), overruled on other grounds by Collier v. State, 834 S.E.2d 769, 2019 Ga. LEXIS 708 (Ga. 2019).

Prosecutor not absolutely immune for advising police on filling out affidavit. — Prosecutor was not entitled to absolute immunity for giving legal advice to police officers on how to fill out affida-

General Consideration (Cont'd)

vits for arrest against a complainant who had sworn a warrant application against one of the officers; had the prosecutor signed the affidavit for the arrest personally, the prosecutor would not have received absolute immunity because the document would have been a sworn factual statement. Because the prosecutor's actions were not in preparation of the prosecutor's own case, were not part of the judicial process, and the prosecutor would not have received absolute immunity had the prosecutor signed the documents personally, the district court erred in granting the prosecutor absolute immunity for giving legal advice to the police. Holden v. Sticher, No. 10-14260, 2011 U.S. App. LEXIS 10499 (11th Cir. May 24, 2011) (Unpublished).

Cited in Dodson v. Grimes, 220 Ga. 269, 138 S.E.2d 311 (1964); Lovett v. State, 111 Ga. App. 295, 141 S.E.2d 595 (1965); Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967); Shaw v. Jones, 226 Ga. 291, 174 S.E.2d 444 (1970); Kametches v. State, 242 Ga. 721, 251 S.E.2d 232 (1978); Anglin v. State, 244 Ga. 1, 257 S.E.2d 513 (1979); Roth v. Carey, 159 Ga. App. 165, 282 S.E.2d 918 (1981); Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981); Pittman v. State, 175 Ga. App. 50, 332 S.E.2d 356 (1985).

Requirements for Affidavit or Warrant

Necessary information for arrest affidavit. — This section required information by way of affidavit in procuring an arrest warrant as to the offense committed, the county in which committed, the time committed and, when relevant, the person against whom the offense is committed. Nicholson v. United States, 355 F.2d 80 (5th Cir.), cert. denied, 384 U.S. 974, 86 S. Ct. 1866, 16 L. Ed. 2d 684 (1966).

Affidavits and warrants must comply with statutory information standard. — This section omitted the "substantial compliance" language formerly used and, hence, requires compliance of affidavits and warrants with the statutory standard of required information. Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

Probable cause is not required for issuance of arrest warrant. Davis v. State, 155 Ga. App. 511, 271 S.E.2d 648 (1980).

Probable cause not applicable to arrest warrants. — Probable cause requirements of an affidavit on which a search warrant is issued are not applicable to arrest warrants. Smith v. Stynchcombe, 234 Ga. 780, 218 S.E.2d 63 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 882, 47 L. Ed. 2d 99 (1976).

Because the defendant was lawfully arrested pursuant to the fifth warrant for the crime of armed robbery, and the warrant was sworn to, signed, and executed, the defendant's arrest was not illegal, and the defendant's fingerprints were not subject to exclusion; moreover, there was no requirement in Georgia that an arrest warrant had to meet the probable cause requirements of an affidavit for a search warrant. Skaggs-Ferrell v. State, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Arrest legal when affidavit meets statutory requirements. — When affidavit serving as basis for arrest warrant issued against the defendant satisfies the statutory requirements of O.C.G.A. §§ 17-4-41 and 17-4-45, an arrest is not illegal and confessions obtained as the product of such affidavit and arrest are not tainted evidence. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Warrant affidavit complying with O.C.G.A. § 17-4-41 is not alone sufficient to demonstrate the validity of an arrest warrant because probable cause must still be shown to the issuing magistrate. Devier v. State, 253 Ga. 604, 323 S.E.2d 150 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

All that is required for issuance of an arrest warrant is an affidavit stating the offense; the time, date, and place of occurrence of the offense; the person against whom such offense was committed; and a statement describing the offense, or offenses. Davis v. State, 155 Ga. App. 511, 271 S.E.2d 648 (1980).

Affidavit must give sufficient information. — Substantial compliance with

the provisions of former Penal Code 1910, §§ 904 and 906 (see O.C.G.A. §§ 17-4-41 and 17-4-46) with reference to affidavits and warrants for the arrest of offenders against the penal laws, and the form of such warrants, was all that was required. Kumpe v. Hall, 167 Ga. 284, 145 S.E. 509 (1928).

Affidavit in support of a battery defendant's arrest was sufficient since the affidavit stated that the defendant committed the battery at a given time, date, and place, and the affidavit stated that the defendant intentionally caused physical harm to the victim by choking and hitting the victim with the defendant's fists. Dunn v. State, 234 Ga. App. 623, 507 S.E.2d 170 (1998).

Requirements for affidavits satisfied. — Defendant's plea counsel did not render ineffective assistance of counsel by failing to challenge the legality of arrest warrants because all four of the supporting affidavits unquestionably satisfied the requirements of O.C.G.A. § 17-4-41(a), and based on the information provided in the supporting affidavits, the officer in the case supplied the issuing magistrate with sufficient information to support an independent finding that probable cause existed for the issuance of the warrants; the defendant failed to demonstrate that the defendant's plea counsel's failure to challenge the legality of the warrants prejudiced the defendant because even if counsel had challenged the warrants and was able to suppress any inculpatory statement the defendant made, there was nothing to suggest that the defendant's guilty plea resulted from such a statement. Murray v. State, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Only name of offense necessary, not details. — Under the former provisions of this section, it was only necessary to name the offense committed by the defendant, in the affidavit and warrant, and it was not necessary to set out the facts which constitute the offense. McAlpin v. Purse, 86 Ga. 271, 12 S.E. 412 (1890); Brown v. State, 109 Ga. 570, 34 S.E. 1031 (1900); Tollison v. George, 153 Ga. 612, 112 S.E. 896 (1922).

Affidavit naming crime and warrant citing "misdemeanor." — When an affidavit upon which a criminal warrant was founded stated that the accused did commit the offense of a misdemeanor by disposing of a radio upon which another held mortgage, and the warrant stated that the accused "did commit the offense of misdemeanor," the affidavit and warrant were sufficient to charge a crime. Cain v. Kendrick, 199 Ga. 147, 33 S.E.2d 417, answer conformed to, 72 Ga. App. 392, 33 S.E.2d 883 (1945).

Affidavit need only give date and county of crime. — This section did not require the exact time of day or the specific location in the county to be given. It was sufficient to state the date the alleged offense was committed and the county in which the offense allegedly occurred. Courtenay v. Randolph, 125 Ga. App. 581, 188 S.E.2d 396 (1972); Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974).

Warrant void without time and place of offense. — Warrant that does not allege when or where the crime was committed is void. Thorpe v. Wray, 68 Ga. 359 (1882).

Omitting time does not invalidate warrant. — Failure to state the time of commission is a mere technical defect and does not void the warrant. Courtenay v. Randolph, 125 Ga. App. 581, 188 S.E.2d 396 (1972); Thompson v. State, 142 Ga. App. 888, 237 S.E.2d 419, rev'd on other grounds, 240 Ga. 296, 240 S.E.2d 87 (1977).

Standard accusation form sufficient with affidavit for arrest. — Standard printed affidavit and accusation form, accompanied by a previously prepared affidavit for arrest, is legally sufficient. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

No arrest affidavit on record makes standard accusation insufficient. — Standard printed affidavit and accusation form is insufficient when no affidavit for arrest is included in the record. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Merely charging "misdemeanor" insufficient. — Accusation supported only by an affidavit charging the commission of a "misdemeanor" and not naming the specific offense is legally insufficient. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Requirements for Affidavit or Warrant (Cont'd)

Misdemeanor accusation did not have to be based on arrest warrant. — There was no merit to a defendant's argument that reversal of the defendant's theft by deception conviction was required because the arrest warrant was not supported by a sufficient affidavit under O.C.G.A. § 17-4-41. Because the defendant had not identified any evidence obtained as a result of the arrest, a new trial was not required; moreover, a misdemeanor accusation did not have to be based on an arrest warrant. Bruster v. State, 291 Ga. App. 490, 662 S.E.2d 265 (2008).

Accusation incorporated by reference not sufficient. — Affidavit which sets forth only that the defendant has committed the offense of misdemeanor and purports to incorporate by reference the substance of an accusation does not serve as the basis for an accusation and does not comport with this section. Bickley v. State, 150 Ga. App. 669, 258 S.E.2d 306 (1979).

Additional information needed if reliance on informer. — If reliance under this section was based on an informer, the affidavit submitted must contain sufficient facts to show: (1) reasons for the informer's reliability; (2) that the affidavit either specifically states how the informant obtained the informant's information or describes the alleged criminal activity in such detail that the magistrate may know that it is more than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation; and (3) that the information is not stale. Dailey v. State, 136 Ga. App. 866, 222 S.E.2d 682 (1975).

Counsel found ineffective when affidavits deficient. — Defendant's trial counsel was ineffective after counsel failed to make minimal inquiries which would have revealed that the arrest of the defendant was predicated on warrants issued without any showing of probable cause before the issuing magistrate; the warrants for defendant's arrest were apparently issued solely on the basis of the attached affidavits which, although satisfying the requirements of O.C.G.A. § 17-4-41, did not supply the magistrate with sufficient judgment that probable cause existed for the issuance of the warrants. Pitts v. State, 209 Ga. App. 47, 432 S.E.2d 643 (1993).

Remedies for unjustified arrest. — If the plaintiff was arrested under a void warrant, the action is for false imprisonment; if the warrant is valid, malicious prosecution is the remedy. Courtenay v. Randolph, 125 Ga. App. 581, 188 S.E.2d 396 (1972).

Verbal error not fatal if affidavit upholds warrant. — Mere verbal inaccuracy will not, if the meaning is clear, vitiate an affidavit or warrant, but the affidavit must uphold the warrant. Dickson v. State, 62 Ga. 583 (1879).

For larceny (now theft) affidavit held sufficient in city court trial, see Taylor v. State, 120 Ga. 484, 48 S.E. 158 (1904).

For misdemeanor properly charged in affidavit, see Williams v. State, 107 Ga. 693, 33 S.E. 641 (1899).

For proper allegation of assault with intent to murder, see Sasser v. McDaniel, 73 Ga. 547 (1884).

Arrest warrant for murder supported by probable cause. — Arrest warrant for murder was supported by probable cause as the record clearly showed that the magistrate issuing the warrant was provided the officer's affidavit and was informed by the same officer that a surviving victim had identified the appellant from a photographic line-up as one of the shooters and the appellant's identification and use of a gun during the shooting was corroborated by the facts and circumstances officers had gathered from witnesses and evidence at the scene of the shooting. Williams v. State, 298 Ga. 538, 783 S.E.2d 594 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Signature in presence of magistrate. — Affidavit which is prepared to support an accusation must be signed by the arresting officer in the presence of a

magistrate or anyone else who has authority to issue criminal warrants. 1980 Op. Att'y Gen. No. U80-2.

Multiple criminal charges in single warrant. — At the present time, multiple criminal charges may be contained on a single arrest warrant provided that the requirements of O.C.G.A. § 17-4-41 are met and that the affidavit contains probable cause as to any charge alleged in the warrant. 1986 Op. Att'y Gen. No. U86-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 10 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 18 et seq. 98 C.J.S., Witnesses, § 778.

ALR. — Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

Electrical energy, gas, water, heat, power as subject of larceny, 113 A.L.R. 1282.

17-4-42. Issuance of special warrants for arrest; treatment of special warrants as general arrest warrants.

No judicial officer except a judge of the superior court shall issue a special warrant for arrest returnable only before himself; nor shall any superior court judge issue such warrant outside of his own judicial circuit. If issued outside the judicial circuit, the warrant shall be treated as a general arrest warrant.

History. — Orig. Code 1863, § 4598; Code 1868, § 4620; Code 1873, § 4717; Code 1882, § 4717; Penal Code 1895, § 886; Penal Code 1910, § 907; Code 1933, § 27-106.

JUDICIAL DECISIONS

Justice of the peace cannot issue a special warrant. Ormond v. Ball, 120 Ga. 916, 48 S.E. 383 (1904).

Cited in Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940).

OPINIONS OF THE ATTORNEY GENERAL

Justice of peace cannot order commitment hearing when arresting officer sets bond. — Since a justice of the peace cannot issue a special warrant for arrest returnable only to the justice, it follows that the justice cannot order a commitment hearing when the arresting officer has purported to personally set the bond. 1970 Op. Att'y Gen. No. U70-152.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, §§ 8 et seq., 10 et seq., 20 et seq., 23 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 185 et seq.

17-4-43. Requirement by judicial officer of bond to prosecute.

The judicial officer issuing a warrant for arrest upon any sufficient grounds may first require the applicant to file a bond, with sufficient sureties, to prosecute the case in the event of a committal.

History. — Orig. Code 1863, § 4600; Code 1868, § 4622; Code 1873, § 4719; Code 1882, § 4719; Penal Code 1895, § 887; Penal Code 1910, § 908; Code 1933, § 27-107.

Cross references. — Bonds and recognizances generally, T. 17, C. 6.

JUDICIAL DECISIONS

Cited in Cox v. Perkins, 151 Ga. 632, 107 S.E. 683, 16 A.L.R. 918 (1921).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 13 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 47 et seq.

17-4-44. Warrants may be issued in any county; execution of warrants without backing or endorsement of judicial officer in county where warrant is executed.

A warrant for arrest may be issued in any county, though the crime was committed in another county. A warrant, once issued, may be executed in any county without being backed or endorsed by a judicial officer in the county where the warrant is executed.

History. — Orig. Code 1863, § 4601; Ga. L. 1865-66, p. 38, §§ 1, 3; Code 1868, § 4623; Code 1873, § 4720; Code 1882, § 4720; Penal Code 1895, § 888; Penal Code 1910, § 909; Code 1933, § 27-108.

JUDICIAL DECISIONS

Invalidity of extraterritorial warrants. — Under O.C.G.A. § 17-4-44, Georgia arrest warrants were invalid because the warrants were executed in Florida, outside of the territorial jurisdiction of the issuing court; thus, the warrants did not insulate a Georgia sheriff's deputy from liability from a Florida resident's false imprisonment and Georgia state law claims under 42 U.S.C. § 1983. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Cited in Payton v. Green, 179 Ga. App. 438, 346 S.E.2d 884 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Probate judge may issue arrest warrant for absent traffic violators. — Judge of the probate court does not have authority to issue a bench warrant, but the judge does have authority to issue an arrest warrant for a person who does not appear to answer a traffic violation citation issued to the person, regardless of

whether the person resides in or out of the respective county. 1975 Op. Att'y Gen. No. U75-65.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 27 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 18 et seq.

ALR. — Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

17-4-45. Form of affidavit for arrest warrant.

An affidavit for an arrest warrant substantially complying with the following form shall in all cases be sufficient:

Georgia, _____ County.

Personally came (name of affiant), who on oath says that, to the best of his knowledge and belief, (name of person against whom the warrant is sought) did, on the _____ day of _____, _____, in the county aforesaid, commit the offense of (insert here all information describing offense as required by Code Section 17-4-41) and this affiant makes this affidavit that a warrant may issue for his arrest.

_____

(Signature of the affiant)

Sworn to and subscribed before me, this _____ day of _____, _____.

_____

Judicial officer

History. — Orig. Code 1863, § 4596; Code 1868, § 4618; Code 1873, § 4715; Code 1882, § 4715; Penal Code 1895, § 884; Penal Code 1910, § 905; Code 1933, § 27-104; Ga. L. 1982, p. 3, § 17; Ga. L. 1999, p. 81, § 17.

JUDICIAL DECISIONS

Analysis

General Consideration
Requirements for Affidavit

General Consideration

Any citizen may procure arrest warrant. — Procurement of an arrest warrant is not peculiar to the official duties of a peace officer. Any private citizen may do so and the procedure followed is the same. Cleland v. U.S. Fid. & Guar. Ins. Co., 99 Ga. App. 130, 107 S.E.2d 904 (1959).

Mistake in citation of statute was irrelevant. — Affidavit given in support of an arrest warrant for the defendant contained all of the required information and was valid; the fact that the affidavit mis-cited the statute that the defendant was accused of violating was irrelevant. Golden v. State, 299 Ga. App. 407, 683 S.E.2d 618 (2009), cert. denied, No.

General Consideration (Cont'd)

S09C1904, 2010 Ga. LEXIS 56 (Ga.), cert. denied, 560 U.S. 941, 130 S. Ct. 3358, 176 L. Ed. 2d 1250 (2010), overruled on other grounds by Collier v. State, 834 S.E.2d 769, 2019 Ga. LEXIS 708 (Ga. 2019).

Cited in Dodson v. Grimes, 220 Ga. 269, 138 S.E.2d 311 (1964); Lovett v. State, 111 Ga. App. 295, 141 S.E.2d 595 (1965); Hutto v. State, 116 Ga. App. 140, 156 S.E.2d 498 (1967); Shaw v. Jones, 226 Ga. 291, 174 S.E.2d 444 (1970); Roth v. Carey, 159 Ga. App. 165, 282 S.E.2d 918 (1981).

Requirements for Affidavit

Complete statutory information required on affidavits and warrants. — This section omits the "substantial compliance" language formerly used and, hence, requires compliance of affidavits and warrants with the statutory standard of required information. Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

Only information required on affidavit for warrant. — In procuring an arrest warrant, this section required an affidavit containing information as to the offense committed, the county in which committed, the time committed and, when relevant, the person against whom the offense was committed. Nicholson v. United States, 355 F.2d 80 (5th Cir.), cert. denied, 384 U.S. 974, 86 S. Ct. 1866, 16 L. Ed. 2d 684 (1966).

All that is required for issuance of an arrest warrant is an affidavit stating the offense; the time, date and place of occurrence of the offense; the person against whom such offense was committed; and a statement describing the offense, or offenses. Davis v. State, 155 Ga. App. 511, 271 S.E.2d 648 (1980).

Arrest legal when affidavit meets statutory requirements. — When affidavit serving as basis for arrest warrant issued against the defendant satisfies statutory requirements of O.C.G.A. §§ 17-4-41 and 17-4-45, arrest is not illegal and confessions obtained as the product of such affidavit and arrest are not tainted evidence. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Standard accusation form sufficient with affidavit for arrest. — Standard printed affidavit and accusation form, accompanied by a previously prepared affidavit for arrest, is legally sufficient. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Arrest affidavit on record. — Standard printed affidavit and accusation form is insufficient when no affidavit for arrest is included in the record. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Affidavit not specifying crime insufficient. — Accusation supported only by an affidavit charging the commission of a "misdemeanor" and not naming the specific offense is legally insufficient. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Probable cause is not required for issuance of arrest warrant. Davis v. State, 155 Ga. App. 511, 271 S.E.2d 648 (1980).

Georgia law imposes no requirements for probable cause evidentiary facts in the affidavits; insofar as the Fourth Amendment to the United States Constitution imposes a requirement of probable cause, a determination as to such prerequisite may be made based upon oral testimony independent of written information contained in an affidavit. Ayers v. State, 181 Ga. App. 244, 351 S.E.2d 692 (1986).

Affidavit for warrant sufficient although founded on belief. — Affidavit made to secure the issuance of a warrant for the arrest of an offender against the penal laws is sufficient when the affidavit is founded on knowledge or belief. Dobbs v. Anderson, 170 Ga. 826, 154 S.E. 342 (1930).

If positive evidence, no grounds for release of prisoner. — If the affidavit is positive on its face, it is no ground for discharge of the prisoner that evidence shows that the affidavit was founded on information and belief, especially when evidence of a positive character tends to establish the guilt of the prisoner. Dobbs v. Anderson, 170 Ga. 826, 154 S.E. 342 (1930).

Affidavit not sworn before officer authorized to administer oath is void. Thorpe v. Wray, 68 Ga. 359 (1882); Cox v. Perkins, 151 Ga. 632, 107 S.E. 863, 16 A.L.R. 918 (1921).

Subornation of perjury could be predicated upon the affidavit prescribed by this section. Herring v. State, 119 Ga. 709, 46 S.E. 876 (1904).

OPINIONS OF THE ATTORNEY GENERAL

Valid warrant for arrest of probation violator must be accompanied by an affidavit, and to be valid the affidavit must be sworn to under oath and signed by the affiant. 1981 Op. Att'y Gen. No. 81-99.

Affiant need not have personal knowledge of information to which the affiant swears when executing affidavit under O.C.G.A. § 42-8-38 for arrest of probation violator. 1981 Op. Att'y Gen. No. 81-99.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, §§ 13 et seq., 17 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 18 et seq.

17-4-46. Form of warrant for arrest.

An arrest warrant substantially complying with the following form shall in all cases be sufficient:

Georgia, _____ County.

To any sheriff, deputy sheriff, coroner, constable, or marshal of said state — Greetings:

(Name of the affiant) makes oath before me that on the _____ day of _____, in the year _____, in the county aforesaid, (name of person against whom the warrant is sought) did commit the offense of (insert here all information describing offense as required by Code Section 17-4-41). You are therefore commanded to arrest (name of person against whom the warrant is sought) and bring him before me, or some other judicial officer of this state, to be dealt with as the law directs. You will also levy on a sufficiency of the property of (name of person against whom the warrant is sought) to pay the costs in the event of his final conviction. Herein fail not.

_____

Judicial officer

History. — Orig. Code 1863, § 4597; Code 1868, § 4619; Code 1873, § 4716; Code 1882, § 4716; Penal Code 1895, § 885; Penal Code 1910, § 906; Code 1933, § 27-105; Ga. L. 1962, p. 668, § 3; Ga. L. 1999, p. 81, § 17.

JUDICIAL DECISIONS

Affidavits and warrants must provide all information statute requires. — This section omitted the "substantial compliance" language formerly used and, hence, required compliance of affidavits and warrants with the statutory standard

of required information. Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

Evidence needed that affiant gave oath or equivalent. — This section provided for a showing that something was done by the affiant signifying that the affiant consciously took upon the affiant the obligation of an oath. Segars v. Cornwell, 128 Ga. App. 245, 196 S.E.2d 341 (1973).

Standard accusation form sufficient with affidavit for arrest. — Standard printed affidavit and accusation form, accompanied by a previously prepared affidavit for arrest, is legally sufficient. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

No arrest affidavit on record makes standard accusation form insufficient. — Standard printed affidavit and accusation form is insufficient when no affidavit for arrest is included in the record. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Accusation failing to name crime. — Accusation supported only by an affidavit charging the commission of a "misdemeanor" and not naming the specific offense is legally insufficient. Faulkner v. State, 146 Ga. App. 604, 247 S.E.2d 147 (1978).

Cited in Dodson v. Grimes, 220 Ga. 269, 138 S.E.2d 311 (1964); Lovett v. State, 111 Ga. App. 295, 141 S.E.2d 595 (1965); Shaw v. Jones, 226 Ga. 291, 174 S.E.2d 444 (1970).

OPINIONS OF THE ATTORNEY GENERAL

Valid warrant for arrest of probation violator must be accompanied by an affidavit, and to be valid the affidavit must be sworn to under oath and signed by the affiant. 1981 Op. Att'y Gen. No. 81-99.

Application to affidavit for arrest of probation violator. — Although O.C.G.A. § 42-8-38, pertaining to the arrest of a probation violator, does not state that personal knowledge of the affiant is required, an analogy may be made to general arrest warrants, which do not require the affiant to have personal knowledge. 1981 Op. Att'y Gen. No. 81-99.

Warrant may levy arrestee's property to pay on costs if convicted. — Arrest warrant can contain directions to the arresting officer to levy on a sufficiency of the property of the arrested party to pay the costs in the event of the party's final conviction. 1967 Op. Att'y Gen. No. 67-357.

Levy is optional with judge. — Legislative intent was to make the provision for the levying on the property of the arrested party in order to pay costs an optional provision to be left to the discretion of the judicial body from which the warrant originated. 1967 Op. Att'y Gen. No. 67-357.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 10 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 47 et seq.

17-4-47. Issuance of warrants by video conference; testimony; initial bond hearings; oaths.

(a) A judge of any court in this state authorized to issue arrest warrants pursuant to Code Section 17-4-40 may, as an alternative to other laws relating to the issuance of arrest warrants, conduct such applications for the issuance of arrest warrants by video conference. The issuance of an arrest warrant by video conference shall be valid irrespective of the physical location of the judge at the time of the video

conference, provided that the judge issuing the warrant is authorized by law to issue such warrant, and, at the time such warrant is issued, he or she is physically located within this state.

(b) Arrest warrant applications heard by video conference shall be conducted in a manner to ensure that the judge conducting the hearing has visual and audible contact with all affiants and witnesses giving testimony.

(c) The affiant participating in an arrest warrant application by video conference shall sign the affidavit for an arrest warrant and any related documents by any reasonable means which identifies the affiant, including, but not limited to, his or her typewritten name, signature affixed by electronic stylus, or any other reasonable means which identifies the person signing the affidavit and any related documents. The judge participating in an arrest warrant application by video conference shall sign the affidavit for an arrest warrant, the arrest warrant, and any related documents by any reasonable means which identifies the judge, including, but not limited to, his or her typewritten name, signature affixed by electronic stylus, or any other reasonable means which identifies the judicial officer signing the affidavit and warrant and any related documents. Such authorization shall be deemed to comply with the signature requirements provided for in Code Sections 17-4-45 and 17-4-46.

(d) A judge may also utilize a video conference to conduct hearings relating to the issuance of an initial bond connected with an offense for which an arrest warrant is issued, provided that the setting of such bond is within the jurisdiction of that court.

(e) A judge hearing matters pursuant to this Code section shall administer an oath to any person testifying by means of a video conference.

History. — Code 1981, § 17-4-47, enacted by Ga. L. 1998, p. 872, § 1; Ga. L. 1999, p. 81, § 17; Ga. L. 2008, p. 324, § 17/SB 455; Ga. L. 2013, p. 584, § 1/HB 146.

RESEARCH REFERENCES

ALR. — Constitutional and statutory validity of judicial videoconferencing, 115 A.L.R.5th 509.

ARTICLE 4

ARREST BY PRIVATE PERSONS

Cross references. — Immunity from criminal liability of persons rendering assistance to law enforcement officers, § 16-3-22.

17-4-60. Grounds for arrest.

A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.

History. — Orig. Code 1863, § 4604; Code 1868, § 4627; Code 1873, § 4724; Code 1882, § 4724; Penal Code 1895, § 900; Penal Code 1910, § 921; Code 1933, § 27-211.

Cross references. — Applicability of section to private detectives and private security agents, § 43-38-13.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

Analysis

General Consideration
Offense Committed in Presence or Within Knowledge
Escaped Felons

General Consideration

During emergency, citizen protected by law. — Private citizen has quite as much power to arrest a fugitive felon, when the emergency calls for immediate action, as a public officer, and while so doing, is equally under the protection of the law. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

Arrest to prevent felony. — Private person has the right to arrest under certain circumstances in order to prevent a felony from being committed, which felony has not yet been attempted. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

Apprehension for felony must be only to bring criminal to magistrate. — When a felony has been committed, a private person acting upon a reasonable and probable ground of suspicion may apprehend a suspect without a warrant, but it is only for the purpose of taking the offender before a magistrate. The suspect may be taken and detained until the suspect can be committed to the custody of the law. Croker v. State, 114 Ga. App. 492, 151 S.E.2d 846 (1966).

Warrantless detention by a private person amounts to a false imprisonment unless the detention comes within certain specific exceptions listed in this section. McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971).

To avoid liability for false imprisonment, it must be shown not only that the arrest was valid but also that the arresting officer had probable cause to believe the charged offense had been committed. Amason v. Kroger Co., 204 Ga. App. 695, 420 S.E.2d 314 (1992).

In a false imprisonment case, the existence of probable cause standing alone is not a complete defense because, even if probable cause to believe a crime has been committed exists, a warrantless arrest would still be illegal unless the arrest was accomplished pursuant to one of the "exigent circumstances" applicable to law enforcement officers enumerated in O.C.G.A. § 17-4-20 or applicable to private persons as set forth in O.C.G.A. § 17-4-60. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

Citizen's arrest not valid defense to offense of false imprisonment. — Trial evidence showed that the defendant confined the victim in the bedroom without lawful authority. In light of the defendant's testimony that the victim had not been confined at all, trial counsel was not ineffective in failing to pursue jury in-

structions based on an inconsistent theory that the defendant had in fact confined the victim, but was legally authorized to do so. Smith v. State, 314 Ga. App. 583, 724 S.E.2d 885 (2012).

Citizen holding offender four days after violation. — Private citizen who forcibly detained a man on the grounds that he had indecently exposed himself to the victim four days previously, when the arrest did not occur until four days after the alleged offense, was guilty of falsely imprisoning the plaintiff. McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971).

Civil protective custody did not constitute a criminal arrest. — Custody authorized by an order to apprehend a defendant for a mental health evaluation pursuant to O.C.G.A. §§ 37-3-41(a) and 37-7-41(b) is plainly civil protective custody, not a criminal arrest, and a peace officer executing such an order does not thereby arrest the person to be examined such that a search incident to an arrest under O.C.G.A. § 17-5-1(a) is authorized; the common thread running through statutes addressing criminal arrests such as O.C.G.A. §§ 17-4-1, 17-4-40, and 17-4-60 is that authority to make a criminal arrest arises from a determination that there is probable cause to believe the person is an offender against the Georgia penal laws, and under Georgia's Mental Health Code, by contrast, taking a person into civil custody is not an arrest of a criminal offender based on probable cause. Lindsey v. State, 282 Ga. App. 644, 639 S.E.2d 584 (2006).

Use of unreasonable force. — Although a private person may make a citizen's arrest under O.C.G.A. § 17-4-60, only force that is reasonable under the circumstances may be used to restrain the individual arrested; an alleged assault of an individual with a baseball bat entailed unreasonable force and could not have been part of a legitimate citizen's arrest. Carter v. State, 269 Ga. 891, 506 S.E.2d 124 (1998).

In defendant's trial on a charge of felony murder, defense counsel was not ineffective for failing to request an instruction on citizen's arrest under O.C.G.A. § 17-4-60 as the defendant used more force than was reasonable in making such an arrest when the defendant shot an intruder through the wall of a storage building. Patel v. State, 279 Ga. 750, 620 S.E.2d 343 (2005).

Arrester has burden to deny tort if no warrant. — Whoever arrests a person without a warrant is guilty of a tort, unless the person can justify under one of the exceptions prescribed by law; and the burden of proof that the case lies within the exception rests upon the person making the arrest. Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51 (1911).

Innocent party shot by arresting party. — Private citizen, who in arresting a person, kills an innocent bystander, is guilty of a tort, unless the arresting party can justify actions under one of the exceptions prescribed by law; and the burden of proof that the case lies within the exception rests upon the person making the arrest. Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51 (1911).

Arrest for murder three years after its commission, see Snelling v. State, 87 Ga. 50, 13 S.E. 154 (1891).

Warrant by private person insufficient. — Mere possession of a warrant does not authorize a private person to arrest the person named therein. Coleman v. State, 121 Ga. 594, 49 S.E. 716 (1905).

No mandamus since citizen's arrest legal remedy. — When the petitioners seek mandamus to compel the mayor, aldermanic board, and sheriff to enforce laws regulating sale of liquor, mandamus is an improper remedy since the law provides for a citizen's arrest of the offenders or for the issuance of a warrant upon complaint by the citizen for the arrest of the violators. Mandamus will not lie if there is an adequate legal remedy. Solomon v. Brown, 218 Ga. 508, 128 S.E.2d 735 (1962).

Citizen's or warrantless arrest for distilling liquor. — See Williams v. State, 148 Ga. 310, 96 S.E. 385 (1918).

Difference between arrest of escaped felons and recapture of property. — See Drew v. State, 136 Ga. 658, 71 S.E. 1108 (1911).

Sheriff without warrant may seize illegal property in public place. — Sheriff may seize unlawfully kept prop-

General Consideration (Cont'd)

erty without a warrant for search, seizure, or arrest of the offender when the sheriff lawfully enters a place of business open to the sheriff as well as other members of the public under an implied invitation to enter, and finds "slot machines" illegally kept by the owner or operator of such place of business. But these powers would not authorize search of private premises of the owner to find slot machines, in the absence of a warrant. Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622 (1942).

Failure of officer to disclose the officer's position places the officer in the same position as a private person when attempting an arrest. Franklin v. Amerson, 118 Ga. 860, 45 S.E. 698 (1903).

Distinctions between arrests by private persons and officers. — See Delegal v. State, 109 Ga. 518, 35 S.E. 105 (1900).

Citizen's arrest by officer outside officer's jurisdiction. — Defendant's admission that the defendant was driving in violation of the law was sufficient to justify an officer, then outside the officer's jurisdiction, to act as a private person and effect a citizen's arrest. Glazner v. State, 170 Ga. App. 810, 318 S.E.2d 233 (1984), but see Zilke v. State, 2016 Ga. LEXIS 422 (Ga. 2016).

Uniformed off-duty officer. — Off-duty officer was treatable as a private citizen vested with the authority to make a citizen's arrest for a battery committed in the officer's presence. Wells v. State, 206 Ga. App. 513, 426 S.E.2d 231 (1992), overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019).

Charge held harmless. — If the arrest was made without a warrant, and the only basis for the arrest without a warrant was that the crime was being committed in the presence of the person making the arrest, whether the defendant acted as an officer or as a private citizen was immaterial, since the officer's authority as either was the same; therefore, the charge injecting this issue in the case could not have been confusing to the jury or harmful to the defendant. Atlantic Coast Line R.R. v. Wegner, 90 Ga. App. 267, 83 S.E.2d 58 (1954).

Grounds for suspicion of burglary question for jury. — What are reasonable and probable grounds for suspicion is for the determination of the jury as is whether the circumstantial evidence was sufficient to establish the commission of a burglary. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

Unreasonable attempt to arrest with unlicensed semi-automatic weapon. — There was no evidence that the defendant, who murdered the victim with a rifle, was attempting to effect a valid citizen's arrest and, hence, the defendant was not entitled to an involuntary manslaughter charge. It was not reasonable for the defendant to attempt an arrest with a semi-automatic weapon which the defendant was not licensed to carry as deadly force in effecting an arrest is limited to self-defense or to a situation in which it is necessary to prevent a forcible felony. Hayes v. State, 261 Ga. 439, 405 S.E.2d 660 (1991).

Cited in Taylor v. State, 44 Ga. App. 64, 160 S.E. 667 (1931); Walker v. State, 46 Ga. App. 824, 169 S.E. 315 (1933); Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940); Mullis v. State, 196 Ga. 569, 27 S.E.2d 91 (1943); Goodwin v. Allen, 89 Ga. App. 187, 78 S.E.2d 804 (1953); Raif v. State, 219 Ga. 649, 135 S.E.2d 375 (1964); O'Neal v. United States, 411 F.2d 131 (5th Cir. 1969); Traylor v. State, 127 Ga. App. 409, 193 S.E.2d 876 (1972); Luke v. State, 131 Ga. App. 799, 207 S.E.2d 213 (1974); Tomblin v. S.S. Kresge Co., 132 Ga. App. 212, 207 S.E.2d 693 (1974); Cash v. State, 136 Ga. App. 149, 221 S.E.2d 63 (1975); Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975); Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984); De La Gonzalez v. Krystal Co., 173 Ga. App. 574, 327 S.E.2d 546 (1985); City of Marietta v. Kelly, 175 Ga. App. 416, 334 S.E.2d 6 (1985); Thompson v. State, 175 Ga. App. 645, 334 S.E.2d 312 (1985); Winn-Dixie Stores, Inc. v. Nichols, 205 Ga. App. 308, 422 S.E.2d 209 (1992); Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006); Ferrell v. Mikula, 295 Ga. App.

326, 672 S.E.2d 7 (2008).

Offense Committed in Presence or Within Knowledge

Citizen's duty to arrest during or after crime. — It is not only the right but the duty of a private citizen when a felony is committed to apprehend the felon; and, after a felony is committed, any private person may arrest the felon upon reasonable and probable ground of suspicion of a felon's guilt. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

Admission of offense by defendant. — Offense is within the presence of the arresting party when, although the arresting party cannot be cognizant of the offense by means of the arresting party's senses, the defendant actually admits that the offense is in fact being so committed. Moore v. State, 128 Ga. App. 20, 195 S.E.2d 275 (1973).

Admission of an offense by an accused to the arresting party is tantamount to the commission of the offense in the presence of the party making the arrest. Young v. State, 238 Ga. 548, 233 S.E.2d 750 (1977).

"Presence" and "knowledge" synonymous. — Words "in his presence" in former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) and "within his immediate knowledge" as used in the former provisions (see O.C.G.A. § 17-4-60) were synonymous. Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51 (1911); Novak v. State, 130 Ga. App. 780, 204 S.E.2d 491 (1974); Forehand v. State, 130 Ga. App. 801, 204 S.E.2d 516 (1974).

Crime known by senses is within knowledge. — Phrases "in his presence" and "within his immediate knowledge" are synonymous and a crime is committed in one's presence if by the exercise of any of the person's senses the person has knowledge of the crime's commission. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

Presence or knowledge determine arrest legality. — Whether an arrest by a private citizen is lawful depends on whether the offense was committed in the person's presence or within the person's immediate knowledge. Walker v. State, 144 Ga. App. 838, 242 S.E.2d 753 (1978).

Arrest must immediately follow misdemeanor in presence. — Private person may make an arrest for a misdemeanor offense only when that offense occurs in the person's presence and, moreover, the arrest must occur immediately after the perpetration of the offense. McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971); Williams v. State, 171 Ga. App. 807, 321 S.E.2d 386 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 966, 83 L. Ed. 2d 970 (1985).

No citizen's arrest for city ordinance violation. — Since former Penal Code 1910, § 921 (see O.C.G.A. § 17-4-60) was a codification of preexisting law, that statute did not authorize a private person to arrest another for a violation of a municipal ordinance committed in the person's presence when the act does not constitute a felony or a misdemeanor. Graham v. State, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

Sheriff may arrest without warrant for crime committed in presence. — Like other police officers or private persons, a sheriff has the power to arrest an offender without a warrant if the offense is committed in the sheriff's presence. Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622 (1942).

Private detective may arrest. — Private detective may arrest offenders who commit crimes in the detective's presence. DuPre v. State, 153 Ga. 798, 113 S.E. 428 (1922).

Night watchman may arrest. — A night watchman of a railroad may arrest offenders who commit crimes in the watchman's presence. Hickman v. State, 142 Ga. 630, 83 S.E. 508 (1914).

Railroad officer may arrest. — Officer of a railroad with probable cause may arrest a person to prevent the person from stealing a ride and use reasonable means to prevent the person's escape. Summers v. Southern Ry., 118 Ga. 174, 45 S.E. 27 (1903).

Evidence of lawful arrest. — When the defendant's shoplifting offense was committed in the presence of the food manager, and within the immediate knowledge of the store manager, both were authorized by law to arrest the defendant, and the trial court did not err in

Offense Committed in Presence or Within Knowledge (Cont'd)

refusing to give requested jury instructions regarding the unlawful arrest by a private person and defendant's alleged right to use force to resist the attempted arrest. Merneigh v. State, 242 Ga. App. 735, 531 S.E.2d 152 (2000).

Charge held harmless. — When the arrest was made without a warrant, and the only basis for the arrest without a warrant was that the crime was being committed in the presence of the person making the arrest, whether the defendant acted as an officer or as a private citizen was immaterial, since the person's authority as either was the same; therefore, the charge injecting this issue in the case could not have been confusing to the jury or harmful to the defendant. Atlantic C.L.R.R. v. Wegner, 90 Ga. App. 267, 83 S.E.2d 58 (1954).

Escaped Felons

Citizen may arrest escaped felon on suspicion. — Private person may arrest an escaped felon on probable ground of suspicion without a warrant. Harper v. State, 129 Ga. 770, 59 S.E. 792 (1907).

OPINIONS OF THE ATTORNEY GENERAL

Officials subject to citizen's arrest. — Any citizen may arrest another person, including sheriffs but not electors, members of the General Assembly, and militiamen, and a coroner, as a private citizen, would be allowed to arrest a sheriff. 1973 Op. Att'y Gen. No. 73-93.

Private citizen may not serve warrant. — While it is true that a private citizen may effect an arrest under this section, only a peace officer has the authority to make an arrest by serving a warrant. 1973 Op. Att'y Gen. No. 73-93.

Private security officer limited to rights of citizen. — Private security officer (not deputized) has the same arrest powers of any private citizens as set forth in this section. 1972 Op. Att'y Gen. No. U72-127.

School security guards. — Power of a public officer to make arrests under former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) can be conferred solely by law and the State Board of Education was not possessed of any lawful power to make its security guards "officers" within the meaning of that section, or to otherwise confer upon a security guard the arrest powers of a peace officer; the only power to arrest which a security guard employed by the State Board of Education would or could possess under law would be that limited power possessed by a private citizen under former Code 1933, § 27-211. 1978 Op. Att'y Gen. No. 78-3.

Drug inspectors. — Drug inspectors do not have official authority to make arrests nor to carry weapons in the performance of the inspectors' duties; inspectors would not be considered arresting officers. 1962 Op. Att'y Gen. p. 413.

City police officer on college campus. — Municipal police officer may make an arrest upon property under the jurisdiction of the Board of Regents in the officer's private capacity as an individual citizen. 1970 Op. Att'y Gen. No. 70-69.

Officer from other state in hot pursuit arresting for municipal violations. — An officer from another state may proceed across the state line into Georgia in hot pursuit of an offender, but when the officer does so the officer assumes the character of a private individual and the officer is not clothed with the authority to make arrests for infractions of municipal ordinances. 1958-59 Op. Att'y Gen. p. 72.

Emergency squad members must be deputized in counties of operation. — Police intelligence unit should provide that members of emergency squads be qualified as de jure deputy sheriffs in all counties in which the squads intend to operate. 1969 Op. Att'y Gen. No. 69-473.

Duties of multi-government emergency squads. — Multi-government

emergency squads may combat common disaster, civil disorder, riot, and other emergency situations. 1969 Op. Att'y Gen. No. 69-473.

District attorney possesses no greater powers than those possessed by ordinary citizen in making an arrest. 1980 Op. Att'y Gen. No. U80-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, §§ 8 et seq., 30 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 47 et seq.

ALR. — Constitutionality of statute or ordinance authorizing an arrest without a warrant, 1 A.L.R. 585.

Degree of force that may be employed in arresting one charged with a misdemeanor, 42 A.L.R. 1200.

Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor, 44 A.L.R. 132.

Information, belief, or suspicion as to commission of felony, as justification for arrest by private person without warrant, 133 A.L.R. 608.

Liability, for false imprisonment or arrest, of a private person answering call of known or asserted peace or police officer to assist in making arrest which turns out to be unlawful, 29 A.L.R.2d 825.

Liability, for false arrest or imprisonment, of private person detaining child, 20 A.L.R.3d 1441.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Escape from custody of private person as criminal offense, 69 A.L.R.3d 664.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney, 90 A.L.R.6th 385.

17-4-61. Taking of persons arrested before judicial officer or to peace officer; duty and liability of peace officer taking custody.

(a) A private person who makes an arrest pursuant to Code Section 17-4-60 shall, without any unnecessary delay, take the person arrested before a judicial officer, as provided in Code Section 17-4-62, or deliver the person and all effects removed from him to a peace officer of this state.

(b) A peace officer who takes custody of a person arrested by a private person shall immediately proceed in accordance with Code Section 17-4-62.

(c) A peace officer who in good faith and within the scope of his authority takes custody of a person arrested by a private person pursuant to this Code section shall not be liable at law for false arrest or false imprisonment arising out of the arrest.

History. — Code 1933, § 27-211.1, enacted by Ga. L. 1977, p. 902, § 1.

Cross references. — False imprisonment, §§ 16-5-41, 16-5-42. Right of action for false arrest and false imprisonment generally, § 51-7-1 et seq. Initial appearance hearing in magistrate court, Uniform Rules for the Magistrate Courts, Rule 13.

JUDICIAL DECISIONS

Cited in City of Marietta v. Kelly, 175 Ga. App. 416, 334 S.E.2d 6 (1985); Thompson v. State, 175 Ga. App. 645, 334 S.E.2d 312 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, §§ 47 et seq., 75 et seq., 120 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 21 et seq., 58 et seq. 35 C.J.S., False Imprisonment, § 35 et seq.

ALR. — Civil liability of judicial officer for false imprisonment, 13 A.L.R. 1344; 55 A.L.R. 282; 173 A.L.R. 802.

Malice and want of probable cause as elements of action for false imprisonment, 19 A.L.R. 671; 137 A.L.R. 504.

Power of private person to whom warrant of arrest is directed to deputize another to make the arrest or to delegate his power in that respect, 47 A.L.R. 1089.

Liability, for false imprisonment or arrest, of a private person answering call of known or asserted peace or police officer to assist in making arrest which turns out to be unlawful, 29 A.L.R.2d 825.

Liability, for false arrest or imprisonment, of private person detaining child, 20 A.L.R.3d 1441.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney, 90 A.L.R.6th 385.

17-4-62. Taking of persons arrested before judicial officer within 48 hours of arrest.

In every case of an arrest without a warrant, the person arresting shall, without delay, convey the offender before the most convenient judicial officer authorized to receive an affidavit and issue a warrant as provided for in Code Section 17-4-40. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose; and any person who is not brought before such judicial officer within 48 hours of arrest shall be released.

History. — Orig. Code 1863, § 4605; Code 1868, § 4628; Code 1873, § 4725; Code 1882, § 4725; Penal Code 1895, § 901; Penal Code 1910, § 922; Code 1933, § 27-212; Ga. L. 1956, p. 796, § 2.

Cross references. — Bail in magistrate court felony cases, Uniform Rules for the Magistrate Courts, Rule 23.2. Initial appearance hearing in magistrate court, Uniform Rules for the Magistrate Courts, Rule 13.

Law reviews. — For article discussing preliminary hearings in felony cases as necessary to satisfy due process requirements, see 12 Ga. St. B.J. 207 (1976).

For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Analysis

General Consideration
Improper Detention
Delivery

General Consideration

Full adversarial hearing not required. — O.C.G.A. § 17-4-62 does not require that a full adversarial hearing be held following a warrantless arrest, but merely seeks to ensure that an arrest and continuing detention of an accused is reviewed by a neutral factfinder and is satisfied when police obtain an arrest warrant within 48 hours of a valid warrantless arrest. Dean v. State, 250 Ga. 77, 295 S.E.2d 306 (1982); Ellison v. State, 242 Ga. App. 636, 530 S.E.2d 524 (2000).

Person who is arrested and released within the time prescribed by law on an appearance bond is not entitled to a commitment hearing. Watts v. Pitts, 253 Ga. 501, 322 S.E.2d 252 (1984).

Delay due to defendant's request for lab analysis. — Defendant, who was arrested without a warrant, charged with, inter alia, possession of a controlled substance, and confined in the city jail, was deprived of liberty without due process after the defendant requested a lab analysis and, pursuant to the practice of the municipal court, the case was reset, delaying the determination of probable cause until over two months later. Lambert v. McFarland, 612 F. Supp. 1252 (N.D. Ga. 1984).

Justification for temporary imprisonment question for jury. — This section allowed detention for a reasonable time of a person who had been arrested. It was a question for the jury whether the exigencies of the case authorized a temporary imprisonment of the accused. King v. State, 6 Ga. App. 332, 64 S.E. 1001 (1909).

Appeal moot. — Appeal from an arrestee's pretrial habeas corpus petition was moot because the arrestee, who argued that the arrestee had not received a commitment hearing within 48 hours of arrest under O.C.G.A. § 17-4-62, had been indicted after filing an appeal; once an indictment had been returned against a defendant, the question of whether a commitment hearing should have been held became moot. Tidwell v. Paxton, 282 Ga. 641, 651 S.E.2d 714 (2007).

Rights not violated. — Although the state failed to carry the state's burden of proving that the defendants knowingly and voluntarily waived the defendants' right to a first appearance hearing under O.C.G.A. § 17-4-62, the defendants were not entitled to immediate release on the defendants' own recognizance, regardless of whether the defendants had first appearance and bail hearings within the time allowed by law, because: (1) a magistrate issued arrest warrants for two of the defendants within 48 hours of their arrest, satisfying § 17-4-62; and (2) the state obtained valid arrest warrants for the remaining two defendants either within or outside of the 48 hours after those defendants were arrested, and the remedy for a violation was only available during the period of illegal detention, which ended when the state obtained valid arrest warrants from a neutral and detached magistrate. Capestany v. State, 289 Ga. App. 47, 656 S.E.2d 196 (2007).

Cited in Sanders v. State, 97 Ga. App. 158, 102 S.E.2d 635 (1958); Johnson v. Plunkett, 215 Ga. 353, 110 S.E.2d 745 (1959); Pistor v. State, 219 Ga. 161, 132 S.E.2d 183 (1963); McCranie v. Mullis, 221 Ga. 617, 146 S.E.2d 723 (1966); Kulyk v. United States, 414 F.2d 139 (5th Cir. 1969); Wilson v. State, 229 Ga. 395, 191 S.E.2d 783 (1972); Blair v. State, 230 Ga. 409, 197 S.E.2d 362 (1973); Gill v. Decatur County, 129 Ga. App. 697, 201 S.E.2d 21 (1973); Tomblin v. S.S. Kresge Co., 132 Ga. App. 212, 207 S.E.2d 693 (1974); McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975); Wheeler v. Stynchcombe, 234 Ga. 240, 215 S.E.2d 244 (1975); State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975); Thompson v. State, 175 Ga. App. 645, 334 S.E.2d 312 (1985); Cherokee County v. North Cobb Surgical Assocs., P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

Improper Detention

Release under O.C.G.A. § 17-4-62 is from custody, not trial. — Requirement that one arrested without a warrant and not conveyed before an officer authorized to issue warrants within 48 hours shall be released means that such person shall be released from imprisonment or custody until a warrant is obtained — not that the person shall be released from trial after the person has been indicted for a crime. Vaughn v. State, 248 Ga. 127, 281 S.E.2d 594 (1981); State v. Cade, 184 Ga. App.

Improper Detention (Cont'd)

347, 361 S.E.2d 494 (1987).

Exclusionary rule inapplicable. — Court declined to extend the exclusionary rule as a sanction to enforce O.C.G.A. § 17-4-62. Battle v. State, 254 Ga. 666, 333 S.E.2d 599 (1985).

Sanction for violating O.C.G.A. § 17-4-62 is that the defendant shall be released and does not require suppression of evidence gathered in the interim. Chisholm v. State, 231 Ga. App. 835, 500 S.E.2d 14 (1998).

Section cannot justify illegal warrantless arrest. — This section presupposed a legal arrest without a warrant and cannot be used as a basis for legitimatizing an otherwise illegal arrest. Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

Escaped convict cannot be unreasonably detained. Harris v. City of Atlanta, 62 Ga. 290 (1879).

Unreasonable detention makes entire transaction trespass. — Imprisonment or detention beyond the reasonable time not only renders the imprisonment or detention illegal, but makes the entire transaction, including the arrest, a trespass ab initio. Potter v. Swindle, 77 Ga. 419, 3 S.E. 94 (1886); Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51 (1911); Great Am. Indem. Co. v. Beverly, 150 F. Supp. 134 (M.D. Ga. 1956).

Reason for requiring speedy appearance before judge. — Requirement of taking arrested persons before a judicial officer without delay is in large measure prompted by the knowledge that "the seeds of coercion sprout readily in the earth of illegal detention." Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Habeas corpus if delay over 48 hours. — This section controlled time of captivity before a hearing; habeas corpus will lie if the time before a hearing exceeded 48 hours. Hyatt v. State, 134 Ga. App. 703, 215 S.E.2d 698 (1975).

Illegal detention does not void court's jurisdiction. — Although an arresting officer may be liable in damages for false arrest and imprisonment when the officer detains the defendant in an illegal manner, this is ordinarily immaterial so far as the jurisdiction of the court over the defendant is concerned after jurisdiction has been acquired by accusation or indictment, and appearance and pleading by the defendant, in a criminal case. French v. State, 99 Ga. App. 149, 107 S.E.2d 890 (1959).

Illegal detention does not void arrest ab initio. — Provision of this section that a person arrested without a warrant and not conveyed before an officer authorized to issue a warrant within 48 hours "shall be released" means only that the person shall be released from imprisonment or custody until a warrant was obtained; it does not mean that an arrest legally made was rendered void ab initio. Peters v. State, 115 Ga. App. 743, 156 S.E.2d 195 (1967).

Defendant, an arresting deputy, could not assume plaintiff arrestee would make bail as the deputy had a duty under O.C.G.A. § 17-4-62 to seek an arrest warrant within 48 hours of arrest, and since it was clearly established at the time that a ten day detention without probable cause violated the Fourth Amendment, the deputy had no qualified immunity on the arrestee's Fourth Amendment claim. Young v. Graham, No. CV 304-066, 2005 U.S. Dist. LEXIS 20882 (S.D. Ga. Aug. 11, 2005).

Breath test not rendered inadmissible. — This section does not automatically void the legality of the arrest itself in such manner as to render inadmissible the result of a "breathalyzer" test because the test was not a product of a "legal arrest." Hyatt v. State, 134 Ga. App. 703, 215 S.E.2d 698 (1975).

Voluntary confession not rendered inadmissible. — Fact that a person is arrested without a warrant and is not conveyed before an officer authorized to issue a warrant within a reasonable time allowed for the purpose, as required by this section, does not of itself render the person's confession, voluntarily given during the person's unlawful detention, inadmissible in evidence. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964); Dollar v. State, 161 Ga. App. 428, 288 S.E.2d 689 (1982).

Fact that O.C.G.A. § 17-4-62 is not complied with does not of itself render an otherwise voluntary confession inadmissible. McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981), aff'd, 721 F.2d 1493 (11th Cir. 1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984).

Confession admissibility state question. — Admissibility of a voluntary confession obtained during an unlawful detention in a state judicial proceeding remains a matter for state determination. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Statements at scene admissible even though made without attorney. — Investigation by police officers at the scene on the officers' arrival, and the defendant's statements to the police, not being tainted by the overtones of coercion incident to prolonged illegal detention, are not objectionable although the defendant may not at that time have had counsel. Dukes v. State, 109 Ga. App. 825, 137 S.E.2d 532 (1964).

Delay in warrant does not require release after indictment. — Provision of this section that a person arrested without a warrant and not conveyed before an officer authorized to issue warrants within 48 hours "shall be released," means that such person shall be released from imprisonment or custody until a warrant is obtained; not that the person shall be released from trial after the person has been indicted for a crime. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Conviction not void after delay. — This section did not require that a prisoner be released after the prisoner had been indicted or after the prisoner has been convicted, despite delaying longer than 48 hours in bringing the accused before an officer for the issuance of a warrant. Donlavey v. Smith, 426 F.2d 800 (5th Cir. 1970).

Failure to hold a commitment hearing within 48 hours as required by this section did not render a conviction invalid nor require the exclusion of evidence. Sanders v. State, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976); Dollar v. State, 161 Ga. App. 428, 288 S.E.2d 689 (1982); Chiasson v. State, 250 Ga. App. 63, 549 S.E.2d 503 (2001).

Effect on verdict. — While the law requires a hearing within 48 hours, nevertheless, a detention or imprisonment beyond a reasonable time does not render the verdict of a jury after indictment illegal or void. Furman v. State, 225 Ga. 253, 167 S.E.2d 628 (1969), rev'd on other grounds, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346, vacated in part on other grounds, 229 Ga. 731, 194 S.E.2d 410 (1972).

Reasonableness of time is question of fact. — This section commented that application for a warrant be made without delay, and makes illegal any imprisonment beyond a reasonable time necessary to obtain a warrant. Whether imprisonment was protracted for an unreasonable time under that section was a question of fact. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Time may be unreasonable although under 48 hours. — What is a reasonable time is a question of fact and it may well be less than 48 hours, the statutory outer limit of reasonableness. Dukes v. State, 109 Ga. App. 825, 137 S.E.2d 532 (1964).

Detention overnight is not illegal. Johnson v. Mayor of Americus, 46 Ga. 80 (1872).

Delivery

Delivery to a police officer is insufficient. Ocean S.S. Co. v. Williams, 69 Ga. 251 (1882).

Fugitive from another state must be carried to an officer who can issue a warrant. Lavina v. State, 63 Ga. 513 (1879).

Person arrested on authority of sheriff of another county should be delivered to that sheriff. Manning v. Mitchell, 73 Ga. 660 (1884).

OPINIONS OF THE ATTORNEY GENERAL

Warrant needed for all state penal law violations. — Laws of Georgia envision that a warrant be issued in all cases involving a violation of the penal laws of the state. 1960-61 Att'y Gen. p. 92.

Drug inspectors do not have official authority to make arrests nor to carry weapons in the performance of the inspectors' duties; inspectors would not be considered arresting officers. 1962 Op. Att'y Gen. p. 413.

Magistrate court may, sua sponte, order the release of arrestees who have been arrested without a warrant and when no warrant has been procured as required by O.C.G.A. § 17-4-26, and also when an individual has been arrested with a warrant, but has not been afforded a first appearance hearing within 72 hours of arrest as required by O.C.G.A. § 17-4-62. 1988 Op. Att'y Gen. No. U88-14.

Probation violators. — If a probation violator is arrested without a warrant, it would be incumbent upon the probation supervisor or other arresting officer to procure a warrant within the 48-hour period of time specified in O.C.G.A. § 17-4-62. 1988 Op. Att'y Gen. No. U88-14.

Waiver. — While it is possible for an individual to waive the individual's statutory right to a "first appearance," in writing, it would be necessary in every instance for a court to ensure that such a waiver is intelligently and competently made, and that the court's findings be made a part of the record of the case. 1988 Op. Att'y Gen. No. U88-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 75 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 97, 109. 35 C.J.S., False Imprisonment, § 35 et seq.

ALR. — Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor, 44 A.L.R. 132.

Liability, for false arrest or imprisonment, of private person detaining child, 20 A.L.R.3d 1441.

Official immunity of national guard members, 52 A.L.R.4th 1095.

Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney, 90 A.L.R.6th 385.

CHAPTER 5

SEARCHES AND SEIZURES

Article 1

Searches Without Warrants

Sec.

17-5-1. Search pursuant to lawful arrest authorized.
17-5-2. Inventory of items seized without search warrant to be given to person arrested and judicial officer before whom person arrested taken; return of items.

Article 2

Searches With Warrants

17-5-20. Requirements for issuance of search warrant generally.
17-5-21. Grounds for issuance of search warrant; scope of search pursuant to search warrant; issuance by retired judge or judge emeritus.
17-5-21.1. Issuance of search warrants by video conference.
17-5-22. Issuance of search warrants by judicial officers generally; maintenance of docket record of warrants issued.
17-5-23. Command of search warrant.
17-5-24. Officers authorized to execute search warrants.
17-5-25. Execution of search warrant generally.
17-5-26. When search warrant may be executed.
17-5-27. Use of force in execution of search warrant.
17-5-28. Detention and search of persons on premises.
17-5-29. Written return of items seized; filing and signing of inventory; delivery of copies of inventory.
17-5-30. Motion to suppress evidence illegally seized generally.
17-5-31. Quashing warrant or suppressing evidence because of technical irregularity not affecting substantial rights of accused.
17-5-32. Search and seizure of documentary evidence in possession of attorney; exclusion of illegally obtained evidence.

Sec.

Article 3

Disposition of Property Seized

17-5-50. Property unlawfully obtained; rights of owner; hearing; admissibility of photographs in lieu of original property; representation of unknown or absent defendants; statements made by defendant or agent at trial.
17-5-51. Civil forfeiture of weapons used in commission of crime, possession of which constitutes crime or delinquent act, or illegal concealment generally.
17-5-52. Disposition of weapons used in commission of crime or delinquent act involving possession; civil forfeiture.
17-5-52.1. Disposal of forfeited or abandoned firearms; innocent owners; auctions; record keeping; liability of government entities [Repealed].
17-5-53. Disposition of devices with historical or instructional value.
17-5-54. Definitions; disposition of personal property in custody of law enforcement agency.
17-5-55. Designation of custodian for introduced evidence; evidence log; storage, maintenance, and disposal of evidence.
17-5-56. Maintenance of physical evidence containing biological material.

Article 4

Investigating Sexual Assault

17-5-70. Definitions.
17-5-71. Preservation of evidence.
17-5-72. Right to free forensic medical examination.
17-5-73. Victim's right to refuse request

Sec.

for polygraph examinations or other truth-telling devices.

Article 5

Immigrants

17-5-100. Investigation of illegal alien status.

Cross references. — Procedure for use of electronic devices by law enforcement officers to intercept wire or oral transmissions, § 16-11-64. Emergency situations; application for an investigative warrant, § 16-11-64.3. Display of identification in electronic format is not consent to search, § 40-5-106

U.S. Code. — Search and seizure, Federal Rules of Criminal Procedure, Rule 41.

Law reviews. — For article discussing past and present trends in the admissibility of illegally obtained evidence in Georgia criminal trials and advocating a state exclusionary rule, see 11 Ga. L. Rev. 105 (1976). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983).

JUDICIAL DECISIONS

Warrant issued only for authorized searches. — Search warrant may be issued only for searches authorized at common law or by statute. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Criminal enterprises not constitutionally protected from government agents. — While U.S. Const., amend. 4 protects reasonable expectations of privacy, and while the use of deception by a government agent to gain access to a protected area may certainly result in an unlawful invasion of that privacy, the Constitution does not protect persons who engage in criminal transactions from the risk that those with whom they choose to do business may be government agents or informants. Shuman v. State, 155 Ga. App. 300, 271 S.E.2d 18 (1980).

When the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if the business were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Shuman v. State, 155 Ga. App. 300, 271 S.E.2d 18 (1980).

Authorized search when parent with joint access. — Parent's joint access and unhindered control over the room authorized the trial court to conclude that the parent had common authority over the room searched by the officers and a sufficient relationship to the premises to consent to the search. Smith v. State, 264 Ga. 87, 441 S.E.2d 241 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, § 1 et seq.

C.J.S. — 79 C.J.S., Searches and Seizures, § 1 et seq.

ALR. — Constitutional guarantees against unreasonable searches and seizures as applied to search for or seizure of intoxicating liquor, 3 A.L.R. 1514; 13 A.L.R. 1316; 27 A.L.R. 709; 39 A.L.R. 811; 41 A.L.R. 1539; 74 A.L.R. 1418.

Federal Constitution as a limitation upon the powers of the states in respect to search and seizure, 19 A.L.R. 644.

Civil liability for improper issuance of search warrant or proceedings thereunder, 45 A.L.R. 605.

Right of search and seizure incident to lawful arrest, without a search warrant, 51 A.L.R. 424; 74 A.L.R. 1387; 82 A.L.R. 782.

Search of automobile without a warrant by officers relying on description of persons suspected of a crime, 60 A.L.R. 299.

Right to search or seize vehicle containing contraband as affected by the fact that it was stationary at the time, 61 A.L.R. 1002.

Admissibility of evidence obtained by illegal search and seizure, 134 A.L.R. 819; 150 A.L.R. 566; 50 A.L.R.2d 531.

Previous illegal search for or seizure of property as affecting validity of subsequent search warrant or seizure thereunder, 143 A.L.R. 135.

Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information, investigation, etc., by one whose name is not disclosed, 14 A.L.R.2d 605.

Propriety and legality of issuing only one search warrant to search more than one place or premises occupied by same person, 31 A.L.R.2d 864.

Authority to consent for another to search or seizure, 31 A.L.R.2d 1078.

Opening, search, and seizure of mail, 61 A.L.R.2d 1282.

Nature of interest in, or connection with, premises searched as affecting standing to attack legality of search, 78 A.L.R.2d 246.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) — state cases, 1 A.L.R.4th 673.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Sufficiency of showing of reasonable belief of danger to officers or others excusing compliance with "knock and announce" requirement — state criminal cases, 17 A.L.R.4th 301.

Use, in attorney or physician disciplinary proceeding, of evidence obtained by wrongful police action, 20 A.L.R.4th 546.

Searches and seizures: reasonable expectation of privacy in contents of garbage or trash receptacle, 28 A.L.R.4th 1219.

Searches and seizures: validity of searches conducted as condition of entering public premises — state cases, 28 A.L.R.4th 1250.

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone, 38 A.L.R.4th 1145.

Propriety of state or local government health officer's warrantless search — post Camara cases, 53 A.L.R.4th 1168.

Books, documents, or other papers: seizure under search warrant not describing such items, 54 A.L.R.4th 391.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child—state cases, 51 A.L.R.5th 425.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse—state cases, 55 A.L.R.5th 125.

ARTICLE 1

SEARCHES WITHOUT WARRANTS

Law reviews. — For note, "To Deceive or Not to Deceive: Law Enforcement Officers Gain Broader Approval to Use Deceptive Tactics to Obtain Voluntary Consent," see 69 Mercer L. Rev. 627 (2018).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Third Party's Lack of Authority to Consent to Search of Premises or Effects, 18 POF2d 681.

Consent to Search Given Under Coercive Circumstances, 26 POF2d 465.

17-5-1. Search pursuant to lawful arrest authorized.

(a) When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within the person's immediate presence for the purpose of:

(1) Protecting the officer from attack;

(2) Preventing the person from escaping;

(3) Discovering or seizing the fruits of the crime for which the person has been arrested; or

(4) Discovering or seizing any instruments, articles, or things which are being used or which may have been used in the commission of the crime for which the person has been arrested.

(b) When the peace officer is in the process of effecting a lawful search, nothing in this Code section shall be construed to preclude him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, the possession of which is unlawful, or any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state.

History. — Ga. L. 1966, p. 567, § 1.

Law reviews. — For survey of 1987 Eleventh Circuit cases on constitutional criminal procedure, see 39 Mercer L. Rev. 1187 (1988). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

For note, "Third Party Consent to Search and Seizure: A Reexamination," see 20 J. of Pub. L. 313 (1971).

JUDICIAL DECISIONS

Analysis

General Consideration
Justification for Warrantless Search
Incidental Seizure of Unrelated Evidence

General Consideration

Purpose of search and seizure laws is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials. Thacker v. State, 226 Ga. 170, 173 S.E.2d 186 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2861, 33 L. Ed. 2d 753, vacated in part on other grounds, 229 Ga. 731, 194 S.E.2d 410 (1972).

Search incident to arrest. — Officers were authorized under O.C.G.A. § 17-5-1 to search the vehicle incident to the defen-

dant's arrest, and the fact that the officers might have expected to find contraband did not lessen the officers' authority to search. Polke v. State, 241 Ga. App. 891, 528 S.E.2d 537 (2000).

Reasonable basis for search. — Without any evidence that an officer had a reasonable basis for concluding that defendant was armed, or posed a threat to the officer's safety, a pat-down search is not authorized and violated the defendant's Fourth Amendment rights. Edgell v. State, 253 Ga. App. 775, 560 S.E.2d 532 (2002).

Trial court did not err in denying the defendant's motion to suppress evidence of contraband as the defendant's nervous behavior and the fact that the police officer's experience allowed the officer to conclude that where drugs were involved, as was true in the defendant's case, weapons were usually found, made the officer's patdown search of the defendant for weapons permissible and the resulting methamphetamine that was found in defendant's pocket was properly seized since the officer knew exactly what it was when the officer touched it while patting down the defendant. Holmes v. State, 267 Ga. App. 651, 601 S.E.2d 134 (2004).

No not guilty verdict on basis of illegal arrest. — Defendant in a criminal case cannot claim a verdict declaring the defendant to be not guilty on the ground that the defendant was illegally arrested. Morton v. State, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

Standing to contest search. — Defendant has no standing to complain of warrantless search of a stolen automobile. Montgomery v. State, 159 Ga. App. 446, 283 S.E.2d 663 (1981).

Rule governing vehicle searches. — For purposes of searching a vehicle contemporaneously with the lawful arrest of an individual, the state rule is the same as the federal rule. Such a search, legal under federal law, is legal under state law. Daniel v. State, 199 Ga. App. 180, 404 S.E.2d 466 (1991).

"Plain-feel" doctrine only applies when item is immediately apparent as contraband. — Motion to suppress was properly granted when during a Terry pat-down an officer felt a lump in the defendant's coin pocket but during the officer's testimony the officer did not articulate any distinguishing characteristics that would reasonably lead the officer to believe that the object was contraband rather than a legal substance. State v. Henderson, 263 Ga. App. 880, 589 S.E.2d 647 (2003).

Cited in Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968); Carter v. Gautier, 305 F. Supp. 1098 (M.D. Ga. 1969); Davidson v. State, 125 Ga. App. 502, 188 S.E.2d 124 (1972); Holtzendorf v. State, 125 Ga. App. 747, 188 S.E.2d 879 (1972); Harris v. State, 128 Ga. App. 22, 195 S.E.2d 262 (1973); Rockholt v. State, 129 Ga. App. 99, 198 S.E.2d 885 (1973); Brewer v. State, 129 Ga. App. 118, 199 S.E.2d 109 (1973); Brooks v. State, 129 Ga. App. 393, 199 S.E.2d 578 (1973); Rautenstrauch v. State, 129 Ga. App. 381, 199 S.E.2d 613 (1973); Brice v. State, 129 Ga. App. 535, 199 S.E.2d 895 (1973); Morrison v. State, 129 Ga. App. 558, 200 S.E.2d 286 (1973); Jones v. State, 131 Ga. App. 699, 206 S.E.2d 601 (1974); Jones v. State, 232 Ga. 771, 208 S.E.2d 825 (1974); Godwin v. State, 133 Ga. App. 397, 211 S.E.2d 7 (1974); Patterson v. State, 133 Ga. App. 742, 212 S.E.2d 858 (1975); Pierce v. State, 134 Ga. App. 14, 213 S.E.2d 162 (1975); Coley v. State, 135 Ga. App. 810, 219 S.E.2d 35 (1975); Smith v. State, 138 Ga. App. 226, 225 S.E.2d 744 (1976); State v. Mathis, 143 Ga. App. 121, 237 S.E.2d 643 (1977); Cook v. State, 145 Ga. App. 544, 244 S.E.2d 64 (1978); Orr v. State, 145 Ga. App. 459, 244 S.E.2d 247 (1978); McCarty v. State, 146 Ga. App. 389, 246 S.E.2d 416 (1978); Kiriaze v. State, 147 Ga. App. 832, 250 S.E.2d 568 (1978); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979); Starr v. State, 159 Ga. App. 386, 283 S.E.2d 630 (1981); Watson v. State, 159 Ga. App. 618, 284 S.E.2d 636 (1981); Denson v. State, 159 Ga. App. 713, 285 S.E.2d 69 (1981); Butler v. State, 159 Ga. App. 895, 285 S.E.2d 610 (1981); Ivory v. State, 160 Ga. App. 193, 286 S.E.2d 435 (1981); Robertson v. State, 161 Ga. App. 715, 288 S.E.2d 362 (1982); Wesley v. State, 162 Ga. App. 737, 293 S.E.2d 27 (1982); Overman v. State, 250 Ga. 494, 299 S.E.2d 542 (1983); Powell v. State, 170 Ga. App. 185, 316 S.E.2d 779 (1984);

General Consideration (Cont'd)

Vaughn v. State, 173 Ga. App. 716, 327 S.E.2d 747 (1985); Minor v. State, 180 Ga. App. 869, 350 S.E.2d 783 (1986); United States v. D'Angelo, 819 F.2d 1062 (11th Cir. 1987); Wade v. State, 184 Ga. App. 97, 360 S.E.2d 647 (1987); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987); Baxter v. State, 188 Ga. App. 598, 373 S.E.2d 834 (1988); Burroughs v. State, 190 Ga. App. 467, 379 S.E.2d 175 (1989); State v. Nelson, 261 Ga. 246, 404 S.E.2d 112 (1991); Loden v. State, 199 Ga. App. 683, 406 S.E.2d 103 (1991); Gebremedhin v. State, 202 Ga. App. 811, 415 S.E.2d 529 (1992); Florence v. State, 246 Ga. App. 479, 539 S.E.2d 901 (2000); Freeman v. State, 248 Ga. App. 363, 548 S.E.2d 616 (2001); Bain v. State, 258 Ga. App. 440, 574 S.E.2d 590 (2002); Banks v. State of Ga., 277 Ga. 543, 592 S.E.2d 668 (2004); Selvy v. Morrison, 292 Ga. App. 702, 665 S.E.2d 401 (2008).

Justification for Warrantless Search

Section permits seizure of evidence when lawful arrest effected. — O.C.G.A. § 17-5-1 permits the discovery and seizure of an instrumentality, or any item, substance, object or thing which is tangible evidence of the commission of the crime, when a lawful arrest has been effected and the search is made in the area of the person's immediate presence. Watkins v. State, 160 Ga. App. 9, 285 S.E.2d 758 (1981).

Since the defendant's warrantless arrest after being found at the home of a friend was justified under O.C.G.A. § 17-4-20(a) in connection with the murder of another of defendant's friends and the disappearance of defendant's spouse, a search incident to the arrest pursuant to O.C.G.A. § 17-5-1(4) permitted the police to search a duffel bag that was on the floor in the bedroom where the defendant was arrested because the bag was in the defendant's "immediate presence" and could be seized and searched for items used in the commission of the crime or crimes. Wright v. State, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Because the police were authorized to seize marijuana found in plain view, seen through the window of an apartment where the police were executing an arrest warrant on another individual, once the defendant answered a knock on the apartment door, police also had the right to search incident to the defendant's arrest for possession of marijuana and based on the exigency of the circumstances; hence, the trial court erred in granting a motion to suppress the marijuana without explaining the court's interpretation of the evidence or ruling on the credibility of the witnesses. State v. Venzen, 286 Ga. App. 597, 649 S.E.2d 851 (2007).

Because an officer had probable cause to arrest the defendant at the scene of an accident for driving without the defendant's driver's license in the defendant's immediate possession, O.C.G.A. § 40-5-29, the officer's search of the defendant's person as the officer placed the defendant in handcuffs and in the squad car was a valid search incident to an arrest pursuant to O.C.G.A. § 17-5-1; gun evidence seized from the car was admissible because the car was impounded due to being undriveable from the accident. State v. McCloud, 344 Ga. App. 595, 810 S.E.2d 668 (2018), cert. denied, No. S18C0899, 2018 Ga. LEXIS 577 (Ga. 2018).

Section permits seizure of evidence from vehicle compartment when lawful arrest. — When a defendant was pulled over for playing the car radio too loudly in violation of city noise ordinances and the officer noted that the windshield was cracked, and after the officer confirmed by radio that the defendant's license had been suspended, there was probable cause for arrest; because of the lawful arrest and the necessity to impound the defendant's vehicle due to the vehicle's unsafe condition, the officer was authorized to search the passenger compartment. Thus, the trial court properly refused to suppress evidence of contraband on the basis that the evidence stemmed from a pretextual stop unsupported by articulable suspicion or probable cause. Freeman v. State, 195 Ga. App. 357, 393 S.E.2d 496 (1990).

Defendant had standing to raise a challenge to a search of a vehicle in which the

defendant was riding as a passenger because the defendant could challenge the prolonged detention and the subsequent vehicle search. However, the taint of the illegal detention was thereafter purged by the intervening arrest of the defendant on outstanding warrants, which then justified the officer's lawful search incident to an arrest and, accordingly, marijuana found in the passenger compartment of the car was not subject to suppression under the principles established by U.S. Const., amend. IV, Ga. Const. Art. I, Sec. I, Para. XIII, or the Georgia Code. State v. Cooper, 260 Ga. App. 333, 579 S.E.2d 754 (2003).

As the defendant was lawfully arrested for traffic violations, the search of the vehicle's passenger compartment incident to that arrest was valid under O.C.G.A. § 17-5-1, the Fourth Amendment, and the Georgia Constitution. Garcia v. State, 293 Ga. App. 422, 667 S.E.2d 205 (2008).

Property taken from defendant at sheriff's office. — There was no error in the warrantless search of the shoes taken from the defendant at the sheriff's office and later introduced into evidence. Property which the arrestee elected to take with the arrestee to jail was subject to search under an analysis similar to that allowing search incident to an arrest. Batton v. State, 260 Ga. 127, 391 S.E.2d 914 (1990).

Elements needed to show informer gives probable cause for search. — To establish probable cause (whether for the issuance of a warrant by a magistrate or, under exigent circumstances, for a search without a warrant) three elements are essential: that there is reason to accept an informer's reliability; that the facts are sufficient to show how the informer obtained the information or that the criminal activity is described in such detail as to negate its being a mere rumor; and, that the information is current, not stale. State v. Watts, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

Informer's past reliability versus veracity of current information. — One may act on the information of an informer as to whom the magic phrase "has given reliable information in the past" cannot be applied. An averment of previous reliability is not essential; the question is whether the informant's present information is truthful and reliable. Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Information can come from informer through other police. — Factual information relayed by police to other law enforcement officers is not per se subject to a "double hearsay" objection, the question being whether probable cause is shown. Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Probable cause does not justify invasion of house without proving emergency. — Probable cause, however well founded, can provide no justification for a warrantless intrusion of a person's home absent a showing "that the exigencies of the situation" made that course imperative. Clare v. State, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

When the circumstances are insufficient to warrant an arrest. — Under former Code 1933, § 326-2614 (see O.C.G.A. § 16-11-44), Ga. L. 1966, p. 567, § 1 (see O.C.G.A. § 17-5-1) did not offer a basis for the officer's warrantless intrusion of the defendant's apartment. Clare v. State, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

Civil protective custody is not a criminal arrest. — Drug evidence found in a defendant's pocket by a police officer who was executing a civil order to apprehend the defendant for a mental health evaluation under O.C.G.A. §§ 37-3-41(a) and 37-7-41(b) should have been suppressed because such an order authorized civil protective custody, not a criminal arrest pursuant to O.C.G.A. § 17-5-1; because no criminal arrest had taken place based on probable cause, the defendant had not been arrested such that a search incident to an arrest was authorized. Lindsey v. State, 282 Ga. App. 644, 639 S.E.2d 584 (2006).

Reasonable nature of seizure varies with case. — Whether a search and seizure is unreasonable within the meaning of U.S. Const., amend. 4 depends upon the facts and circumstances of each case. Martasin v. State, 155 Ga. App. 396, 271 S.E.2d 2 (1980) (opinion of Smith, J., concurring specially).

Justification for Warrantless Search (Cont'd)

Reasonable nature of seizure is not determined by ease in getting search warrant. — Practicability of procuring a search warrant is not a sine qua non to the reasonableness of a search. Some flexibility will be accorded law officers. Thomas v. State, 118 Ga. App. 359, 163 S.E.2d 850 (1968), cert. denied, 394 U.S. 943, 89 S. Ct. 1273, 22 L. Ed. 2d 477 (1969).

Search can be made with consent as well as lawful arrest. — Legal search may be made incident to a lawful arrest or by consent of the owner of the premises or property. Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967).

Prevention of destruction of contraband. — Trial court's finding that an officer's right to search defendant upon arresting the defendant encompassed the right to ask the defendant to empty the defendant's mouth of its contents; furthermore, because the arrest was lawful, the officer was authorized to discover or seize any item that was unlawful to possess, and, even though the officer did not know exactly what was in the defendant's mouth, the officer's suspicion that it may have been an unlawful item was reasonable under the circumstances. Sanders v. State, 247 Ga. App. 170, 543 S.E.2d 452 (2000).

Bloody clothing freely given is admissible evidence. — Bloody sweater and shoes of a defendant who is charged with robbery by intimidation, when voluntarily given to the officer, are admissible and the defendant cannot complain of being compelled to testify against oneself. Moton v. State, 225 Ga. 401, 169 S.E.2d 320 (1969).

Consent after momentary stop with reasonable suspicion not consent after illegal arrest. — When the momentary detention of the defendant's car was "an intrusion short of arrest" and when the officer had "specific and articulable facts" to provoke a "reasonable and founded suspicion," assertions that the consent to search was not valid because consent was given after an illegal arrest were without merit. Huffman v. State, 149 Ga. App. 464, 254 S.E.2d 489, cert. denied, 444 U.S. 918, 100 S. Ct. 236, 62 L. Ed. 2d 174 (1979).

Head of household gives effective consent. — Voluntary consent of the head of a household to the search of premises owned or controlled by such head of the household is sufficient to authorize a search of the premises without a search warrant, and such search does not violate the constitutional prohibition against unreasonable searches and seizures. Montgomery v. State, 155 Ga. App. 423, 270 S.E.2d 825 (1980).

Third party car owner who turns over defendant's suitcases. — If an individual, in whose car defendant's luggage is placed prior to the defendant's arrest, is torn between two unattractive alternatives — keeping the unwanted luggage or turning the luggage over — and finally decides to take a police receipt and give the luggage to the police, the individual's consent is voluntary and effective. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

When the defendant, in making no provision for the luggage, in effect abandons the luggage in an individual's automobile with no undertaking from the individual to keep the luggage, the individual is at best a reluctant bailee, and thus the defendant's argument that the individual has no authority to dispose of the luggage, by turning the luggage over to the police, is clearly erroneous. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Test determining whether consent to search is voluntary is the "totality of the circumstances" under Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) and United States v. Scott, 578 F.2d 1186 (6th Cir.) cert. denied 439 U.S. 870, 99 S. Ct. 201, 58 L. Ed. 2d 182 (1978); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Burden on state to show consent. — Whether or not consent to search was freely given is an issue on which the state must carry the burden of proof. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert.

denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Search for weapons or contraband incident to arrest. — Once defendant has been placed under custodial arrest, police may search the defendant's person, incident to that arrest, for weapons or contraband. Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981).

Transcript showed that deputies were conducting a legitimate Terry search of the defendant's jacket for weapons when the cocaine was discovered; therefore, seizure of the cocaine was incident to a lawful arrest. Montoya v. State, 232 Ga. App. 24, 499 S.E.2d 699 (1998).

Because the defendant was handcuffed to ensure the officers' safety after a pistol-like device was found and the handcuffs were removed before the agent spoke with the defendant, the defendant's statement to the agent that the defendant used drugs that evening gave the agent probable cause for the defendant's arrest; the defendant was then searched incident to a lawful arrest. Bond v. State, 271 Ga. App. 849, 610 S.E.2d 609 (2005).

Immediate search of area for weapons. — Officer is entitled to make a reasonable search of the immediate area for weapons. Mobley v. State, 130 Ga. App. 80, 202 S.E.2d 465 (1973), overruled on other grounds, Patterson v. State, 238 Ga. 204, 232 S.E.2d 233 (1977).

Search including area where defendant might reach. — It is reasonable for an officer to search an area surrounding the arrest area into which a suspect might reach to obtain a weapon. Banks v. State, 246 Ga. 178, 269 S.E.2d 450 (1980).

In exigent circumstances, police officers are authorized, pursuant to a lawful arrest, to enter upon the premises and conduct a reasonable search of the suspects' persons and immediate presence, including a search under a piece of furniture where one of the suspects was observed reaching for or disposing of an unknown object, which might reasonably be thought to be either a weapon or evidence. Dennis v. State, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Weapons within lunging area properly seized. — Trial court properly denies a motion to suppress evidence of weapons found in a box within the arrestee's "lunging area" when the law enforcement officer knew that the arrestee was armed. Smallwood v. State, 166 Ga. App. 247, 304 S.E.2d 95 (1983).

Officer may remove weapons. — It is reasonable that when a lawful arrest is made the arresting officer may remove any weapons that the suspect might seek to use to try to resist arrest or to escape. Banks v. State, 246 Ga. 178, 269 S.E.2d 450 (1980).

If limited "pat down" sufficient, only limited "stop and frisk" allowed. — If a search of a person is conducted pursuant to this section and a limited "pat down" of the person's outer clothing would be sufficient to satisfy the police officer's suspicion that a weapon was being concealed, only a limited "stop and frisk" search is permitted. Merritt v. State, 133 Ga. App. 956, 213 S.E.2d 84 (1975).

Limitations on search incident to arrest. — Except under exigent and unusual circumstances, a search incident to arrest can be held reasonable only for the purposes of preventing the defendant from accessing a weapon or evidence which the defendant may destroy, and this usually limits the search to the defendant's person and clothing, and that very narrow area surrounding the defendant where the defendant might reach even though under restraint. Scott v. State, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Seizure of instrumentalities used to commit crime. — Instrumentalities used to commit a crime may also be seized during arrest without search warrants. Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967).

Searching entire house to discover occupants and preserve evidence permitted. — Subsequent to warrantless entrance under exigent circumstances, officers were authorized to make a search of the entire house for the limited purpose of securing the house, i.e., discovering the presence of all occupants and eliminating the possibility of harm to the officers and the destruction of evidence. Lentile v. State, 136 Ga. App. 611, 222 S.E.2d 86 (1975).

Officer was entitled to search the defendant's person and immediate presence

Justification for Warrantless Search (Cont'd)

pursuant to the defendant's valid arrest for marijuana possession, and was further entitled to a limited search of the entire house, and to seizure of cocaine that was spotted in plain view. Jenkins v. State, 223 Ga. App. 486, 477 S.E.2d 910 (1996).

Searching trailer justified when defendant took guns and lied about location. — When a murder had just been committed by the defendant and the defendant retreated to the defendant's trailer with the gun in the defendant's hand and misstated the gun's location upon arrest, the limited immediate search conducted by an officer to find the murder weapon was reasonable and any error was harmless beyond a reasonable doubt. Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979).

Searching house justified if police likely noticed by defendants. — When several persons were in the house before the defendant's arrest, two persons were seen fleeing the house after the defendant's arrest, and the defendant had brought out only a third of the agreed-on sale of marijuana — giving the officers reason to believe that the officers' presence and identity had been detected, and that there was a substantial possibility that the remaining occupant or occupants would attempt to escape or destroy evidence, set up resistance to an eventual entry or plan a desperate flight, a warrantless search was justified. Lentile v. State, 136 Ga. App. 611, 222 S.E.2d 86 (1975).

Evidence of consent sufficient to authorize search of vehicle. — When the state presents evidence of defendant's free and voluntary consent to search the trunk of the defendant's vehicle and of the subsequent creation of probable cause as to the suitcase by defendant's statement to the officers that the suitcase contained marijuana, along with the exigent circumstances arising from the mobility of the automobile, these were circumstances which authorized a warrantless search of the vehicle. Smith v. State, 160 Ga. App. 690, 287 S.E.2d 44 (1981).

With regard to a defendant's convictions for possession of methamphetamine with intent to distribute, possession of a firearm during the commission of a drug offense, and carrying a concealed weapon, the trial court properly denied the defendant's motion to suppress the items seized from the defendant's vehicle and the defendant's person after a traffic stop as the defendant's failure to wear a seatbelt and to have insurance on the vehicle justified the traffic stop. Thereafter, after being released from the traffic stop and being asked to come back, the defendant consented to the search of the vehicle and of the defendant's person, which led to the seizure of the contraband. Hughes v. State, 293 Ga. App. 404, 667 S.E.2d 163 (2008).

Consensual search following lawful warrantless arrest valid. — When the warrantless arrest was legal, the search of the accused's car 30 minutes later with the accused's consent, as an incident to a lawful arrest, was proper. Knighton v. State, 166 Ga. App. 390, 304 S.E.2d 512 (1983).

Search of automobile incident to arrest. — Once passenger was placed under arrest, officer could lawfully search the entire passenger compartment of the defendant's vehicle as a search incident to arrest. Tutu v. State, 252 Ga. App. 12, 555 S.E.2d 241 (2001).

Police officers lawfully arrested the defendant after the officers saw the defendant's companion drive at a high rate of speed and hit a stop sign; furthermore, the officers were allowed to search the car that the defendant's companion was driving after the defendant was arrested, and the trial court erred by suppressing items associated with the use and manufacture of methamphetamine which police found when police searched the car. State v. Lowe, 263 Ga. App. 1, 587 S.E.2d 169 (2003).

Search of the defendant's vehicle incident to the defendant's arrest for driving with a suspended license was not illegal under O.C.G.A. § 17-5-1; there was no claim that the defendant was unlawfully arrested, and no violation of a deputy's authority to search incident to the defendant's arrest. Hurley v. State, 287 Ga. App. 482, 651 S.E.2d 748 (2007), cert.

denied, No. S08C0166, 2008 Ga. LEXIS 175 (Ga. 2008).

Trial court did not err in denying the defendant's motion to suppress as the officers could lawfully search the interior of the defendant's car. A sergeant who had received a report of a speeding car had a reasonable and articulable suspicion of criminal activity having occurred, and after the defendant fled and disobeyed an order to stop, a second officer had probable cause to arrest the defendant for obstruction following which the car interior could be lawfully searched under O.C.G.A. § 17-5-1. Spence v. State, 295 Ga. App. 583, 672 S.E.2d 538 (2009).

Seizure of automobile as instrumentality of crime. — When police officers had probable cause to seize an automobile as an instrumentality of crime, a search was made of the automobile contemporaneously with the automobile's seizure, the police had no way of determining who might have access to the vehicle and could remove and destroy the evidence, and the evidence contained in the automobile was in plain view, there was no error in allowing the results of the warrantless search into evidence since the search was reasonable. Collins v. State, 171 Ga. App. 906, 321 S.E.2d 757 (1984).

Officer may search automobile to find and protect evidence. — Officer at the time of a lawful custodial arrest may, without a warrant, make a full search of the accused, a limited area within the control of the person arrested, and of the automobile in the person's possession at the scene of the arrest for the discovery and preservation of criminal evidence. Stoker v. State, 153 Ga. App. 871, 267 S.E.2d 295 (1980).

If probable cause justifies a search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and the vehicle's contents that may conceal the object of the search; contraband lawfully discovered and seized from the passenger area of a vehicle furnishes probable cause for believing that more contraband is contained in the vehicle. Medlin v. State, 168 Ga. App. 551, 309 S.E.2d 639 (1983); Watson v. State, 190 Ga. App. 696, 379 S.E.2d 817 (1989), overruled on other grounds, Berry v. State, 248 Ga. App. 874, 547 S.E.2d 664 (2001), overruled on other grounds, Bius v. State, 254 Ga. App. 634, 563 S.E.2d 527 (2002).

Warrantless search of an automobile glove compartment was justified for the purpose of attempting to find a robbery weapon which was not found on the defendant's person at the time of arrest since the defendant was in the vehicle when the defendant was arrested for armed robbery. Cain v. State, 178 Ga. App. 247, 342 S.E.2d 742 (1986).

When a driver was lawfully arrested for operating a car without a license and for not having proof of insurance, a police officer did not exceed the permissible scope of a search incident to arrest when the officer searched the car. Vega v. State, 236 Ga. App. 319, 512 S.E.2d 65 (1999).

Evidence insufficient for arrest and evidence seized required suppression. — Because the circumstances of the defendant's low-speed flight from an uniformed detective, who was driving an unmarked vehicle, were insufficient to present law enforcement with evidence of a particular crime, the defendant could not be charged with the crime of attempting to elude an officer, and the police lacked probable cause sufficient to warrant an arrest for the offense; thus, the search incident to the arrest was invalid, warranting suppression of the evidence seized. Stephens v. State, 278 Ga. App. 694, 629 S.E.2d 565 (2006).

Search of automobile for proof of intoxication. — Search of a vehicle is proper for the purpose of obtaining evidence of the basis of a suspect's intoxication. Stoker v. State, 153 Ga. App. 871, 267 S.E.2d 295 (1980); State v. Holden, 162 Ga. App. 33, 290 S.E.2d 130 (1982); State v. Elliott, 205 Ga. App. 345, 422 S.E.2d 58 (1992).

If a person is lawfully arrested for driving under the influence of any substance, the officer may conduct a warrantless search of the passenger compartment of the vehicle for the purpose of obtaining evidence of intoxication as an incident to that lawful arrest. Knox v. State, 216 Ga. App. 90, 453 S.E.2d 120 (1995).

Abandoned vehicle was searchable. — Although after committing a traffic violation the defendant attempted to

Justification for Warrantless Search (Cont'd)

evade arrest so that the defendant's vehicle was no longer in the defendant's immediate presence when the defendant was arrested, that fact did not deprive the officer of authority to search the vehicle. State v. Nichols, 225 Ga. App. 609, 484 S.E.2d 507 (1997).

Police have probable cause to believe that car contains contraband. — Automobile in which contraband goods are concealed and transported may be searched without a warrant provided the police have probable cause for believing that the automobile contains the contraband. Still v. State, 149 Ga. App. 792, 256 S.E.2d 133 (1979).

Rationale for search of automobile without warrant. — Automobile in which contraband goods are concealed and transported may be searched without a warrant provided the police have probable cause for believing that the automobile which the police search contains the contraband. The reason for this rule is obvious. An automobile, unlike a home or place of business, is mobile and can be quickly moved out of the locality or jurisdiction; therefore, a search without a warrant is allowed when it is impractical to obtain a warrant. Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Search of automobile and closed container therein. — Broad scope of authority granted to police officers in conducting searches of automobiles pursuant to the search incident to arrest exception extends to the entire passenger compartment of the automobile and any closed containers therein. Bagwell v. State, 214 Ga. App. 15, 446 S.E.2d 739 (1994).

Probable cause needed to search and seize moving vehicle. — One of the exigent circumstances justifying a warrantless search is a situation where there is a seizure and search of a moving vehicle, and when the vehicle is indeed moving there is only the requirement that the search and seizure be based upon sufficient probable cause. State v. Watts, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

Police may search car later at station house. — Police officers with probable cause to search an automobile on the scene where it was stopped may constitutionally do so later at the station house without first obtaining a warrant. Shaw v. State, 149 Ga. App. 853, 256 S.E.2d 150 (1979).

Impoundment of car when occupants arrested. — When occupants of a car are arrested, and no one remains to take custody of the car, which has been stopped in a traffic lane, the police are authorized to impound the car, and a resultant inventory is proper. Hansen v. State, 168 Ga. App. 304, 308 S.E.2d 643 (1983).

Limited stop when there is articulable suspicion. — Limited stop by police officers when there is an articulable suspicion is permissible even though no probable cause exists. Smith v. State, 160 Ga. App. 690, 287 S.E.2d 44 (1981).

Permissible extent of momentary stop. — Investigatory stop is a brief stop, limited in time to that minimally necessary to investigate the allegation invoking suspicion, and limited in scope to identification, licensing of a driver and a vehicle if appropriate, a protective "pat down" of the outer surface of clothing for weapons if the officer has reasonable apprehension that the person is armed or dangerous, and questioning reasonably related to the circumstances that justified the initiation of the momentary stop. Clinkscale v. State, 158 Ga. App. 597, 281 S.E.2d 341 (1981).

Articulable suspicion less than probable cause. — Articulable suspicion is less than probable cause to make an arrest or conduct a search, but must be more than mere caprice or arbitrary harassment. Clinkscale v. State, 158 Ga. App. 597, 281 S.E.2d 341 (1981).

Specific and articulable suspicion found. — When, based on the information received from an informant, as well as the officer's own observations, the officer had specific and articulable facts which reasonably warranted a stop of the defendant's vehicle, because the defendant had been identified as a possible suspect in the distribution of illegal drugs, there was sufficient articulable suspicion for the officer to temporarily detain and question the defendant and, after the defendant's

arrest, to search the defendant for weapons and contraband. Johnson v. State, 246 Ga. App. 197, 540 S.E.2d 212 (2000).

Search without warrant or seizure before seeing magistrate both justified with probable cause. — For constitutional purposes, there is no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant; given probable cause to search, either course is reasonable under U.S. Const., amend. 4. State v. Watts, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

Warrantless arrest for fleeing. — Flight accompanied by other suspicious circumstances will sometimes authorize a warrantless arrest even though the officers do not at the time know that the particular crime for which the arrestee is brought to trial has been committed. Morton v. State, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

Search based on outstanding arrest warrant. — Marijuana found in a search of the defendant incident to the defendant's arrest was admissible under O.C.G.A. § 17-5-30 because a police dispatcher's statement to an officer that there was an outstanding arrest warrant for the defendant provided the probable cause necessary to arrest the defendant and, as a consequence, the search incident to the arrest was lawful under O.C.G.A. § 17-5-1. State v. Edwards, 307 Ga. App. 267, 704 S.E.2d 816 (2010).

Searching car stopped for traffic violation without further suspicion. — If a defendant, while operating an automobile, runs a stop light upon entering a state highway, in the presence of a state police officer, who immediately arrests the defendant for that offense and searches the automobile without the consent of the defendant, and the police officer gives as the officer's only reason for searching the automobile that it was the officer's usual practice to search stopped cars, and no other reason appears from the evidence on a hearing upon a motion to suppress, such a search is unreasonable and illegal. Rowland v. State, 117 Ga. App. 577, 161 S.E.2d 422 (1968).

Trial court did not err in denying the defendant's motion to suppress evidence that a police officer gathered incident to a traffic stop of the defendant's vehicle as the officer was justified in stopping the defendant's vehicle because the officer observed the defendant weave substantially outside the defendant's lane of travel, which was a traffic violation that permitted the officer to stop the defendant's vehicle. Spence v. State, 263 Ga. App. 377, 587 S.E.2d 766 (2003).

Warrantless automobile search must be reasonable. — If search of an automobile is made by a police officer without a warrant, the test of the search's legality is whether the search was reasonable. Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Violation of O.C.G.A. § 40-5-33 did not justify the defendant's continued detention by the police and the officer's decision to detain the defendant while the officer waited for another officer to bring a written warning book was unreasonable; thus, under the totality of the circumstances, the officer did not have specific, articulable facts that could constitute a particularized and objective basis for suspecting that the defendant was involved in any criminal activity thereby making the search unreasonable under the Fourth Amendment and requiring suppression of the evidence seized from the vehicle. Bennett v. State, 285 Ga. App. 796, 648 S.E.2d 126 (2007).

Reasonableness is question for trial judge, not appellate court. — Reasonableness is not determined by the hindsight of appellate court judges after weeks of academic deliberation; it is determined by the foresight of the officer on the scene who must act in the public interest in a very short space of time. The reasonableness of the officer's action must be judged in relation to the circumstances then existing and is in the first instance a question for the trial judge to determine. Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Incidental Seizure of Unrelated Evidence

Motive for search under section immaterial. — Whenever a search is made

Incidental Seizure of Unrelated Evidence (Cont'd)

pursuant to Ga. L. 1966, p. 567, §§ 1 and 2 (see O.C.G.A. §§ 17-5-1 and 17-5-2), the motive for the search is irrelevant. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Right to search based on officer's reasonable belief, not right to arrest. — Right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for the belief that the contents of the automobile offend the law. Meneghan v. State, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Officer needs only probable cause to believe articles stolen. — Law does not require knowledge by the officer seizing articles subsequent to an arrest that the articles have been stolen. Probable cause to believe the articles have been stolen is sufficient. Boyd v. State, 133 Ga. App. 136, 210 S.E.2d 251 (1974).

Items in plain view giving probable cause to believe crime occurring. — When articles are in plain view without a search and are in sufficient connection with the totality of the circumstances to constitute probable cause for the belief that a crime is being committed in the police officers' presence, the arrest is valid and the search incident thereto is reasonable. Anderson v. State, 123 Ga. App. 57, 179 S.E.2d 286 (1970).

Plain view. — Officers are not required to ignore articles that are in plain view and readily observable and seizure of the articles under these circumstances does not make the articles the fruit of an unlawful search since, being in plain view, no search is involved. Scott v. State, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

"Plain view" doctrine will support a warrantless search and seizure if the agents are lawfully in a position to obtain the view, the discovery is inadvertent, and the object viewed is immediately seen to be incriminating. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Trial court did not err by limiting the admissibility of admissible items in a defendant's felony murder trial to those items seized incident to the defendant's arrest in the early morning hours and in plain view during the processing of the crime scene as an approximately 15-minute video recording of the premises, which was viewed by the trial court, supported the officers' testimony that guns, shell casings, significant amounts of cash, and items appearing to be crack cocaine were all in plain view and, under the circumstances, presented probable cause as being contraband or evidence of the crime of the felony murder of an officer. Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008).

Trial court did not err in denying the defendant's motion to suppress the tennis shoes and jeans found in the defendant's motel room with blood on them and the results of the DNA tests showing that the victims' blood was found on them because a Georgia Bureau of Investigation agent lawfully seized the shoes and clothes under the plain view doctrine, and the agent seized the shoes and clothes during the execution of the search warrant as the agent knew at the time of the seizure, based on the agent's training and experience, that shoes and clothes worn by the suspect could be evidence of the crimes being investigated. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016).

Entry based on exception to warrant requirement. — If the initial intrusion that brings the police within plain view of an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Warrantless search and seizure when sheriff given entry by defendant's spouse. — If evidence establishes that a warrantless arrest and seizure were unrelated as when a sheriff who seized the items in question was permitted inside defendant's home by a person identified as defendant's spouse, and the items seized were either in plain view or voluntarily given to the sheriff, the evidence does not show a seizure pursuant to an illegal warrantless arrest that should

be suppressed. Dickerson v. State, 151 Ga. App. 429, 260 S.E.2d 535 (1979).

If officer's presence is lawful, plain view doctrine applies. — If a police officer has a right to be in the position from which an object is seen lying in plain view, the object is admissible as evidence. Dennis v. State, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

There was evidence that when police officers entered the hotel room, the officers saw a pistol butt protruding from under the pillow on which the defendant was lying, clearly within arm's reach, therefore, the introduction of the pistol at trial was not suppressed, although the officers had an arrest warrant for the defendant and not a search warrant for the room. Majors v. State, 203 Ga. App. 139, 416 S.E.2d 156 (1992).

Seizure of fruits of crime within plain view. — In a trial for murder and armed robbery, the trial court did not err in refusing to suppress items seized in the room where the defendant was arrested, which were believed to be clothing belonging to the victim, as the items were possible fruits of the crime and were within plain view of the officers at the time of the arrest. Batton v. State, 260 Ga. 127, 391 S.E.2d 914 (1990).

Police may seize evidence not specifically in warrant. — When peace officers entered a defendant's residence with an arrest warrant and a search warrant, arrested the defendant and searched the premises, certain articles in plain view having strong evidentiary value as to the crimes charged are not subject to a motion to suppress although not specifically named in the search warrant. Scott v. State, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Offense influences what objects incidentally seizable. — Nature of the offense for which the accused is arrested has an important bearing upon what objects may be seized as incidental to the arrest. Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967); Scott v. State, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Seizure of marijuana is valid when the defendant is arrested for driving under the influence and police officers are searching the defendant's automobile for the source of the defendant's intoxication. Howe v. State, 132 Ga. App. 840, 209 S.E.2d 258 (1974).

Because the underlying crime that was the basis for issuance of an arrest warrant involved threatening a person in an attempt to obtain firearms, officers were justified in searching the bedroom where the defendant was arrested for weapons and any confederates or other persons who might pose a danger to the officers. Powell v. State, 245 Ga. App. 796, 538 S.E.2d 857 (2000).

"Papers" not immune from searches. — There is nothing inherent in "papers" which immunizes the papers from searches otherwise proper under U.S. Const., amend. 4. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Obviously sexually oriented materials not immune if no warrant. — Since the sexually oriented materials offered for sale and seized were obviously for the primary purpose of stimulation of human genital organs in violation of former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) and the materials were in plain view to the officers in a lawful position to view and see the materials, no warrant was necessary to make a lawful seizure. Ball v. State, 149 Ga. App. 270, 253 S.E.2d 886 (1979).

Shotgun in plain view following armed robbery not immune if no warrant. — When officers were advised following a robbery of the description of the robber and details of the robbery, upon finding the suspect and the suspect's car, no search warrant was necessary as the shotgun was in plain view and the alleged shotgun had been used in the robbery. Duffey v. State, 151 Ga. App. 673, 261 S.E.2d 421 (1979).

Weapon discovered in vehicle. — Search of defendant's vehicle, after the defendant had been arrested for a traffic violation, resulting in the discovery of a .38 caliber revolver "stuffed down" between the front seat and the console, was justified as a search incident to a lawful arrest. Daniel v. State, 199 Ga. App. 180, 404 S.E.2d 466 (1991).

Police may not open closed containers without warrant. — Once officers

Incidental Seizure of Unrelated Evidence (Cont'd)

are entitled to go throughout the house for the limited purpose of securing the house, the officers are free to seize the marijuana in plain sight on the bed and in open suitcases. The officers are not authorized to open up closed containers or otherwise discover contraband which is not in plain view, and this is true whether the officers are conducting the warrantless search incident to the lawful arrest of the occupants or under the exigencies of the situation. Lentile v. State, 136 Ga. App. 611, 222 S.E.2d 86 (1975).

Search of the area within arrested person's "immediate presence" did not mean that a search of the defendant's bedroom closets and dresser drawers was justified as a "search incident to arrest" when the defendant was arrested in the kitchen. Brannon v. State, 231 Ga. App. 847, 500 S.E.2d 597 (1998).

Warrant required for search of house when all occupants detained. — After it is determined that all of the occupants of the house plus the defendant are in custody, no exigency exists which would justify a general search of the entire house. At that point, the officers could and should procure a search warrant to discover whatever contraband or other evidence may be on the premises, not in plain view. Lentile v. State, 136 Ga. App. 611, 222 S.E.2d 86 (1975).

Items in plain view during routine inventory search of vehicle. — When a driver is arrested and removed from the driver's vehicle, and the vehicle is on a highway or other public property, and there is no third person present to whom it is or might properly be turned over, or for some other sufficient reason a decision to impound it is properly made, and when in connection with such impoundment an "inventory search" is a recognized and routine procedure, contraband which appears in plain view in the course of such inventory is properly seized, and may be introduced in evidence. Martasin v. State, 155 Ga. App. 396, 271 S.E.2d 2 (1980).

Police may itemize the vehicle's property. — When the police take custody of any sort of container such as an automobile, it is reasonable to search the container to itemize the property to be held by the police. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Inventory search requires no warrant or probable cause. — In circumstances involving noncriminal inventory searches, when probable cause to search is irrelevant, search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Inventory searches have two purposes: to protect the vehicle and the property in the vehicle, and to safeguard the police or other officers from claims of lost possessions. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980); Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Inventory not just to protect property. — Police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve the property. The police are permitted to take charge of property under broader circumstances than that. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Inventory also permissible to protect police from danger. — An inventory search serves three distinct purposes: the protection of personal property; the protection of the police against claims arising from property allegedly lost or stolen; and the protection of the police from possible danger. Gaston v. State, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

Routine searches when cars impounded permitted by U.S. Const., amend. 4. — When vehicles are impounded, police routinely follow caretaking procedures by securing and inventorying the cars' contents. These procedures have been widely sustained as reasonable under U.S. Const., amend. 4. Martasin v. State, 155 Ga. App. 396, 271 S.E.2d 2 (1980).

Impound search of the automobile in an armed robbery trial was not illegal as it followed defendant's arrest by an undercover officer. Smith v. State, 151 Ga. App. 697, 261 S.E.2d 439 (1979).

Inventory search rationale must inhere in decision to seize and inventory. — Unless the rationale for an inventory search inheres in the decision to seize and inventory, the impoundment itself may be unreasonable and the resulting inventory search invalid. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Seizure of marijuana legal during arrest for forgery. — When arresting officer acted with reasonable caution in believing that the appellant was involved in the forgery scheme being perpetrated on a bank, marijuana which fell from the appellant's hand was lawfully seized incident to the appellant's arrest. Denson v. State, 159 Ga. App. 713, 285 S.E.2d 69 (1981).

Inventory search proper when defendant allows car to be driven to police station. — After the lawful initial stop and arrest of the defendant, the subsequent inventory search of the defendant's automobile, which revealed additional contraband, was proper when the defendant made no request that someone be called to retrieve the vehicle but, instead, voluntarily acquiesced to an officer's driving the automobile to the police station where the vehicle would be impounded. Kilgore v. State, 158 Ga. App. 55, 279 S.E.2d 239 (1981).

Evidence of traffic violation justifies search. — If there was probative evidence that the defendant was driving in excess of the lawful speed limit, there was evidence from which the trial court could reasonably conclude that the police officer did not overstep the officer's bounds in stopping the defendant, arresting the defendant for a traffic violation, and conducting a protective search of the immediate vicinity of the defendant's automobile. Kilgore v. State, 158 Ga. App. 55, 279 S.E.2d 239 (1981).

If a police officer stopped the defendant's car for having an improper tag, determined that the defendant appeared intoxicated and arrested the defendant, the search of the defendant's car was proper, and cocaine found during the search was seized lawfully. It was not error to deny the defendant's motion to suppress. Lewis v. State, 195 Ga. App. 59, 392 S.E.2d 563 (1990).

Evidence of other crimes found in container during search for marijuana. — When officers were lawfully conducting a search for marijuana in the house when the officers found a closed container with unknown contents apparently stored or hidden in the attic, the officers had the right to open any receptacle that could reasonably hold the substance or thing being sought and to discover or seize any item, substance, object, thing, or matter, the possession of which is unlawful or which is tangible evidence of the commission of a crime in the State of Georgia. Whittington v. State, 165 Ga. App. 763, 302 S.E.2d 617 (1983).

Admission into evidence of substances contained within boxes and envelopes found on the defendant's person during a search incident to the defendant's arrest for a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-1 et seq., is not error. Dasher v. State, 166 Ga. App. 237, 304 S.E.2d 87 (1983).

Search of bag not incident to arrest. — Trial court properly suppressed evidence gathered in connection with a warrantless search of a bag owned by the defendant after the defendant's arrest at a friend's house. The search was not incident to the defendant's arrest under O.C.G.A. § 17-5-1 as the defendant was already secured in a patrol car and there was no contention that the bag was related to the outstanding warrant on which the defendant had been arrested; the consent given by the defendant's friend to the search of the friend's home did not override the privacy interest that the defendant, a visitor, had in the bag; and there was no testimony that the bag was searched as part of an inventory of the defendant's personal effects. State v. McCarthy, 288 Ga. App. 426, 654 S.E.2d 239 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Campus police and security personnel are peace officers within the meaning of this section and may employ the procedures authorized by those provisions. 1970 Op. Att'y Gen. No. 70-69.

Searches by campus police and security personnel. — Individuals who have been granted arrest powers on premises under the jurisdiction of the Board of Regents are authorized to conduct searches. 1969 Op. Att'y Gen. No. 69-172.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 22 Am. Jur. Pleading and Practice Forms, Searches and Seizures, § 2.

ALR. — Entry and search of premises for purpose of arresting one without search warrant, 5 A.L.R. 263.

Right of search and seizure incident to lawful arrest, without a search warrant, 32 A.L.R. 680; 51 A.L.R. 424; 74 A.L.R. 1387; 82 A.L.R. 782.

Arrest, or search and seizure, without warrant on suspicion or information as to unlawful possession of weapons, 92 A.L.R. 490.

Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime, 129 A.L.R. 1296.

Search incident to one offense as justifying seizure of instruments of or articles connected with another offense, 169 A.L.R. 1419.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest, 89 A.L.R.2d 715.

Lawfulness of search of motor vehicle following arrest for traffic violation, 10 A.L.R.3d 314.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 A.L.R.3d 727.

Search and seizure: "furtive" movement or gesture as justifying police search, 45 A.L.R.3d 581.

Lawfulness of "inventory search" of motor vehicle impounded by police, 48 A.L.R.3d 537.

State or municipal liability for invasion of privacy, 87 A.L.R.3d 145.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) — state cases, 1 A.L.R.4th 673.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property - state cases, 2 A.L.R.4th 1173.

Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime, 29 A.L.R.4th 771.

Search and seizure of bank records pertaining to customer as violation of customer's rights under state law, 33 A.L.R.5th 453.

Application of "plain-feel" exception to warrant requirements — state cases, 50 A.L.R.5th 467.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

17-5-2. Inventory of items seized without search warrant to be given to person arrested and judicial officer before whom person arrested taken; return of items.

An inventory of all instruments, articles, or things seized in a search without a search warrant shall be given to the person arrested and a copy thereof delivered to the judicial officer before whom the person arrested is taken. If the person arrested is released without a charge

being preferred against him, all instruments, articles, or things seized, other than contraband or stolen property, shall be returned to him upon release.

History. — Ga. L. 1966, p. 567, § 2.
Law reviews. — For comment on warrantless search of defendant's home, see 41 Emory L.J. 321 (1992).

JUDICIAL DECISIONS

Analysis

General Consideration
Inventory Search Rationale
Consent to General Searches

General Consideration

Jury instructions. — There was no showing the trial court erred in failing to give the defendant's written request to charge the language of O.C.G.A. § 17-5-2 regarding the defendant's right to an inventory of property seized from the defendant at the time of arrest when the defendant did not suggest how the defendant was harmed by the trial court's failure to give the defendant's written request. Ingram v. State, 211 Ga. App. 821, 441 S.E.2d 74 (1994).

Cited in Touchstone v. State, 121 Ga. App. 602, 174 S.E.2d 450 (1970); Gunter v. State, 182 Ga. App. 548, 356 S.E.2d 276 (1987).

Inventory Search Rationale

This section relates only to search without a warrant. Williams v. State, 125 Ga. App. 170, 186 S.E.2d 756 (1971).

Noncriminal inventory searches do not involve probable cause. — In circumstances involving noncriminal inventory searches, when probable cause to search is irrelevant, search warrants are not required, linked as the warrant requirement textually is to the probable cause concept. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Seizure of observable item permitted through exception to warrant requirement. — When the initial intrusion that brings the police within plain view of an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

"Plain view" doctrine will support warrantless search and seizure if the agents are lawfully in a position to obtain the view, the discovery is inadvertent, and the object viewed is immediately seen to be incriminating. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Discovery of death note during reasonable search. — When police officers acting in good faith and while carrying out an inventory procedure without investigative intent, discovered and read a "death note" contained in the defendant's open ended shopping bag, the search was deemed reasonable and, therefore, was not violative of the defendant's rights under U.S. Const., amend. 4. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Second glance doctrine. — When one officer pursuant to a valid and proper inventory read and called attention to a "death note" found in the defendant's possessions and since the discovery and disclosure of the note were appropriate police actions, the subsequent acts of other officers, in rereading and perusing the documents in question were plainly justified under the "second glance doctrine." Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

"Papers" not immune from searches. — There is nothing inherent in

Inventory Search Rationale (Cont'd)

"papers" which immunizes the papers from searches otherwise proper under U.S. Const., amend. 4. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Suspicion of contraband does not invalidate search. — Inventory rationale is one which may be abused and stretched to cover unnecessary searches; but even some suspicion that contraband will be found will not avoid an otherwise valid inventory search. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Failure to give defendant inventory does not invalidate search. — When the circumstances authorized a warrantless search, the failure to make an inventory, being merely a ministerial act, did not affect the validity of the search and the arrest. Williams v. State, 125 Ga. App. 170, 186 S.E.2d 756 (1971).

Failure to furnish the defendant an inventory of the items taken from the defendant's home does not establish that an unlawful search and seizure took place or that this evidence is inadmissible. Such failure is a ministerial act and does not affect the validity of the search. Carter v. State, 232 Ga. 654, 208 S.E.2d 474 (1974).

Failure to give defendant inventory does not exclude evidence. — Failure to furnish a defendant with the inventory required by this section does not operate to exclude the recovered evidence from the trial. United States v. Baty, 486 F.2d 240 (5th Cir. 1973), cert. denied, 416 U.S. 942, 94 S. Ct. 1948, 40 L. Ed. 2d 294 (1974).

Failure to give inventory or follow other procedures does not necessarily suppress evidence. — When the executing officers give the defendant an inventory of the items seized, the officers' failure to deliver a similar inventory to the magistrate issuing the warrant as required by Ga. L. 1966, p. 567, § 2 (see O.C.G.A. § 17-5-2) and a return thereof on the warrant as required by Ga. L. 1966, p. 567, § 2 (see O.C.G.A. § 17-5-29) and a delivery to the sheriff of the items seized and a report to the commissioner of revenue are not cause for the suppression of the evidence. Holloway v. State, 134 Ga. App. 498, 215 S.E.2d 262 (1975).

Failure to provide the defendant with an inventory as required by O.C.G.A. § 17-5-2 provides no basis for suppressing the inventory at trial. Ingram v. State, 211 Ga. App. 821, 441 S.E.2d 74 (1994).

Failure to furnish inventory is ministerial act. — Seizure of evidence is not made invalid when the sheriff fails to make a written inventory as required by this section since failure to furnish an inventory to a defendant is a ministerial act and does not affect the validity of the search and seizure. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Ministerial act does not affect rights of defendant. — That the making and filing of an inventory pursuant to Ga. L. 1966, p. 567, § 2 (see O.C.G.A. § 17-5-2) is merely a ministerial act not affecting the substantive rights of an accused is borne out by the fact that failure to file an inventory is not a ground for a motion to suppress under the provisions of Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30). Williams v. State, 125 Ga. App. 170, 186 S.E.2d 756 (1971).

Custodial seizures and accompanying inventory searches are reasonable. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Standard police practice required for reasonable custodial seizure. — Inventory searches are reasonable if conducted in accordance with standard police practice. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979); Gaston v. State, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

Reasonable to search car to itemize contents. — When the police take custody of any sort of container such as an automobile it is reasonable to search the container to itemize the property to be held by the police. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Custody of arrestee's property for safekeeping. — Fourth Amendment is not violated when police take custody of property of persons the police arrest to store that property for safekeeping.

Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Motive immaterial for search under section. — Whenever a search is made pursuant to Ga. L. 1966, p. 567, §§ 1 and/or 2 (see O.C.G.A. § 17-5-1 and/or § 17-5-2) the motive for the search is irrelevant. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Inventory must not be done with investigative intent, but it should be incident to the caretaking function of the police. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory searches have two purposes: to protect the vehicle and the property in the vehicle, and to safeguard the police or other officers from claims of lost possessions. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980); Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Inventory not just to protect property. — Police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve the property. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979); Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Inventory can be for broader reason than just to protect property. — Police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve the property. The police are permitted to take charge of property under broader circumstances than that. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980); Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Inventory justified in order to protect police from danger. — Only so long as the scope of the search is reasonable, taking into consideration the three interests to be protected by the inventory (the protection of the owner's property while property remains in police custody; the protection of police against claims or disputes over lost or stolen property; and the protection of the police from potential danger), will the search be held to be a constitutionally permissible intrusion. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory not at prisoner's discretion. — Inventory is not for the exclusive protection of the owner, but also serves to protect the police and, therefore, it is not necessary that police ask a prisoner whether the prisoner wants personal items to be inventoried. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Accused need not be present for inventory search. — There is no requirement for the accused's presence during a routine inventory of valuables in an impounded car done in accordance with Ga. L. 1966, p. 567, § 2. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Seizure of car not part of crime permitted even when not threat to public. — Any inference from the language in both Dunkum v. State, 138 Ga. App. 321, 226 S.E.2d 133 (1976) and State v. McCranie, 137 Ga. App. 369, 223 S.E.2d 765 (1976) suggesting that seizure and inventorying of an automobile not involved in an offense against the law may be justified only when the automobile poses some threat to the traveling public, such as impeding the roadway, is mistaken. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Impoundment may be illegal. — Even though the decision to seize and inventory need not be based upon the absolute necessity to do so, unless the rationale for an inventory search inheres in the decision to seize and inventory, the impoundment itself may be unreasonable and the resulting inventory search invalid. Garner v. State, 154 Ga. App. 839, 269 S.E.2d 912 (1980); Thompson v. State, 155 Ga. App. 101, 270 S.E.2d 313 (1980).

Consent to General Searches

Test of consent is totality of circumstances. — Test as to whether or not consent to search was freely given is the "totality of the circumstances" under

Consent to General Searches (Cont'd)

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) and United States v. Scott, 578 F.2d 1186 (6th Cir.), cert. denied, 439 U.S. 870, 99 S. Ct. 201, 58 L. Ed. 2d 182 (1978). Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Burden on state to show consent voluntary. — Whether or not consent to search was freely given is an issue on which the state must carry the burden of proof. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Third-party car owner who gives defendant's luggage to police does so voluntarily. — When an individual, in whose car defendant's luggage was placed prior to the defendant's arrest, is torn between two unattractive alternatives — keeping the unwanted luggage or turning the luggage over — and finally decides to take a police receipt and gives the luggage to the police, the individual's consent is voluntary and effective. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Abandonment of defendant's suitcase in owner's automobile. — When the defendant, in making no provision for the luggage, in effect abandons the luggage in an individual's automobile with no undertaking from the individual to keep the luggage, the individual is at best a reluctant bailee, and thus the defendant's argument that the individual has no authority to dispose of the luggage, by turning the luggage over to the police, is clearly erroneous. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Seizure of defendant's luggage from another's car for protective custody. — When an officer requests and seizes the defendant's luggage, as a protective custody action, from an individual in whose automobile the luggage had been placed prior to the defendant's arrest, the officer's acts are not improper and issues of probable cause and time to obtain a warrant do not arise. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, § 312 et seq.

ARTICLE 2

SEARCHES WITH WARRANTS

Cross references. — Inspection warrants in connection with enforcement of public health laws, § 31-5-20 et seq. Inspection warrants in connection with enforcement of laws relating to mental health, § 37-1-70 et seq.

Law reviews. — For note, "To Deceive or Not to Deceive: Law Enforcement Officers Gain Broader Approval to Use Deceptive Tactics to Obtain Voluntary Consent," see 69 Mercer L. Rev. 627 (2018).

17-5-20. Requirements for issuance of search warrant generally.

(a) A search warrant may be issued only upon the application of an officer of this state or its political subdivisions charged with the duty of enforcing the criminal laws or a currently certified peace officer engaged in the course of official duty, whether said officer is employed by a law enforcement unit of:

(1) The state or a political subdivision of the state; or

(2) A university, college, or school.

(b) A search warrant shall not be issued upon the application of a private citizen or for his aid in the enforcement of personal, civil, or property rights.

History. — Ga. L. 1966, p. 567, § 14; Ga. L. 1990, p. 1980, § 1.

Law reviews. — For note on 1990 amendment of this Code section, see 7 Ga. St. U.L. Rev. 261 (1990).

JUDICIAL DECISIONS

Only a law enforcement officer may successfully apply for a search warrant. Holstein v. State, 183 Ga. App. 610, 359 S.E.2d 360, cert. denied, 183 Ga. App. 906, 359 S.E.2d 360 (1987).

When the officer who obtains a search warrant is not a certified police officer, the officer has no authority to obtain a search warrant, and evidence obtained as a result of that warrant is inadmissible. Rottenberg v. State, 184 Ga. App. 331, 361 S.E.2d 533 (1987).

Lack of certification precluding application. — Noncompliance with the conditions of O.C.G.A. Ch. 8, T. 35, by the express terms of O.C.G.A. § 35-8-17(a), renders the exercise of any powers of a law enforcement officer unauthorized. Thus, due to an officer's lack of certification, the officer had no authority to apply for a search warrant, and the evidence seized pursuant to the execution of the illegal warrant should have been suppressed. Holstein v. State, 183 Ga. App. 610, 359 S.E.2d 360, cert. denied, 183 Ga. App. 906, 359 S.E.2d 360 (1987).

Warrant application. — City of Atlanta police officer, who is also a deputy sheriff of Fulton County, has the authority to apply for, obtain, and execute a search warrant in Clayton County. Bruce v. State, 183 Ga. App. 653, 359 S.E.2d 736 (1987).

Absence of signature on affidavit did not invalidate search warrant. — Absence of a signature on the affidavit left in the magistrate court's file did not invalidate a search warrant for vehicles because there were multiple original affidavits, only one of which was unsigned, and the warrant actually served contained the affiant's signature; the affiant explained that the affiant took three identical search warrants to the magistrate, that the affiant signed two of the affidavits but inadvertently failed to sign the third one and that the affiant served the defendants with the warrants by leaving copies for the defendants at the jail. Prado v. State, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Section inapplicable to disposition of seized property. — O.C.G.A. § 17-5-20 deals with the requirements for the issuance of search warrants generally and does not deal in any way with the disposition of the seized property. Wallace v. State, 165 Ga. App. 804, 302 S.E.2d 718 (1983).

Juvenile court probation officer has no authority to apply for a search warrant. Huff v. Walker, 125 Ga. App. 251, 187 S.E.2d 343 (1972).

Private litigants not entitled to search warrant. — Search warrants are criminal in nature, having no relation to civil process and are unavailable to an individual for the maintenance of a mere private right. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Temporary protective order not substitute for search warrant. — Temporary protective order (TPO) obtained by the defendant's girlfriend did not constitute a valid search warrant and was not a substitute for a search warrant authorizing entry into the defendant's home and, therefore, the trial court erred by denying the defendant's motion to suppress because the TPO did not meet the warrant and probable cause standard of the Fourth Amendment and O.C.G.A. § 17-5-20 and the state did not articulate

a need to deviate from the requirement of obtaining a warrant to search the defendant's home. State v. Burgess, 349 Ga. App. 486, 826 S.E.2d 352 (2019).

Sufficient particularity in warrant. — Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because the fact that the investigator who submitted the affidavit for the search warrant did not leave a copy of the affidavit with the warrant at the premises did not render the warrant invalid; the warrant satisfied the particularity requirement of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII on the warrant's face because the warrant listed the address of the place to be searched and contained a description of the home, and the warrant also listed items to be seized, including marijuana, weighing devices, and other paraphernalia used in the distribution of drugs. Pass v. State, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Sufficient probable cause. — Because the magistrate was presented with a substantial basis for concluding that evidence of child molestation would be found in the cameras and film located in the defendant's car, and such provided probable cause to support the issuance of a search warrant, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of the search warrant. Manders v. State, 281 Ga. App. 786, 637 S.E.2d 460 (2006).

With regard to a defendant's convictions on drug-related offenses, the trial court properly denied the defendant's motion to suppress the evidence seized from the defendant's apartment upon execution of a search warrant since the affidavit of a deputy, which was based on an informant's tip, sufficiently established probable cause as the informant had been in the defendant's apartment and had personally viewed the drugs. Rocha v. State, 284 Ga. App. 852, 644 S.E.2d 921 (2007).

Trial court properly found that under the totality of the circumstances, the affidavit in support of a search warrant for a residence suspected of being a marijuana "grow house" gave the magistrate a substantial basis for concluding that probable cause existed because the affidavit set forth the fact that similar investigations and seizures had taken place in several grow houses in the area, the house under surveillance had characteristics similar to those houses, and two men fled from the residence and were apprehended with large amounts of cash; the information from the stop was not excludable as "stale" because there was a substantial basis for believing that the electrical ballasts and light fixtures identified in the search warrant could still be found at the residence and the items were not perishable. Prado v. State, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence a detective found in the defendant's home because given the totality of the circumstances, the magistrate who issued the search warrant was authorized to conclude that there was a fair probability that contraband would be found at the defendant's home; the detective's affidavit in support of the warrant contained ample facts by which the magistrate could independently evaluate the veracity and reliability of anonymous informants and their information, and a confidential informant's controlled buy of marijuana from the defendant at the defendant's residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at the home. Taylor v. State, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Trial court did not err in refusing to suppress the defendant's hospital records, which showed that the defendant used drugs on the day the defendant shot the victim, because on the evidence's face, the affidavit for the search warrant issued for the records demonstrated a fair probability that evidence of the defendant's drug use would be found in the hospital records; the alleged omissions in the affidavit, which was based on the statements of the defendant's spouse, had the potential to impeach the statements made by the spouse, but the omissions did not eliminate the existence of probable cause because if the omitted material were included in the warrant, probable cause would still exist. Herrera v. State, 288 Ga. 231, 702 S.E.2d 854 (2010).

Cited in Fowler v. State, 128 Ga. App. 501, 197 S.E.2d 502 (1973); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973); Baxter v. State, 134 Ga. App. 286, 214 S.E.2d 578 (1975); State v. Harber, 198 Ga. App. 170, 401 S.E.2d 57 (1990); Davis v. State, 261 Ga. 382, 405 S.E.2d 648 (1991); Hightower v. State, 205 Ga. App. 305, 422 S.E.2d 28 (1992); White v. Traino, 244 Ga. App. 208, 535 S.E.2d 275 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Constable or small claims court bailiff is not charged with the general duty of enforcing the criminal laws of this state. 1975 Op. Att'y Gen. No. U75-17.

Authority of "registered" or "exempt" peace officers. — "Registered" or "exempt" peace officer who is in compliance with the requirements for certification under the Georgia Peace Officer Standards and Training Act, O.C.G.A. § 35-8-1 et seq., has the same authority and limitations as that of a "certified" peace officer in all respects relevant to law enforcement duties, including the ability to apply for a search warrant. 1999 Op. Att'y Gen. No. 99-7.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 179, 183, 187, 193.

ALR. — Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information and investigation by one whose name is not disclosed, 14 A.L.R.2d 605.

Search warrant: sufficiency of showing as to time of occurrence of facts relied on, 100 A.L.R.2d 525.

Disputation of truth of matters stated in affidavit in support of search warrant — modern cases, 24 A.L.R.4th 1266.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 A.L.R.5th 52.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 A.L.R.5th 229.

Validity of anticipatory search warrants — state cases, 67 A.L.R.5th 361.

Civilian participation in execution of search warrant as affecting legality of search, 68 A.L.R.5th 549.

When is consent voluntarily given so as to justify search conducted on basis of that consent — Supreme Court cases, 148 A.L.R. Fed. 271.

17-5-21. Grounds for issuance of search warrant; scope of search pursuant to search warrant; issuance by retired judge or judge emeritus.

(a) Upon the written complaint of any certified peace officer of this state or its political subdivisions charged with the duty of enforcing the criminal laws and otherwise as authorized in Code Section 17-5-20 under oath or affirmation, which states facts sufficient to show probable cause that a crime is being committed or has been committed and which particularly describes the place or person, or both, to be searched and things to be seized, any judicial officer authorized to hold a court of inquiry to examine into an arrest of an offender against the penal laws, referred to in this Code section as "judicial officer," may issue a search warrant for the seizure of the following:

(1) Any instruments, articles, or things, including the private papers of any person, which are designed, intended for use, or which have been used in the commission of the offense in connection with which the warrant is issued;

(2) Any person who has been kidnapped in violation of the laws of this state, who has been kidnapped in another jurisdiction and is now concealed within this state, or any human fetus or human corpse;

(3) Stolen or embezzled property;

(4) Any item, substance, object, thing, or matter, the possession of which is unlawful; or

(5) Any instruments, articles or things, any information or data, and anything that is tangible or intangible, corporeal or incorporeal, visible or invisible evidence of the commission of the crime for which probable cause is shown, other than the private papers of any person.

(b) When the peace officer is in the process of effecting a lawful search, nothing in this Code section shall preclude such officer from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, the possession of which is unlawful, or any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state, the United States, or another state. Other personnel, sworn or unsworn, acting under the direction of a peace officer executing a search warrant may assist in the execution of such warrant. While in the process of effecting a lawful arrest or lawful search, nothing in this Code section nor in Code Section 16-11-62 shall be construed to preclude the use of any device, as such term is defined in Code Section 16-11-60, by the peace officer executing the search warrant or other personnel assisting in the execution of such warrant.

(c) Any retired judge or judge emeritus of a state court may issue search warrants as authorized by this Code section if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

(d) Notwithstanding any provisions of Code Section 17-5-20 or other provisions of this Code section to the contrary, with respect to the execution of a search warrant by a certified peace officer employed by a university, college, or school, which search warrant will be executed beyond the arrest jurisdiction of a campus policeman pursuant to Code Section 20-3-72, the execution of such search warrant shall be made jointly by the certified peace officer employed by a university, college, or school and a certified peace officer of a law enforcement unit of the political subdivision wherein the search will be conducted.

History. — Ga. L. 1966, p. 567, § 3; Ga. L. 1985, p. 1105, § 2; Ga. L. 1990, p. 1980, §§ 2, 3; Ga. L. 2015, p. 1046, § 3/SB 94.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 79 (2015).

For note on 1990 amendment of this Code section, see 7 Ga. St. U.L. Rev. 261 (1990).

For comment on Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 597 (1965), see 17 Mercer L. Rev. 479 (1966). For comment discussing satisfaction of probable cause requirement for issuance of search warrant by reasonable inference in light of Murphy v. State, 238 Ga. 725, 234 S.E.2d 911 (1977), see 29 Mercer L. Rev. 347 (1977).

JUDICIAL DECISIONS

Analysis

General Consideration
Sufficiency of Warrant
1. Technical Requirements for Affidavit
2. Probable Cause
Seizure of Contraband Not in Warrant

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, Ch. 27-3 and Ga. L. 1951, p. 291, § 8 are included in the annotations for this Code section.

Authority of judicial officer to issue search warrant does not vanish within restricted area. — O.C.G.A. 17-5-22 (when considered with O.C.G.A. §§ 17-5-21 and 17-7-20) means that the authority of a judicial officer to issue a search warrant to be executed within the area of the officer's jurisdiction does not vanish when the officer physically steps into an area where the officer's authority is restricted within the county in which the officer serves. State v. Varner, 248 Ga. 347, 283 S.E.2d 268 (1981).

Seizure of sexually explicit videos. — Sexually explicit VCR tapes and photographs, although in the private possession of the defendant, were seizable as evidentiary items used in accomplishing a crime, aggravated sodomy, and such tapes could also be used to show bent of mind of the defendant to commit such crimes. Tyler v. State, 176 Ga. App. 96, 335 S.E.2d 691 (1985).

Discovery of evidence of another crime. — Evidence of another crime, discovered while searching pursuant to a valid search warrant, may be lawfully seized. Bing v. State, 178 Ga. App. 288, 342 S.E.2d 762 (1986).

Probable cause may rely on evidence inadmissible at trial. — While a warrant may issue only upon a finding of "probable cause," the term means less than evidence which would justify condemnation, and a finding of probable cause may rest upon evidence which is not legally competent in a criminal trial. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Facts must lead prudent man to believe crime committed. — Whether by recitals in the affidavit or by an independent showing before the magistrate, the facts must be such as to lead a man of prudence and caution to believe that the offense has been committed. Mere speculation, conjecture, or opinion is not enough, nor is mere rumor. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Probable cause must be determined by magistrate, not police. — Determination as to whether there is probable cause is not to be made by one who applies for issuance of the warrant; it must be made by the magistrate from a consideration of the facts submitted under oath. It must exist before the search is made and cannot be supplied by after-discovered facts. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

General Consideration (Cont'd)

Probate court judge could issue search warrant. — Defendant's motion to suppress evidence seized pursuant to a warrant issued by a probate court judge was properly denied because the probate court judge was authorized to hold a court of inquiry under O.C.G.A. § 17-7-20 and, therefore, was authorized to issue a search warrant under O.C.G.A. § 17-5-21(a). O.C.G.A. § 40-13-21(b), assuming the statute required the state court to issue a warrant, pertained to the jurisdiction of probate courts in misdemeanor traffic cases and did not apply in this felony case. Joyner v. State, 347 Ga. App. 159, 817 S.E.2d 822 (2018).

Preferable to incorporate facts in affidavit. — While probable cause may be made to appear by a showing under oath before the magistrate when issuance of the warrant is sought, it is better, even necessary, that the facts then made to appear as showing probable cause be incorporated in the affidavit. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Judicial officer other than magistrate may issue warrant. — At common law, justices of the peace had general power to issue search warrants for stolen goods. So long as a judicial determination of the existence of probable cause is made, there is no constitutional inhibition against designation by the General Assembly of persons other than a justice of the peace for doing it. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Juvenile court probation officer has no authority to apply for a search warrant. Huff v. Walker, 125 Ga. App. 251, 187 S.E.2d 343 (1972) (decided under Ga. L. 1951, p. 291, § 8).

Private papers. — Warrant for the seizure of private papers that did not clearly limit the items to be seized to those involving the named participants was overly broad and allowed for an impermissible exercise of discretion by the searching officers. Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996).

Defendant's rights were not violated when the contents of a handwritten letter were not used against the defendant and only the characteristics of the handwriting were used by a handwriting expert for comparison purposes. Hale v. State, 220 Ga. App. 667, 469 S.E.2d 871 (1996).

Private papers, as referred to in O.C.G.A. § 17-5-21, are restricted to those covered by an applicable privilege, and slips of paper listing pornographic internet sites were not within the coverage. Walsh v. State, 236 Ga. App. 558, 512 S.E.2d 408 (1999).

Defendant's assertion that the contents of a notebook were private papers exempt from seizure under O.C.G.A. § 17-5-21 was rejected since the contents were voluntarily handed over to the police for review. Heckman v. State, 276 Ga. 141, 576 S.E.2d 834 (2003).

Judgment of divorce not private paper. — As to the defendant's conviction for possession with the intent to distribute, the trial court did not err in denying the defendant's motion to suppress papers found in a residence because O.C.G.A. § 17-5-21 authorizes the seizure of certain private papers, but the defendant's judgment of divorce, a public record, was not a private paper subject to suppression. Flemister v. State, 317 Ga. App. 749, 732 S.E.2d 810 (2012).

Medical records were not private papers. — Defendant's argument that the defendant's medical records could not have been obtained via search warrant because the records constituted "private papers," which were exempt from search warrants pursuant to O.C.G.A. § 17-5-21, was unavailing; medical records could have been properly seized pursuant to a search warrant. Brogdon v. State, 299 Ga. App. 547, 683 S.E.2d 99 (2009), aff'd, 287 Ga. 528, 697 S.E.2d 211 (2010).

Blood sample. — Search warrant is an appropriate vehicle for obtaining a blood sample from a defendant. State v. Slavny, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

Use of thermal scanning device. — Fruits of a search warrant allowing the police to use a thermal scanning device to search the defendant's home for anomalous heat loss were not suppressed because "anomalous heat loss" was tangible evidence, under O.C.G.A. § 17-5-21(a)(5), as "anomalous heat loss" was definable and measurable and could, at least in

some cases, be perceived through the sense of touch. Brundige v. State, 310 Ga. App. 900, 714 S.E.2d 681 (2011), aff'd, 291 Ga. 677, 735 S.E.2d 583 (2012).

Thermal imaging evidence. — Giving the word tangible full effect, the Supreme Court of Georgia finds that it appears that the Georgia General Assembly intends tangible evidence under O.C.G.A. § 17-5-21 to mean evidence that is essentially an object with material form that could be touched by a person. Brundige v. State, 291 Ga. 677, 735 S.E.2d 583 (2012).

Concerned citizens' call to police. — Search warrant for the defendant's trailer was supported by probable cause given multiple calls from concerned citizens that the defendant was firing a gun outside the defendant's home at all hours and the defendant's prior convictions for felony drug and firearms offenses, and marijuana plants outside a second trailer gave probable cause for a warrant for that trailer. State v. Dotson, 337 Ga. App. 284, 787 S.E.2d 262 (2016), cert. denied, No. S16C1717, 2016 Ga. LEXIS 829 (Ga. 2016).

Search of probationer's residence. — Trial court properly denied the defendant's motion to suppress because the court did not err in determining that the law-enforcement officers who searched the defendant's home had reasonable suspicion to suspect criminal activity or violations of probation based on the probation officer's concerns that the defendant was using drugs and attempting to avoid detection; thus, the search was conducted for probationary purposes, rather than for law-enforcement purposes. Whitfield v. State, 337 Ga. App. 167, 786 S.E.2d 547 (2016).

Cited in Hutto v. State, 116 Ga. App. 140, 156 S.E.2d 498 (1967); Neal v. State, 118 Ga. App. 407, 164 S.E.2d 150 (1968); Patterson v. State, 124 Ga. App. 465, 184 S.E.2d 228 (1971); Vaughn v. State, 126 Ga. App. 252, 190 S.E.2d 609 (1972); Young v. Caldwell, 229 Ga. 653, 193 S.E.2d 854 (1972); Fowler v. State, 128 Ga. App. 501, 197 S.E.2d 502 (1973); Simmons v. State, 233 Ga. 429, 211 S.E.2d 725 (1975); Butler v. State, 134 Ga. App. 131, 213 S.E.2d 490 (1975); Pope v. State, 134 Ga. App. 455, 214 S.E.2d 686 (1975); Granger v. State, 235 Ga. 681, 221 S.E.2d 451 (1975); State v. McDonald, 142 Ga. App. 359, 235 S.E.2d 776 (1977); Reynolds v. State, 142 Ga. App. 549, 236 S.E.2d 525 (1977); Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978); Toole v. State, 146 Ga. App. 305, 246 S.E.2d 338 (1978); Contreras v. State, 242 Ga. 369, 249 S.E.2d 56 (1978); Branch v. State, 248 Ga. 300, 282 S.E.2d 894 (1981); Suddeth v. State, 162 Ga. App. 460, 291 S.E.2d 430 (1982); Reed v. State, 163 Ga. App. 233, 293 S.E.2d 469 (1982); Landers v. State, 250 Ga. 808, 301 S.E.2d 633 (1983); Bogan v. State, 165 Ga. App. 851, 303 S.E.2d 48 (1983); Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984); Mosley v. State, 180 Ga. App. 30, 348 S.E.2d 555 (1986); Rush v. State, 188 Ga. App. 520, 373 S.E.2d 377 (1988); Cayce v. State, 192 Ga. App. 97, 383 S.E.2d 648 (1989); Davis v. State, 261 Ga. 382, 405 S.E.2d 648 (1991); Hightower v. State, 205 Ga. App. 305, 422 S.E.2d 28 (1992); Davis v. State, 262 Ga. 578, 422 S.E.2d 546 (1992); Felix v. State, 234 Ga. App. 509, 507 S.E.2d 172 (1998); State v. Henderson, 271 Ga. 264, 517 S.E.2d 61 (1999); Jones v. State, 289 Ga. App. 767, 658 S.E.2d 386 (2008); Carson v. State, 314 Ga. App. 515, 724 S.E.2d 821 (2012).

Sufficiency of Warrant

1. Technical Requirements for Affidavit

Strict construction. — Proceedings for issuance of search warrants are to be strictly construed, and every constitutional and statutory requirement must be fully met, including all formalities required by statute, before a valid search warrant may issue. Moreover, a section prescribing the method of issuing search warrants must be read and construed in the light of, and conform in all essential respects to, the provisions of the Constitution granting immunity from unreasonable searches and seizures. Pruitt v. State, 123 Ga. App. 659, 182 S.E.2d 142 (1971).

Requirements of section must be met. — It is only after requirements of this section are met that the warrant may be issued and the search instituted. Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968).

Sufficiency of Warrant (Cont'd)
1. Technical Requirements for Affidavit (Cont'd)

Police as officer of state. — Police officer employed by county is an "officer of the state or its political subdivisions charged with the duty of enforcing the criminal laws" within the meaning of this section. Hawkins v. State, 130 Ga. App. 426, 203 S.E.2d 622 (1973).

Common sense reading of affidavit required. — Common-sense reading of the entire affidavit is all that is required. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973).

No place for minor technical errors in reading of affidavit. — Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion and technical requirements of elaborate specificity have no proper place in this area. Driscoll v. State, 129 Ga. App. 702, 201 S.E.2d 11 (1973).

Warrant given preference when affidavit uncertain. — Although in a particular case it may not be easy for the court to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Bradley v. State, 131 Ga. App. 271, 205 S.E.2d 463 (1974).

Information can be in wrong part of form. — When grounds for a search warrant appear on the face of the printed search warrant form, the fact that the grounds may be stated in the wrong place on the form is immaterial. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973).

There is no requirement that probable cause for the issuance of a warrant be set out only in that section of the printed affidavit form designated "probable cause." The affidavit is to be read as a whole. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973).

Not all information must appear within affidavit. — It is not necessary that all the information relied upon in seeking a warrant must appear within an affidavit. Hornsby v. State, 124 Ga. App. 724, 185 S.E.2d 623 (1971).

Exculpatory material. — There is no requirement that exculpatory material be included in an ex parte application for a search warrant. Hayes v. State, 182 Ga. App. 319, 355 S.E.2d 700 (1987).

Written complaint must be signed by the attesting officer in order to be valid. State v. Barnett, 136 Ga. App. 122, 220 S.E.2d 730 (1975).

General warrants void. — General warrant, one which does not sufficiently specify the place or the person to be searched, is void. Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

Search area must be described. — Warrant should not leave the place to be searched to the discretion of the officer. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Legal search not invalidated by overbroad warrant. — If a search as it was actually conducted is lawful, it is not rendered invalid merely because the warrant pursuant to which the search was made was overbroad or founded upon erroneous beliefs. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973).

Description sufficient if person and place can be definitely located. — Description is sufficient if prudent officer executing the warrant can locate the person and place definitely and with reasonable certainty. Buck v. State, 127 Ga. App. 72, 192 S.E.2d 432 (1972); Cooksey v. State, 149 Ga. App. 572, 254 S.E.2d 892 (1979); State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980); Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981).

Description in the warrant itself must be sufficient to enable the officer who serves the warrant to ascertain with reasonable certainty and identify the place intended. Vaughn v. State, 141 Ga. App. 453, 233 S.E.2d 848 (1977).

Incomplete description of suspect does not void seizure. — Lack of description of the person to be searched does not void the search and seizure of items found in a search of the place. Holloway v. State, 134 Ga. 498, 215 S.E.2d 262 (1975).

Lack of description of the person to be searched does not void the search and seizure of items found in a search of the place; even a "John Doe" warrant is legally sufficient "for a search of described prem-

ises." Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979), overruled on other grounds, State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Although the search warrant only described the defendant as a "black male unknown," it was not an invalid warrant. A warrant is sufficient if it particularly describes the place or person, or both, to be searched and things to be seized. The warrant had a very specific description of the location of the defendant's residence — the place from which the defendant was observed leaving. Smith v. State, 187 Ga. App. 231, 369 S.E.2d 549 (1988).

Warrant omitting name of owner or occupant. — Search warrant otherwise sufficient is not rendered invalid by the omission of the name of the owner or occupant of the premises to be searched. Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979), overruled on other grounds, State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Premises described exactly if owner's or occupant's name not given. — When the name of the owner or the occupant is not given, the description of the premises must be exact. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Warrant may list owner, not occupant. — It is not fatal to list the owner of the premises, rather than the occupant of the premises, when the primary object of the warrant is the search of the premises. Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979), overruled on other grounds, State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Failure to include street address in body of clear warrant not fatal. — When a search warrant clearly authorized the search of the premises described in the caption of the warrant, the failure to reflect the street address or description in the body of the warrant is a technical irregularity which did not affect the substantial rights of the defendants and did not authorize suppression of the evidence. Latimer v. State, 134 Ga. App. 372, 214 S.E.2d 390 (1975).

Omission of county and state not fatal. — Description in warrant itself can be sufficient to enable the officer who served the warrant to ascertain with reasonable certainty the identity of the place intended, despite the omission of the county and state therein. Miller v. State, 155 Ga. App. 399, 270 S.E.2d 822 (1980).

Warrant describing car, house, and address sufficient. — Search warrant, in giving specific directions on how to find the house, the street address, a house description ("one-story frame dwelling"), and the description and license number of the appellant's car, gives a sufficient description. Cooksey v. State, 149 Ga. App. 572, 254 S.E.2d 892 (1979).

Exact specification of instrumentalities not essential. — Though specificity is to be desired, when circumstances make an exact description of instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items the officer is seeking. Dugan v. State, 130 Ga. App. 527, 203 S.E.2d 722 (1974); Cooper v. State, 212 Ga. App. 34, 441 S.E.2d 448 (1994).

Mere room number change on warrant permissible. — When both the affidavit and the warrant recited probable cause to believe drugs would be found on the person of the named defendant and on the premises under the defendant's possession, custody, and control, namely hotel room 327, the search of room 337 of the hotel constituted a reasonable search under the warrant, without amendment, upon the discovery before the warrant's execution that the defendant was registered in room 337, and the actions of the officer in phoning the issuing magistrate and obtaining authorization to make the correction were reasonable and proper. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Warrant narrowly drafted. — Trial court did not err in denying the defendant's motion to suppress the results of a blood-alcohol-content test that was obtained via the seizure of the defendant's blood samples and pursuant to a search warrant because the warrant was narrowly drafted to seek only the blood samples and medical records from the hospital where the defendant was treated on the night of the accident; even if the warrant could be construed as authorizing a broader seizure of all of the defendant's medical records instead of only those rel-

Sufficiency of Warrant (Cont'd)
1. Technical Requirements for Affidavit (Cont'd)

evant to the defendant's treatment related to the accident, the defendant failed to show that any such broader seizure occurred and, thus, failed to show any harm. Jones v. State, 313 Ga. App. 590, 722 S.E.2d 202 (2012).

Description in warrant held sufficient. — Affidavit and warrant, each headed "Gwinnett County," contained a description sufficient to enable an officer who served a warrant to ascertain with reasonable certainty the identity of the place intended, which is more specifically known as Tucker, Georgia. Mosier v. State, 160 Ga. App. 415, 287 S.E.2d 357 (1981).

Information provided in an affidavit and a search warrant issued was not insufficient to set out with exactitude a description of the premises to be searched. Martin v. State, 165 Ga. App. 760, 302 S.E.2d 614 (1983).

With regard to the defendant's conviction for possession of marijuana with the intent to distribute, even if the defendant had not waived the issue of defense counsel being ineffective for failing to file a motion to suppress, the challenge was meritless since the search warrant properly named the package the police sought to seize, which the defendant picked up at a mailing store, and the warrant did not need to name the defendant's vehicle, which the defendant entered into with the package. Ferguson v. State, 292 Ga. App. 7, 663 S.E.2d 760 (2008).

Taped affidavit. — Fact that a taped "affidavit" was not in written form when the affidavit was presented to the magistrate was a technical defect; accordingly, the court properly denied the defendant's motion to suppress evidence. Williams v. State, 188 Ga. App. 334, 373 S.E.2d 42 (1988).

Affidavit based on information from ISP. — GBI agent was authorized to rely on information regarding sexually explicit images of children as reported by an internet service provider (ISP) pursuant to the ISP's statutory reporting obligation set forth in 42 U.S.C. § 13032(b)(1); the ISP's report was the equivalent of one made from a law-abiding concerned citizen, and therefore was afforded a preferred status insofar as testing the credibility of the information. Manzione v. State, 312 Ga. App. 638, 719 S.E.2d 533 (2011), cert. denied, No. S12C0485, 2012 Ga. LEXIS 308 (Ga. 2012).

Suppression motion should have been granted based on confidential informant's testimony. — Denial of the defendant's suppression motion was error as a search warrant was based upon the statements of a confidential informant (CI) whose reliability, credibility, and source of information were unknown, law enforcement officers had failed to corroborate the CI's claim that the defendant was selling drugs from the residence, and the officers did not observe the CI's conduct before or after the controlled buy. Chatham v. State, 323 Ga. App. 51, 746 S.E.2d 605 (2013).

Insufficient corroboration of anonymous informant. — Given the complete lack of information regarding the anonymous informant, the informant's motives, or the basis for the informant's knowledge, the informant's allegations, standing alone, were insufficient to establish probable cause for the search of the defendant's home and, thus, the trial court erred in denying the defendant's motion to suppress evidence discovered during a search of the defendant's home. Wiggins v. State, 331 Ga. App. 447, 771 S.E.2d 135 (2015).

2. Probable Cause

Evaluation of evidence by magistrate. — Task of the issuing magistrate is simply to make a practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before the magistrate, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Farmer, 177 Ga. App. 18, 338 S.E.2d 489 (1985); Hayes v. State, 182 Ga. App. 319, 355 S.E.2d 700 (1987).

Magistrate must decide probable cause. — Law requires that the question

of probable cause for the issuance of the search warrant must be independently determined by a neutral and detached magistrate and not by the officer engaged in the often competitive enterprise of ferreting out crime. Patterson v. State, 126 Ga. App. 753, 191 S.E.2d 584 (1972).

Basis for determining if sufficient probable cause. — Determination of whether or not there was a sufficient showing of probable cause to justify the issuance of a search warrant depends on the resolution of two questions: first, whether or not the facts as stated in the affidavit constitute a sufficient showing of probable cause and, second, whether in the light of all of the sworn evidence placed before the magistrate, the magistrate was justified in issuing the warrant. Campbell v. State, 226 Ga. 883, 178 S.E.2d 257 (1970), cert. denied, 401 U.S. 1002, 91 S. Ct. 1246, 28 L. Ed. 2d 535 (1971).

Duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis" for concluding that probable cause existed when the magistrate issued the warrant, while the issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before the magistrate, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. In determining if an affidavit contained sufficient information for a magistrate to determine that probable cause existed to issue a search warrant, the reviewing court may consider the remainder of an affidavit after a portion has been excised in combination with the totality of the circumstance. Porter v. State, 264 Ga. App. 526, 591 S.E.2d 436 (2003).

Trial court properly denied the defendant's motion to suppress because probable cause to conduct the search to take the defendant's blood at the hospital existed based on evidence of the odor of alcohol combined with evidence from a witness that the driver lost control of the vehicle and crashed into a tree; thus, there was a fair probability that a test of the defendant's blood would reveal evidence of driving under the influence of alcohol. Mason v. State, 353 Ga. App. 404, 837 S.E.2d 711 (2020).

Affidavit needs sufficient facts for magistrate to determine probable cause. — Law requires that sufficient facts be set forth in the affidavit required by this section to enable the magistrate to make an independent determination as to whether probable cause exists for the issuance of a search warrant. McMahan v. State, 125 Ga. App. 491, 188 S.E.2d 183 (1972).

Affidavit requiring facts showing criminal activity likely at defendant's home. — When facts fail to show when taken as a whole the reasonable likelihood of any criminal activity within the defendant's home, the requirement of probable cause has not been met. McMahan v. State, 125 Ga. App. 491, 188 S.E.2d 183 (1972).

Affidavit listed salient evidence sought and gave a reason why the evidence was salient. — Trial court properly denied the defendant's motion pursuant to O.C.G.A. § 17-5-30 to suppress evidence in a prosecution for felony murder and other charges; the search warrant was supported by probable cause pursuant to O.C.G.A. § 17-5-21(a) as the application listed the salient evidence sought, and gave a reason why the evidence, including pornographic materials, was salient as the evidence indicated that the defendant choked a girlfriend after they got into an argument over the defendant watching pornography in their home. Lemon v. State, 279 Ga. 618, 619 S.E.2d 613 (2005).

Search warrant affidavit insufficient for residence search. — Magistrate did not have a substantial basis for concluding that marijuana and items used for growing and distributing marijuana would be found at the residence and, therefore, the trial court did not err by granting the defendants' motions to suppress because the investigator did not surveil the house to determine if there were excessive visitors to support a thriving marijuana trafficking operation or other suspicious activity, the investigator provided no information as to the tipster's identity, how the tipster was aware of the

Sufficiency of Warrant (Cont'd)
2. Probable Cause (Cont'd)

criminal activity, or what the tipster's motives for reporting the crime were, the tipster reported it had been at least two years since the tipster had been inside the house, and it was reasonably possible that the marijuana trash came from another nearby person or address. State v. Cartee, 355 Ga. App. 326, 844 S.E.2d 202 (2020).

Magistrate must have reason to believe items on premises. — Probable cause finding must be based on more than the conclusion that a crime was committed and that the items sought are connected with the crime. The magistrate must also have a sufficient reason to believe that the items will be found in the place to be searched. Murphy v. State, 238 Ga. 725, 234 S.E.2d 911 (1977).

Judge must realize probable cause cannot be definite. — In reaching a judgment on probable cause for a search warrant, a judge must use a common-sense approach because the judge is dealing with a probability and not a certainty that a crime has been committed. Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975).

Probable cause means reasonable grounds and is that apparent state of facts which seems to exist after reasonable and proper inquiry. Hogan v. State, 140 Ga. App. 716, 231 S.E.2d 802 (1976); State v. Johnson, 152 Ga. App. 115, 262 S.E.2d 197 (1979).

Test of probable cause. — Test is whether it would justify a man of reasonable caution in believing that an offense has been or is being committed, and this requires merely a probability — less than a certainty but more than a mere suspicion or possibility. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); Baxter v. State, 134 Ga. App. 286, 214 S.E.2d 578, cert. denied, 423 U.S. 895, 96 S. Ct. 194, 46 L. Ed. 2d 127 (1975); Brown v. State, 151 Ga. App. 830, 261 S.E.2d 717 (1979); Lewis v. State, 255 Ga. 101, 335 S.E.2d 560 (1985).

Level of proof need not equal level for guilt. — Considerably less is required to show probable cause for search or arrest than is required to prove guilt. Hornsby v. State, 124 Ga. App. 724, 185 S.E.2d 623 (1971).

Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. Davis v. State, 127 Ga. App. 76, 192 S.E.2d 538 (1972).

"Reasonable cause" necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial. Baxter v. State, 134 Ga. App. 286, 214 S.E.2d 578, cert. denied, 423 U.S. 895, 96 S. Ct. 194, 46 L. Ed. 2d 127 (1975).

Law sanctions a difference between the methods permitted to prove the ultimate issue of guilt and that of probable cause for search or arrest. Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975).

When dealing with probable cause, as the name implies, one deals with probabilities, not certainty, and the quantum of proof necessary to establish probable cause is not that level which is necessary for proof of guilt in a trial. Bradford v. State, 149 Ga. App. 839, 256 S.E.2d 84, cert. denied, 444 U.S. 936, 100 S. Ct. 285, 62 L. Ed. 2d 195 (1979).

Determining probable cause from totality of information. — Judge may consider the totality of the information to determine if probable cause exists before issuing a search warrant. Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975).

Consideration of inadmissible evidence outside affidavit. — In determining whether the magistrate was justified in issuing the search warrant, the court is not limited to the facts on the face of the affidavit, and is free to make judgments on the veracity of any or all of the evidence. Campbell v. State, 226 Ga. 883, 178 S.E.2d 257 (1970), cert. denied, 401 U.S. 1002, 91 S. Ct. 1246, 28 L. Ed. 2d 535 (1971).

Not only what is stated in the affidavit for the search warrant but also the totality of the sworn circumstances before the magistrate may be considered in establishing probable cause. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); Franklin v. State, 135 Ga. App. 718, 218 S.E.2d 641 (1975); Brown v. State, 151 Ga. App. 830, 261 S.E.2d 717 (1979).

Consideration of information gathered by police. — Information gathered

by arresting and investigating officers can be used to support probable cause. Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979), overruled on other grounds, State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Officer's corroboration of informant's allegations insufficient. — Defendant's motion to suppress was improperly denied as the application and affidavit for the search warrant contained insufficient information to allow a finding of probable cause to search the residence because the confidential informant had not assisted law enforcement before; the investigator only corroborated the information that was readily available to the general public; the investigator did nothing to independently confirm the informant's tip that there were items commonly associated with methamphetamine production in the trash can outside the residence; and the independent investigation did not establish the informant's reliability to any meaningful degree. Nichols v. State, 336 Ga. App. 287, 783 S.E.2d 918 (2016).

Consideration of marijuana odor. — Although there is some controversy as to whether or not the odor of burning marijuana by itself supplies sufficient probable cause for a search or an arrest, it may be considered and may be part of a totality of circumstances sufficient to validate one. State v. Medders, 153 Ga. App. 680, 266 S.E.2d 331 (1980).

Identification of marijuana odor by expert. — While odor of marijuana smoke alone does not authorize a search without a warrant, a "sufficiently distinctive" odor recognized by one "qualified to know the odor" may form a proper basis for the issuance of a search warrant. Clare v. State, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

Mere suspicion of drugs insufficient. — Suspicion that drugs were being used on the premises is insufficient to constitute probable cause under this section. Clare v. State, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

Absent testimony which stated objective facts which corroborated as both true and current the information supplied by the defendant's neighbors about suspected drug activity at the defendant's home, the affiant had only a mere suspicion that contraband was being kept on the premises; thus, the warrant to search for drugs was not supported by probable cause. Banks v. State of Ga., 277 Ga. 543, 592 S.E.2d 668 (2004).

Police information arising out of official investigation. — Information provided by police officers, arising out of an official investigation, may be used to establish probable cause for a search warrant. Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981).

Police officer's knowledge of suspect's reputation. — Magistrate may rely on law enforcement officer's knowledge of a suspect's reputation in issuing a search warrant. Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981).

Local law enforcement officers as reliable informants. — Local law enforcement officers participating in a common investigation are reliable informants. Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981).

Magistrate may consider inadmissible oral testimony. — Information supporting a finding of probable cause may be presented to the magistrate by means of an affidavit or by oral testimony. Bradley v. State, 131 Ga. App. 271, 205 S.E.2d 463 (1974); Franklin v. State, 135 Ga. App. 718, 218 S.E.2d 641 (1975).

This section authorizes a qualified judicial officer to issue a search warrant upon the written complaint of any state law enforcement officer under oath or affirmation which states facts sufficient to show probable cause to justify a search; although, the judicial officer may receive additional information by oral testimony that section does not require that the officer do so. All that is necessary is that the affidavit or the testimony, or both, provide probable cause for the search. State v. Barber, 148 Ga. App. 743, 252 S.E.2d 911 (1979).

Oath does not cover oral statements. — When the magistrate does not administer any oath until after the affidavit is signed, the oath covers only the truthfulness of the statements contained in the written affidavit and not the oral statements given to show probable cause.

Sufficiency of Warrant (Cont'd)
2. Probable Cause (Cont'd)

Riggins v. State, 136 Ga. App. 279, 220 S.E.2d 775 (1975).

Hearsay sufficient for probable cause. — Affidavit to obtain a search warrant is not insufficient merely because the affiant relies on information obtained from others to show probable cause for the issuance of the warrant. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53 (1971).

Probable cause for the issuance of an arrest or search warrant may be founded upon hearsay. Hornsby v. State, 124 Ga. App. 724, 185 S.E.2d 623 (1971).

Oral testimony can include hearsay upon hearsay. — Hearsay and even hearsay upon hearsay may be sufficient to furnish the basis for the issuance of a valid warrant if the magistrate is informed of the underlying circumstances supporting the affiant's underlying conclusions and the magistrate's belief that the informant was credible or the information reliable. State v. Griffin, 154 Ga. App. 361, 268 S.E.2d 412 (1980).

Probable cause when original informant shown reliable. — Fact that an affidavit for issuance of a warrant was based upon information received by the affiant from another police officer, who in turn received the information from informants, does not preclude a finding of probable cause if the reliability of such informants is established. Reece v. State, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Substantial basis for crediting hearsay needed. — Hearsay can be the basis for issuance of a warrant so long as there is a substantial basis for crediting the hearsay. Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975).

Hearsay may support the issuance of a valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and the affiant's belief that the informant was credible or the informant's information reliable. There must be a substantial basis for crediting such hearsay. Smith v. State, 136 Ga. App. 17, 220 S.E.2d 11 (1975), cert. denied, 425 U.S. 938, 96 S. Ct. 1671, 48 L. Ed. 2d 179 (1976).

Magistrate must be informed of circumstances supporting statement. — Constitution requires that there be presented to the judicial officer issuing the search warrant some of the underlying circumstances relied on by the officer applying for the warrant and, if the officer relies on an informant, some of the underlying circumstances from which the officer concluded that the officer's informant was reliable. Wood v. State, 118 Ga. App. 477, 164 S.E.2d 233 (1968).

Affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and the affiant's belief that any informant involved whose identity need not be disclosed was credible or the informant's information reliable. Davis v. State, 127 Ga. App. 76, 192 S.E.2d 538 (1972).

Underlying circumstances must meet tests. — General tests to be applied to determine the sufficiency of the affidavit's facts and circumstances to show probable cause are: (1) that the affidavit gives reasons for the informer's reliability; (2) that the affidavit either specifically states how the informer obtained the information or the tip describes the criminal activity in such detail that the magistrate may know that it is more than a "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation"; and (3) a time period closely related to the commission of the offense must be affirmatively stated within the affidavit to show that the information contained therein is not stale. Bradley v. State, 131 Ga. App. 271, 205 S.E.2d 463 (1974); State v. Watts, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

When probable cause based on informer's tip. — If hearsay such as an informer's tip is relied upon for probable cause, the sworn information placed before the justice of the peace must adequately set forth: (1) the underlying circumstances necessary to enable the magistrate independently to judge the validity of the information; and (2) the informant's credibility or reliability. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Test requires showing how informer obtained information. — When the hearsay of an informant is relied upon, the affidavit must give the reasons for the informer's reliability and must either state how the informer obtained the information or the tip must describe the criminal activity in such detail that the magistrate may know it is more than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. Hornsby v. State, 124 Ga. App. 724, 185 S.E.2d 623 (1971).

Tip must give enough details to show not mere rumor. — Affidavit upon which a search warrant is issued must give the reasons for the informer's reliability and must either state how the informer obtained the information or the tip must describe the criminal activity in such detail that the magistrate may know it is more than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. Sams v. State, 121 Ga. App. 46, 172 S.E.2d 473, cert. denied, 400 U.S. 865, 91 S. Ct. 100, 27 L. Ed. 2d 103 (1970).

Accusation based solely on individual's reputation. — Affidavit on which the warrant issues, when the warrant depends for the warrant's efficacy upon statements made by others, must either specifically state how the informer obtained the information or the tip should describe the criminal activity in such detail that the magistrate may know it is more than a casual rumor or an accusation based merely on reputation. Dresch v. State, 125 Ga. App. 110, 186 S.E.2d 496 (1971).

One of the general tests to determine the sufficiency to show probable cause is that the affidavit either specifically states how the informer obtained the information or the tip describes the criminal activity in such detail that the magistrate may know that it is more than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. Cochran v. State, 136 Ga. App. 94, 220 S.E.2d 83 (1975).

Rumors from unidentified persons insufficient. — Rumors or information from unidentified persons cannot form the basis for the issuance of a search warrant. Thornton v. State, 125 Ga. App. 374, 187 S.E.2d 583 (1972).

Failure to provide basis of information in affidavit not fatal. — It clearly is the better practice, if an informant has obtained the information through personal observation or contact or through some other reliable manner, to include this fact in the affidavit or so inform the magistrate considering the affidavit's issuance; however, the failure to include a statement of the informant's "basis of knowledge" in the affidavit or to specifically inform the magistrate of that basis by sworn testimony does not always cause the resulting warrant to be fatally defective. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Sufficient details test based on information, not separate corroboration. — In determining the reliability of the manner in which an informant obtained the information, determination of whether the tip meets the "sufficient detail" test is based exclusively on what information came from the informant without reference, at this point, to independent verification of the informant's information. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

If tip detailed enough to seem reliable, police can corroborate. — If a tip is sufficiently detailed so as to show a reliable basis for the informant's information, independent police work can corroborate the details of the tip. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Probable cause based on arrestees' directing to address. — Magistrate had a substantial basis for concluding that probable cause existed to issue warrant given affidavit based on various arrestees' information which showed that prescription drugs were being sold at the defendant's residence. Smith v. State, 207 Ga. App. 463, 428 S.E.2d 403 (1993).

Underlying circumstances requirement not for examining informant's reliability. — Underlying circumstances requirement is designed to locate the original source of the incriminating information and to examine the validity or reliability of that information, but is not

Sufficiency of Warrant (Cont'd)
2. Probable Cause (Cont'd)

concerned with the overall reliability of the informant personally. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Once information gathering method shown reliable, reliability of informer considered. — Reliable manner of the acquisition of the information having been demonstrated, it must now be determined whether the individual supplying this "reliable" information is a truthful person. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Officer's reasons for believing informant. — Hearsay may support the issuance of a valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and the affiant's belief that the informant was credible or the information reliable. Reece v. State, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Officer must do more than cite "reliable informant's" information. — It is not enough simply to recite that from information received from a reliable informant the affiant has come to suspect or to believe that a named person is in possession of contraband items. Courson v. State, 125 Ga. App. 373, 187 S.E.2d 554 (1972).

When the information upon which an officer seeks the issuance of a search warrant comes from an informant who is not named, it is essential that sufficient facts be stated with specificity to indicate that the informant was reliable. Courson v. State, 125 Ga. App. 373, 187 S.E.2d 554 (1972).

To show reliability, affidavit must specify informer's prior information. — Statement that the informant provided information in the past which has proven to be correct is not sufficient when standing alone and unaccompanied by any further specifics as to the type of information provided, the use to which it was put, or the length of time which has elapsed since the information was furnished, but only one of these three specifics (type of information, use to which it was put, and elapsed time since the information was furnished) must be present. Kouder v. State, 154 Ga. App. 597, 269 S.E.2d 92 (1980).

Information that the affiant knew the informer for over five years, that the informer was concerned about the drug problem, was known to be reliable and truthful, and had seen marijuana at the defendant's house within the past 96 hours, sufficiently established the reliability of both the tip and the tipster. Miller v. State, 155 Ga. App. 399, 270 S.E.2d 822 (1980).

Details showing informant trustworthy and previous help. — When the search warrant is based upon an informant's information, the law requires that there be particular facts or circumstances which justify concluding that the informant is a reliable and trustworthy person; and a warrant, in stating that the informant had a past history of reliability in similar matters which had led to three arrests and to the confiscation of illegal drugs, met this test. Cooksey v. State, 149 Ga. App. 572, 254 S.E.2d 892 (1979).

Motion to suppress was properly denied because, although an officer possibly could have provided the magistrate with more detail concerning the confidential informant's past reliability, considering the information about the informant's relationship with the defendant and how the informant came to be in the defendant's apartment; that the officer knew the informant and found the information from the informant to be reliable in the past; the recent time frame for when the informant had been in the apartment and viewed suspected drugs and paraphernalia; and the confirmation that the occupants were convicted felons, the information relayed to the magistrate provided a substantial basis for the magistrate's finding of probable cause. Galloway v. State, 332 Ga. App. 389, 772 S.E.2d 832 (2015).

Informant's lack of previous contact not fatal. — Informant's lack of previous contact with the authorities is not fatal to the informant's veracity. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Investigation showing informant law abiding sufficient. — There is a sufficient showing of credibility and thus probability of truthfulness to authorize

issuance of a search warrant when the affiant can state to the magistrate that the affiant's investigation shows that the informant is a law-abiding citizen or the informant is personally known to the affiant to be a law-abiding citizen. Miller v. State, 155 Ga. App. 399, 270 S.E.2d 822 (1980).

Officer's corroboration of informant's allegations sufficient. — Personal observation by the affiant that known violators of the law sought to be enforced frequented the defendant's home, plus information from an informant who had proven reliable in the past of specific facts sufficient to constitute probable cause will authorize the issuance of the warrant. Wood v. State, 118 Ga. App. 477, 164 S.E.2d 233 (1968).

Information received from an informant, who has proven to be reliable in the past, in conjunction with the affiant's personal observation that violators of the law sought to be enforced frequent the place to be searched is sufficient to sustain a search warrant. Thornton v. State, 125 Ga. App. 374, 187 S.E.2d 583 (1972).

When an officer's investigation of the information received from the officer's informants corroborates the informants' allegations against the defendant, the reliability of the informants is sufficiently established to justify the issuance of a search warrant. Reece v. State, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Trial counsel was not ineffective in failing to pursue a motion to suppress the drug evidence as the magistrate had a substantial basis for concluding that probable cause existed to issue the search warrant because any deficiency in the affidavit with respect to an informant's veracity was not fatal as the informant's veracity, reliability, and basis of knowledge were merely several of a number of relevant factors that the appellate court had to review; and the informant's tip that marijuana was being sold out of a particular apartment was sufficiently corroborated by the police officers' detection of a strong odor of unburned marijuana emanating from the apartment that the informant had identified as selling the marijuana. Coleman v. State, 337 Ga. App. 304, 787 S.E.2d 274 (2016), cert. denied, No. S16C1735, 2016 Ga. LEXIS 801 (Ga. 2016).

Minor inaccuracies will not void warrant. — Existence or nonexistence of probable cause must be judged as of the time it is presented to the magistrate. Minor factual inaccuracies which are only peripherally relevant to the showing will not void the warrant when the inaccuracies' presence in the affidavit is not such as to reflect on the credibility of the affiant. Dresch v. State, 125 Ga. App. 110, 186 S.E.2d 496 (1971).

Informant's testimony consistent with major allegations in affidavit. — When, on the hearing of a motion to suppress evidence, the testimony of an informant is consistent with the material allegations in the affidavit, factual inaccuracies of peripheral relevance that are not the personal observations of the affiant do not destroy an otherwise adequate showing of probable cause. Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971).

Informer's reliability and how information obtained necessary. — Affidavit based on informer's tip is fatally defective as basis for search warrant when an affidavit recites absolutely nothing which would show the informer's reliability nor states how the informer obtained information, and under Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) evidence thus obtained must be suppressed. Grebe v. State, 125 Ga. App. 873, 189 S.E.2d 698 (1972).

Declaration against penal interest by an informant, based on personal observation, in itself provides a substantial basis for the magistrate to credit that statement given in an affidavit for a search warrant. Tomlinson v. State, 242 Ga. App. 117, 527 S.E.2d 626 (2000).

Affidavit not showing recent offense insufficient even if informer reliable. — When an affidavit fails to show that a tip, even if from a reliable informer, relates to an offense or offenses closely related in time to the date of the affidavit, and does not show when, from whom, and under what circumstance the informer purchased the substance identified as heroin, it is deficient as a basis for probable cause. Gilliam v. State, 124 Ga. App. 843, 186 S.E.2d 290 (1971).

Sufficiency of Warrant (Cont'd)
2. Probable Cause (Cont'd)

Test requires information to follow shortly after crime. — Warrant may issue based upon the hearsay of an informant. However, the time period involved must be closely enough related to the commission of the offense as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant. State v. Clark, 141 Ga. App. 886, 234 S.E.2d 713 (1977).

Information must follow crime closely enough to indicate conditions similar when warrant issued. — Proof of probable cause must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Fowler v. State, 121 Ga. App. 22, 172 S.E.2d 447 (1970).

Requirement for timely execution of a search warrant under Ga. L. 1966, p. 567, § 5 (see O.C.G.A. § 17-5-25) indicates the legislative intent, as well as constitutional demand, that probable cause relate to current and not stale information. Fowler v. State, 121 Ga. App. 22, 172 S.E.2d 447 (1970).

Occurrence should be so near in point of time to the making of the affidavit and execution of the search warrant as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant. Kouder v. State, 154 Ga. App. 597, 269 S.E.2d 92 (1980).

Time requirements must be flexible. — In determining probable cause, it is clear that no iron-clad time rule should be established. It is a determination based on probabilities and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. State v. Boswell, 131 Ga. App. 657, 206 S.E.2d 682 (1974).

Five days between information and affidavit not excessive. — A "five-day interval between the date of the affidavit and the date of the information" will not render a warrant invalid on the ground that the information was stale. Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979), overruled on other grounds, State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Present tense in affidavit shows facts current. — Use of the present tense in an affidavit to support a search warrant is sufficient to show that the facts recited are current and not stale. State v. Clark, 141 Ga. App. 886, 234 S.E.2d 713 (1977).

Future tense in affidavit shows facts current. — Since the "staleness" objection to information upon which a warrant is issued is without merit when the affidavit states that the activity is occurring, a fortiori there cannot be "staleness" when it is stated the activity will occur in the immediate future. Danford v. State, 133 Ga. App. 890, 212 S.E.2d 501 (1975).

Standard of prudent magistrate believing from affidavit that crime occurred. — Laying aside the question of whether the information in the affidavit was stale or too remote in point of time, in deciding whether there was probable cause, one looks to the affidavit to determine whether a reasonably prudent and discreet magistrate would be led to believe from the facts stated that a crime was probably being committed or probably had been committed. McMahan v. State, 125 Ga. App. 491, 188 S.E.2d 183 (1972).

How "staleness" measured. — "Staleness" as relates to probable cause is measured by the probability that the thing to be seized is located at the place to be searched and it involves the interval between (i) the time when the thing to be seized is indicated by the evidence or information to be at the place to be searched and (ii) the time when the search warrant is issued. Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981); Shrader v. State, 159 Ga. App. 522, 284 S.E.2d 37 (1981).

Sufficient probable cause in sexual exploitation of children case. — Trial court did not err in denying the defendant's motion to suppress evidence seized from a search warrant authorizing entry into the defendant's home because the affidavit submitted in support of the warrant provided a sufficient basis for the magistrate to make a practical, commonsense decision that there was a fair prob-

ability that evidence of sexual exploitation of children would be found at the defendant's residence; the National Center for Missing and Exploited Children forwarded the information it received from a security specialist employed by the host of the website to the Georgia Bureau of Investigation (GBI), and the affidavit of a special agent with the GBI set forth facts that showed both the reliability and basis of knowledge of the specialist. James v. State, 312 Ga. App. 130, 717 S.E.2d 713 (2011), cert. denied, No. S12C0347, 2012 Ga. LEXIS 227 (Ga. 2012).

Sufficient probable cause in child abuse case. — Probable cause for issuance of a search warrant to find items used in mistreatment of deceased child was present based on testimony of social worker who had questioned deceased child's mother, and affidavit of investigator who had interviewed sister of deceased child. Lewis v. State, 255 Ga. 101, 335 S.E.2d 560 (1985).

Investigating officer's hearsay sufficient basis for warrant. — Hearsay of police officer investigating aggravated sodomy and child molestation case as to what the victim told the officer is a permissible basis for issuance of a warrant. Tyler v. State, 176 Ga. App. 96, 335 S.E.2d 691 (1985).

Evidence held sufficient to establish probable cause. — See Thomas v. State, 183 Ga. App. 819, 360 S.E.2d 75 (1987); Abraha v. State, 271 Ga. 309, 518 S.E.2d 894 (1999); Felix v. State, 241 Ga. App. 323, 526 S.E.2d 637 (1999).

Search warrant affidavit sufficient for motel room search. — Search warrant affidavit stating victims were shot with the same type of handgun; two were wrapped in large plastic bags sealed with tape; all three were crack addicts who dealt with and purchased cocaine from defendant; a photograph of defendant was found on one victim's body; defendant admitted owning guns and selling narcotics to the victims and claimed to be on a "hit list" of a rival drug dealer and sought protection for the dealer and the dealer's family but did not tell police about the motel room defendant leased provided a substantial basis to conclude probable cause existed for the issuance of a search warrant for the motel room to search for weapons, ammunition, blood, rope, tape, and garbage bags under O.C.G.A. § 17-5-21(a). Fitz v. State, 275 Ga. 349, 566 S.E.2d 668 (2002).

Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because under the totality of the circumstances, the magistrate was authorized to make a pragmatic, commonsense judgment that there was a fair probability that a search of the suite would produce evidence that the occupants were in possession of drugs; a detective interviewed a member of the hotel's housekeeping staff who had seen drugs in the suite, and the affidavit showed that the witness, who was identified by name in the affidavit, reported that a guest in the room requested that the suite be cleaned while the guests went to get something to eat and that immediately upon entering the suite, the housekeeper observed a large quantity of what appeared to be marijuana and other drugs lying openly on the desk and television. Glass v. State, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Probable cause for search of out of state home in murder of spouse. — In a defendant's prosecution for malice murder in which the defendant's spouse was the victim, a motion to suppress evidence seized from the defendant's Florida home was properly denied because even after excision of information from an unreliable informant, the reconstituted affidavit provided probable cause to issue a search warrant under O.C.G.A. § 17-5-21(a) based on an affidavit containing information about the defendant's pending divorce from the spouse and phone calls to and from the defendant at the time of the murder. Sullivan v. State, 284 Ga. 358, 667 S.E.2d 32 (2008).

Sufficient probable cause in rape case. — With regard to a defendant's convictions on multiple counts of rape and related crimes, the magistrate was presented with facts sufficient to show probable cause that a crime was being committed or had been committed to support the search of the defendant's home since, even excluding the photographic line-up identification of the defendant that was made by

Sufficiency of Warrant (Cont'd)
2. Probable Cause (Cont'd)

one victim that the state conceded was illegal, there was remaining additional evidence to have established probable cause to have searched the defendant's home. Namely, the same victim's cell phone was taken by the perpetrator and a phone call was made to the defendant's home from the cell phone, the physical description of the perpetrator by the victim matched the defendant's appearance, as did the victim's description of the perpetrator's vehicle, which matched the defendant's vehicle. Baker v. State, 295 Ga. App. 162, 671 S.E.2d 206 (2008), cert. denied, No. S09C0571, 2009 Ga. LEXIS 183 (Ga. 2009).

Trial counsel was not ineffective in failing to object to the admission of evidence of clothing, a mask, and a television seized from the defendant's apartment because probable cause existed for a search warrant as the magistrate had a substantial basis to determine that there was a fair probability that evidence of a crime would be found in the defendant's apartment because the police caught the defendant peeping into a woman's apartment in the area where the police believed a serial sexual offender was operating, and the defendant lied, falsely claiming to be spying on a girlfriend; the first victim testified that the perpetrator stole a television; and the defendant matched the description of the perpetrator given by two of the victims. Baxter v. State, 329 Ga. App. 589, 765 S.E.2d 738 (2014).

Officer's observations of stolen jonboat sufficient for probable cause. — Information from two neighbors that a jonboat had been stolen from another neighbor and that two men had been seen spray painting a jonboat and removing the jonboat's identifying numbers at the house next door, coupled with an officer's observation of the jonboat and the officer's comparison with a photo of the stolen boat, justified issuance of a search warrant. A tackle box that was improperly removed would have inevitably been discovered. State v. Kaulbach, 331 Ga. App. 610, 771 S.E.2d 245 (2015).

Probable cause to issue warrant following controlled buy. — Although the agent's affidavit lacked any information by which the magistrate could evaluate the confidential informant's credibility and reliability, the controlled buy established more than a fair probability that evidence of drug offenses would be found at the defendant's residence and, thus, the magistrate was presented with probable cause to issue the search warrant. Johnson v. State, 336 Ga. App. 888, 785 S.E.2d 424 (2016).

Trial court did not err in denying the defendant's motion to suppress because the need for continued investigation in the circumstances surrounding the shooting justified the issuance of the warrant for that purpose, and the affidavit also contained information about the defendant's drug activities, which supplied a possible motive for the shooting. Jones v. State, 337 Ga. App. 545, 788 S.E.2d 132 (2016).

Trial court did not err in denying the defendant's motion to suppress as the magistrate had sufficient information to find that probable cause existed for the issuance of the search warrant because a confidential informant (CI) participated in a controlled purchase of crack cocaine from the defendant; and, during the motion to suppress hearing, the officer testified that the officer told the magistrate under oath that the CI was searched before walking to the defendant's residence to make the buy with money supplied by the police; the CI had a substance believed to be an illegal drug in the CI's possession after the CI left the defendant's residence; and the officer had used the CI on two previous occasions. Woods v. State, 346 Ga. App. 323, 816 S.E.2d 156 (2018).

Officers plainly had probable cause to search the defendant's apartment as the affidavit accompanying the search warrant application stated that there were signs of a struggle in the victims' apartment, that there were two victims with stab wounds, that there were areas of blood spatter throughout the apartment, and that fresh blood was located on the entry door handle of the defendant's apartment. Bailey v. State, 301 Ga. 476, 801 S.E.2d 813 (2017).

There was sufficient probable cause to support the issuance of the warrant because the detective who received the tip

and obtained the warrant surveilled the premises out of which the defendant was conducting drug sales for almost two weeks, during which time the officer observed a pattern of activity which was consistent with the description of drug activity provided by the anonymous source; the detective used a confidential source to buy narcotics, and the activity the officer observed during the buy was consistent with what the officer observed during the officer's surveillance; and law enforcement officers were not required to actually see drugs at a residence in order to establish probable cause for the issuance of the search warrant. Burgess v. State, 349 Ga. App. 635, 824 S.E.2d 99 (2019).

Probable cause to search in murder case. — Defendant's motion to suppress was properly denied as a substantial basis existed for issuance of a warrant because the victim's body was discovered near the defendant's apartment as well as bloodstained items and cigarette butts wrapped in a towel; and, when the defendant belatedly disclosed that the defendant had disposed of bloodstained women's clothing before the discovery of the victim, and that the defendant smoked the brand of cigarettes found in the bloody towel, that evidence provided a substantial basis for the conclusion that the clothing belonged to the victim, that the defendant had a connection both to the clothing and cigarettes, and that the defendant's apartment had a fair probability of containing evidence of the crime. Mizell v. State, 304 Ga. 723, 822 S.E.2d 211 (2018).

Trial court erred by granting the defendant's motion to suppress all of the evidence seized at a residence because the affidavits underlying the warrants provided the magistrate with sufficient information to support probable cause as the evidence in the affidavits sufficiently corroborated the information received from the informant and established a nexus between the apartment and another address. Based on the suspect's vehicle, the investigators conducted surveillance on the apartment and the other address, a search of the other address uncovered large amounts of cocaine and methamphetamine, and a background check on the suspect connected the suspect to both the apartment and the other address. State v. Perez, 349 Ga. App. 707, 824 S.E.2d 804 (2019).

Fair probability that contraband would be found. — Defendant's suppression motion was properly denied as a search warrant was based on probable cause because Clayton County investigators purchased an illegal video poker machine from a subject in Clayton County, who said that the machine was obtained from a particular address in DeKalb County, and both DeKalb and Clayton investigators observed "several other illegal video poker machines" at that address; while the investigators could not tell from looking at the machines whether the machines were legal or not, the test was only whether the evidence established a fair probability that contraband would be found. Jones v. State, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

Defendant's suppression motion was properly denied as: (1) the search warrant affidavit outlined the information provided by a New Hampshire detective's investigation, including the fact that the defendant had electronically sent the detective sexually explicit photographs of young boys; (2) the officer's affidavit also included information regarding the detective's extensive background and vast experience in the investigation of child sexual exploitation cases; (3) the detective's investigation provided probable cause to search the defendant's residence wherever that was; (4) the warrant sought sexually explicit photographs and other sexually explicit visual depictions of children, as well as the computer hardware and software used to create, store, and distribute those depictions; and (5) the affidavit contained information based on the detective's contact and electronic correspondence with the defendant indicating the likelihood that the defendant's computer files would contain evidence of child sexual exploitation, given that the affidavit stated that those who sexually exploited children often kept sexually explicit photographs and other images in their possession and often stored those images in computer files. Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Sufficiency of Warrant (Cont'd)
2. Probable Cause (Cont'd)

Disregard of false or omitted information. — Probable cause existed to issue warrant for search of a defendant's residence on the basis of a controlled buy of 3.5 grams of cocaine from the residence, regardless of allegedly false additional statements that the defendant had possessed handguns and narcotics at the residence in the recent past. Daniel v. State, 306 Ga. App. 48, 701 S.E.2d 499 (2010).

Pursuant to O.C.G.A. § 17-5-21(a), a magistrate properly issued the search warrant for a home, notwithstanding that false and illegally obtained information in the search warrant affidavit had been deleted, there still was sufficient untainted information regarding the location of marijuana to support a finding of probable cause for issuance of the warrant. Martinez-Vargas v. State, 317 Ga. App. 232, 730 S.E.2d 633 (2012), overruled on other grounds, State v. Kazmierczak, 331 Ga. App. 817, 771 S.E.2d 473 (Ga. Ct. App. 2015).

Seizure of Contraband Not in Warrant

Officer not permitted to seize every item considered connected. — To permit an officer to enter a home under a valid search warrant and then to extend the officer's search and seize every item in the house that the officer thinks might possibly be connected with a crime, when there is no substantiation by circumstance but just suspicion, would be contrary to constitutional guaranties of liberty. Dugan v. State, 130 Ga. App. 527, 203 S.E.2d 722 (1974).

Officer cannot use warrant to investigate unincriminating item. — Officer cannot use a warrant as a pretext for launching a full scale investigation as to the origins of an item which is not incriminating on the item's face. Hogan v. State, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

General searches are prohibited. Hogan v. State, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Seizure of items not in warrant not per se general search. — Fact that a police officer seizes items not listed in the warrant does not render the search a general one nor make the search unlawful. Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); Jarvis v. Rubiano, 244 Ga. 735, 261 S.E.2d 645 (1979); McBee v. State, 228 Ga. App. 16, 491 S.E.2d 97 (1997).

Officers may seize contraband from crimes not in warrant. — Not only may contraband be seized if related to the crime in connection with which the search is made, but items related to other crimes may also be seized without prior enumeration in the warrant. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973).

Evidence of another crime discovered while searching pursuant to a valid search warrant may be lawfully seized. Jefferson v. State, 199 Ga. App. 594, 405 S.E.2d 575 (1991).

Officers may seize incriminating items in plain view. — When peace officers entered a defendant's residence armed with an arrest warrant and a search warrant, arrested the defendant and searched the premises, certain articles in plain view having strong evidentiary value as to the crimes charged are not subject to a motion to suppress although not specifically named in the search warrant. Scott v. State, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Officer in the process of executing a lawful search warrant was authorized under O.C.G.A. § 17-5-21(b) to seize a defendant's tennis shoes, which appeared to the officer to be stained with blood, after performing a field test that confirmed the presence of blood because the shoes were in plain view as the officers lawfully searched the defendant's room for items stolen in a string of burglaries. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439 (2010).

Discovery of contraband in room adjoining room named in warrant. — When contraband was not discovered in the room named in a search warrant, but in an adjoining room, and the defendant was occupying the room and was named in the warrant as one of the persons believed to be concealing cocaine on the premises, the search of the room was authorized by the warrant. Smith v. State, 194 Ga. App. 870, 392 S.E.2d 56 (1990).

Officers may seize marijuana in van when warrant was for portable welder. — Seizure of marijuana, which is contraband, from a closed van under a warrant for a stolen portable welder is authorized under subsection (b) of this section, which provides that while a peace officer is engaged in a lawful search the officer can seize anything, with the exception of private papers, which is unlawful or tangible evidence of the commission of a crime. Bradley v. State, 131 Ga. App. 271, 205 S.E.2d 463 (1974).

Officer not required to ignore contents of personal papers. — Officer who is properly searching the accused's personal effects for weapons or contraband is not required to ignore the contents of papers which constitute personal effects. Culbreth v. State, 152 Ga. App. 867, 264 S.E.2d 315 (1980).

Seizure of a checkbook. — Seizure of a personal paper of the defendant was harmless error in light of the defendant's admission of an offense relating to marijuana and the defendant's admission of other unlawful activity. Grant v. State, 198 Ga. App. 732, 403 S.E.2d 58, cert. denied, 198 Ga. App. 897, 403 S.E.2d 58 (1991).

Seizure of drug ledgers. — Trial court did not err in admitting the drug ledgers which were found during a search of the defendant's residence as the ledgers were clearly relevant to the drug trafficking charge. Ibekilo v. State, 277 Ga. App. 384, 626 S.E.2d 592 (2006).

Papers as instrumentalities of crime. — If private papers merely constitute "tangible evidence" of the commission of a crime, those papers are not seizable. But if the papers are the instrumentalities of the crime, the papers are properly seizable under this section. Tuzman v. State, 145 Ga. App. 761, 244 S.E.2d 882, cert. denied, 439 U.S. 929, 99 S. Ct. 317, 58 L. Ed. 2d 323 (1978).

Seizure of papers to obtain a sample of defendant's handwriting did not violate the "private papers" exception to the permissible scope of search warrants under O.C.G.A. § 17-5-21. Lowe v. State, 203 Ga. App. 277, 416 S.E.2d 750, cert. denied, 203 Ga. App. 906, 416 S.E.2d 750 (1992).

Bona fide search for item sought required. — There must be a bona fide search for the item sought to be found, but if, in the course of an authorized search, another contraband item is found on the party or premises searched, the officer is authorized to seize the item; for the search, though not productive of that which was sought, was legal. Dugan v. State, 130 Ga. App. 527, 203 S.E.2d 722 (1974).

If probable cause, seizure of car before warrant or search without warrant proper. — For constitutional purposes, there is no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant; given probable cause to search, either course is reasonable under U.S. Const., amend. 4. State v. Watts, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

Warrantless search of vehicle permissible only if prudent person expects contraband. — Probable cause would exist for the warrantless search of a vehicle only if the facts and circumstances would cause a reasonably prudent person to believe that contraband was present in the vehicle. Barlow v. State, 148 Ga. App. 717, 252 S.E. 214 (1979).

Officer needs probable cause to believe items part of crime. — In order to make a seizure, the officer effecting the seizure must have probable cause to believe that the articles seized were tangible evidence of the commission of the crime. Zimmerman v. State, 131 Ga. App. 793, 207 S.E.2d 220 (1974); Hogan v. State, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Probable cause cannot be found retroactively. — Rumor, suspicion, speculation, or conjecture is not sufficient to show probable cause. The police may not search and seize and then look for probable cause to justify police action. Probable cause must exist at the time of the search and seizure. Zimmerman v. State, 131 Ga. App. 793, 207 S.E.2d 220 (1974).

When the officer first viewed the rug, the officer only suspected that it was one of the stolen rugs, it was not immediately apparent to the officer that the rug was stolen property; thus, it cannot be said

Seizure of Contraband Not in Warrant (Cont'd)

that the officer had probable cause to seize a rug when the rug was first seen by the officer. Hogan v. State, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Consent after seizure does not constitute retroactive consent. — Statement by the defendant that the police could take the typewriters does not operate as consent to the seizure for this statement occurred after the seizure. Zimmerman v. State, 131 Ga. App. 793, 207 S.E.2d 220 (1974).

Probable cause to believe items stolen is sufficient. — Law does not require that the officer knows that goods are the stolen property at the time the goods are seized. It is enough that the officer has probable cause to believe that this is the case. Dugan v. State, 130 Ga. App. 527, 203 S.E.2d 722 (1974).

Property immediately apparent as contraband. — Before a police officer may seize property in plain sight, it must be immediately apparent to the officer that the property to be seized is contraband. Copeland v. State, 162 Ga. App. 398, 291 S.E.2d 560 (1982).

Stolen property, contraband, and tangible evidence of other crimes subject to seizure. — Officer in the process of executing a lawful search warrant is authorized under O.C.G.A. § 17-5-21(b) to seize any stolen property, contraband, or other item, other than private papers, which the officer has probable cause to consider tangible evidence of the commission of a crime, even though the property is not listed in the warrant. Whittington v. State, 165 Ga. App. 763, 302 S.E.2d 617 (1983).

Seizure of gun alleged to be stolen. — When, prior to a lawful search, a police officer had information from two sources that the defendant allegedly had a stolen gun, and the officer had a description of the gun, there was probable cause to seize the gun, and no rights were violated by the seizure of a gun hidden under a mattress. In re A.B., 194 Ga. App. 665, 391 S.E.2d 683 (1990).

Stolen articles lawfully seized during search for marijuana. — When officers lawfully conducting a search for marijuana ascertained that the contents of a bag was silverware of various patterns, one of the officers believed the patterns were consistent with certain silverware reported stolen and the fact that the silverware was concealed in a container which reasonably could hold marijuana and was located in a place where one does not expect to find silverware, this was sufficient to arouse the suspicion that the silverware was stolen and authorized seizure. Whittington v. State, 165 Ga. App. 763, 302 S.E.2d 617 (1983).

Stolen items subject to seizure with execution of search warrant for documents. — Seizure of items in plain view suspected to have derived from recent area burglaries while executing a search warrant for documents proving theft of services was valid when the incriminating character of the items was immediately apparent and the officer had a lawful right to visual and physical access of the objects themselves. Nichols v. State, 210 Ga. App. 134, 435 S.E.2d 502 (1993).

Search did not exceed scope of warrant. — Trial court did not err in finding that an officer's search of the defendant's computer did not exceed the scope of the warrant seeking evidence of illegal drug transactions because the warrant permitted the search of personal computers at the subject address since electronic records of illegal drug transactions were included amongst those items to be searched; the officer searching the defendant's computer did not engage in a wholesale fishing expedition but was instead seeking files encompassed by the warrant when the officer stumbled across the images of child pornography, and the officer immediately halted the search until an additional warrant was obtained. Henson v. State, 314 Ga. App. 152, 723 S.E.2d 456 (2012), cert. denied, No. S12C1217, 2012 Ga. LEXIS 669 (Ga. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Probate judges have the authority to issue search warrants. 1983 Op. Att'y Gen. No. U83-13.

Police must show informer reliable if tip basis of warrant. — If a warrant is to be obtained on basis of an informant's tip, the officer must set forth some of the underlying circumstances indicating that the informant is reliable. 1973 Op. Att'y Gen. No. U73-14.

Search and seizure of pharmaceutical prescriptions. — Any law enforcement official who has obtained a search warrant may lawfully search and seize prescriptions retained for inspection by a pharmacy as required by law. 1970 Op. Att'y Gen. No. 70-112.

Chief drug inspector of the State Board of Pharmacy and the inspector's assistants have the authority to make arrests for violations of Georgia Code Annotated T. 79A (see O.C.G.A. Ch. 13, T. 16) and to search and seize evidence necessary for the presentation before courts or before the State Board of Pharmacy; the chief drug inspector and the inspector's assistants do not have the authority to seize prescriptions from a pharmacy without properly acquiring a valid search warrant. 1970 Op. Att'y Gen. No. 70-112.

Campus police may execute affidavits for search warrants. — Campus police and security personnel are officers of the state within the meaning of this section and are authorized to execute the affidavits necessary for the procurement of a search warrant. 1970 Op. Att'y Gen. No. 70-69.

Campus police may search if granted arrest powers. — Individuals who have been granted arrest powers on premises under the jurisdiction of the Board of Regents are authorized to conduct searches. 1969 Op. Att'y Gen. No. 69-172.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, § 176 et seq.

ALR. — Power to issue warrant for search of train, 7 A.L.R. 121.

Admissibility of evidence obtained by illegal search and seizure, 24 A.L.R. 1408; 32 A.L.R. 408; 41 A.L.R. 1145; 52 A.L.R. 477; 88 A.L.R. 348; 134 A.L.R. 819; 150 A.L.R. 566: 50 A.L.R.2d 531.

Right to enforce production of papers or document by subpoena duces tecum or other process, as affected by unlawful means by which the knowledge of their existence was acquired, 24 A.L.R. 1429.

Civil liability for improper issuance of search warrant or proceedings thereunder, 45 A.L.R. 605.

Proceeding to obtain search warrant as judicial proceeding within rule of privilege in libel and slander, 58 A.L.R. 723.

Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime, 129 A.L.R. 1296.

Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information, investigation, etc., by one whose name is not disclosed, 14 A.L.R.2d 605.

Sufficiency of description in search warrant of automobile or other conveyance to be searched, 47 A.L.R.2d 1444.

Search warrant: sufficiency of showing as to time of occurrence of facts relied on, 100 A.L.R.2d 525.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 A.L.R.3d 359.

Search warrant: sufficiency of description of apartment or room to be searched in multiple-occupancy structure, 11 A.L.R.3d 1330.

Disputation of truth of matters stated in affidavit in support of search warrant — modern cases, 24 A.L.R.4th 1266.

Books, documents, or other papers: seizure under search warrant not describing such items, 54 A.L.R.4th 391.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 A.L.R.5th 229.

Validity of anticipatory search warrants — state cases, 67 A.L.R.5th 361.

17-5-21.1. Issuance of search warrants by video conference.

(a) A judge of any court in this state authorized to issue search warrants pursuant to Code Section 17-5-21 may, as an alternative to other laws relating to the issuance of search warrants, conduct such applications for the issuance of search warrants by video conference. The issuance of a search warrant by video conference shall be valid irrespective of the physical location of the judge at the time of the video conference, provided that the judge issuing the warrant is authorized by law to issue such warrant, and, at the time such warrant is issued, he or she is physically located within this state.

(b) Search warrant applications heard by video conference shall be conducted in a manner to ensure that the judge conducting the hearing has visual and audible contact with all affiants and witnesses giving testimony.

(c) The affiant participating in a search warrant application by video conference shall sign the affidavit for a search warrant and any related documents by any reasonable means which identifies the affiant, including, but not limited to, his or her typewritten name, signature affixed by electronic stylus, or any other reasonable means which identifies the person signing the affidavit and any related documents. The judge participating in a search warrant application by video conference shall sign the affidavit for a search warrant, the search warrant, and any related documents by any reasonable means which identifies the judge, including, but not limited to, his or her typewritten name, signature affixed by electronic stylus, or any other reasonable means which identifies the judicial officer signing the affidavit and warrant and any related documents. Such applications shall be deemed to be written within the meaning of Code Section 17-5-21. Such authorization shall be deemed to comply with the issuance requirements provided for in Code Section 17-5-22.

(d) A judge hearing matters pursuant to this Code section shall administer an oath to any person testifying by means of a video conference.

(e) A video recording of the application hearing and any documents submitted in conjunction with the application shall be maintained as part of the record.

History. — Code 1981, § 17-5-21.1, enacted by Ga. L. 2001, p. 300, § 1; Ga. L. 2013, p. 584, § 2/HB 146.

Cross references. — Issuance of arrest warrants by video conference, § 17-4-47.

JUDICIAL DECISIONS

Violation of state procedural rule vs. violation of federal procedural rule. — Evidence seized from the defendant's apartment pursuant to a search warrant would not be suppressed because a violation of state procedural law did not rise to the level of a Fourth Amendment violation, and there was no Fourth Amendment violation as police were in possession of a search warrant, signed by a judge and based on probable cause, at the time police seized evidence, and an affidavit provided ample probable cause for the search; even if the defendant could show that violation of a state procedural rule was analogous to a violation of a federal procedural rule for Fourth Amendment purposes, there was no evidence that the search might not have occurred if the video recording of an application hearing were maintained as part of the record in accordance with state rule. United States v. Gordon, No. 1:14-cr-312-WSD, 2015 U.S. Dist. LEXIS 162150 (N.D. Ga. Dec. 2, 2015).

RESEARCH REFERENCES

ALR. — Constitutional and statutory validity of judicial videoconferencing, 115 A.L.R.5th 509.

17-5-22. Issuance of search warrants by judicial officers generally; maintenance of docket record of warrants issued.

All warrants shall state the time and date of issuance and are the warrants of the judicial officer issuing the same and not the warrants of the court in which he is then sitting. Such warrants need not bear the seal of the court or clerk thereof. The warrant, the complaint on which the warrant is issued, the affidavit or affidavits supporting the warrant, and the returns shall be filed with the clerk of the court of the judicial officer issuing the same, or with the court if there is no clerk, at the time the warrant has been executed or has been returned "not executed"; provided, however, that the judicial officer shall keep a docket record of all warrants issued by him, and upon issuing any warrant he shall immediately record the same, within a reasonable time, on the docket.

History. — Ga. L. 1966, p. 567, § 4; Ga. L. 1992, p. 1328, § 1; Ga. L. 2014, p. 866, § 17/SB 340.

JUDICIAL DECISIONS

Authority of judicial officer to issue search warrant does not vanish within restricted area. — O.C.G.A. § 17-5-22 (when considered with O.C.G.A. §§ 17-5-21 and 17-7-20) means that the authority of a judicial officer to issue a search warrant to be executed within the area of the officer's jurisdiction does not vanish when the officer physically steps into an area where the officer's authority is restricted within the county in which the officer serves. State v. Varner, 248 Ga. 347, 283 S.E.2d 268 (1981).

Strict construction of warrant issuance procedure. — Proceedings for issuance of search warrants are to be strictly construed, and every constitutional and statutory requirement must be fully met,

including all formalities required by statute, before a valid search warrant may issue. Moreover, a statute prescribing the method of issuing search warrants must be read and construed in light of, and conform in all essential respects to, the provisions of the Constitution granting immunity from unreasonable searches and seizures. Pruitt v. State, 123 Ga. App. 659, 182 S.E.2d 142 (1971).

Magistrate must decide if probable cause exists before issuing search warrant. — It is incumbent upon a magistrate to make an independent determination of probable cause before the magistrate issues a search warrant. An affidavit, sufficient both as to form and content, cannot support a search warrant when the issuing magistrate has not made any decision from reading the sheriff's affidavit but signed the warrant after ascertaining that the affidavit was technically correct. Page v. State, 136 Ga. App. 807, 222 S.E.2d 661 (1975).

Warrant must clearly describe suspect and premises. — To be valid, a search warrant must contain a description of the person and premises to be searched with such particularity as to enable a prudent officer executing the warrant to locate the person and place definitely and with reasonable certainty, without depending upon the officer's discretion. Durrett v. State, 136 Ga. App. 114, 220 S.E.2d 92 (1975).

Failure to state time of issuance. — When the time of issuance is not set forth as required by this section, in certain instances this omission can be a fatal defect, e.g., when there is some reason to believe the warrant was issued after the search. Merritt v. State, 121 Ga. App. 832, 175 S.E.2d 890 (1970).

Failure to state time not fatal if evidence shows warrant issued before search. — When officers have a warrant and serve the warrant when the officers arrive to make the search, an omission on the warrant of the time of issuance is a "technical irregularity not affecting the substantial rights of the accused" which would not require suppression of the evidence seized. Merritt v. State, 121 Ga. App. 832, 175 S.E.2d 890 (1970).

When the evidence showed that the warrants were issued prior to the search and seizure, the irregularity in omitting the time of issuance would not require the suppression of the evidence seized. Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975).

No need for seal on warrants. — There is no requirement for a seal either on a warrant or a search warrant; therefore, a charge for the seal is not valid. Gill v. Decatur County, 129 Ga. App. 697, 201 S.E.2d 21 (1973).

Failure to file affidavit or prove docket record of warrant. — Search warrant is not inadmissible because the officers failed to file the affidavit with the issuing court after the warrant was executed or because there was no evidence indicating that a docket record of the warrant was made as these are technical irregularities not affecting the substantial rights of the accused. Sampson v. State, 165 Ga. App. 833, 303 S.E.2d 77 (1983); Bolt v. State, 230 Ga. App. 760, 497 S.E.2d 406 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 176 et seq., 185, 193 et seq., 211 et seq., 342.

ALR. — Power to issue warrant for search of train, 7 A.L.R. 121.

Civil liability for improper issuance of search warrant or proceedings thereunder, 45 A.L.R. 605.

Proceeding to obtain search warrant as judicial proceeding within rule of privilege in libel and slander, 58 A.L.R. 723.

Search warrant: sufficiency of showing as to time of occurrence of facts relied on, 100 A.L.R.2d 525.

Disputation of truth of matters stated in affidavit in support of search warrant — modern cases, 24 A.L.R.4th 1266.

17-5-23. Command of search warrant.

The search warrant shall command the officer directed to execute the same to search the place or person particularly described in the warrant and to seize the instruments, articles, or things particularly described in the search warrant.

History. — Ga. L. 1966, p. 567, § 7.

JUDICIAL DECISIONS

Standards required for description of place and suspect. — To be valid, a search warrant must contain a description of the person and premises to be searched with such particularity as would enable a prudent person executing the warrant to locate the person and premises definitely and with reasonable certainty. Anderson v. State, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Premises description is sufficient if on its face it enables a prudent officer executing the warrant to locate the person and place definitely and with reasonable certainty. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Description of premises when owner's name not given. — When the name of the owner or occupant is not given, the description of the premises must be exact. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Search area to be described. — Warrant should not leave the place to be searched to the discretion of the officer. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Evidence needed to search automobile next to house in warrant. — In order to authorize a search of a vehicle parked within the curtilage of the premises which are to be searched pursuant to a warrant, there must be some evidence to connect the vehicle with the premises. Albert v. State, 155 Ga. App. 99, 270 S.E.2d 220 (1980).

Search warrant for residence permits searching guest rooms. — Warrant authorizing the search of a residence justifies the search of rooms which are part of the residence and under control of the proprietor of the residence, and evidence discovered may be used against a temporary gratuitous guest of the residence. Jones v. State, 127 Ga. App. 137, 193 S.E.2d 38 (1972).

No retroactive validation of void warrant. — Void search warrant cannot be validated and property illegally seized introduced in evidence merely because the officers were in fact reliably informed and did in fact recover contraband, nor can a deficiency be supplied by facts discovered in making the search, for the sufficiency of the affidavit must be determined as of the time the warrant issued. Anderson v. State, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Telephone call to magistrate to correct warrant justified. — When both the affidavit and the warrant recited probable cause to believe drugs would be found on the person of the named defendant and on the premises under defendant's possession, custody, and control, namely hotel room 327, the search of room 337 of that hotel constituted a reasonable search under the warrant, without amendment, upon the discovery before the warrant's execution that the defendant was registered in room 337, and the actions of the officer in phoning the issuing magistrate and obtaining authorization to make the correction were reasonable and proper. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Using redial feature of phone during execution of warrant. — Pretermitting whether the court erred in admitting the evidence the detective garnered from the employer by hitting automatic redial on the defendant's phone and reaching the defendant's employer, who informed the detective of the defendant's location, such evidence obtained did not contribute to the verdict inasmuch as

there was an eyewitness to the crimes and other evidence linking the defendant with the murder and assaults. Veasley v. State, 275 Ga. 516, 570 S.E.2d 298 (2002), cert. denied, 538 U.S. 1002, 123 S. Ct. 1904, 155 L. Ed. 2d 832 (2003).

"Buy money" need not be attached. — Failure to attach a photocopy of the "buy money" to the affidavit did not violate the particularity requirement describing items to be seized since the warrant specified "monies derived from the sale of controlled substances." Smith v. State, 207 Ga. App. 463, 428 S.E.2d 403 (1993).

Cited in Hunt v. State, 180 Ga. App. 103, 348 S.E.2d 467 (1986); State v. Rocco, 255 Ga. App. 565, 566 S.E.2d 365 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, § 299 et seq.

ALR. — Propriety and legality of issuing only one search warrant to search more than one place or premises occupied by same person, 31 A.L.R.2d 864.

Books, documents, or other papers: seizure under search warrant not describing such items, 54 A.L.R.4th 391.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

17-5-24. Officers authorized to execute search warrants.

The search warrant shall be issued in duplicate and shall be directed for execution to all peace officers of this state. However, the judicial officer may direct the search warrant to be executed by any peace officer named specially therein.

History. — Ga. L. 1966, p. 567, § 5.

Law reviews. — For comment, "Seeking Warrants for Unknown Locations: The Mismatch Between Digital Pegs and Territorial Holes," see 68 Emory L.J. 185 (2018).

JUDICIAL DECISIONS

Constitutional standards for acceptable warrant directed to all police. — Even though the execution of a warrant is directed to all peace officers, a search pursuant to the warrant meets the requirements of the United States and Georgia Constitutions if the warrant was limited in the warrant's scope to physically described persons in a specific vicinity, and the description sufficiently permitted a prudent officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty. Fomby v. State, 120 Ga. App. 387, 170 S.E.2d 585 (1969), cert. denied, 397 U.S. 1008, 90 S. Ct. 1236, 25 L. Ed. 2d 421 (1970).

Warrant photocopy acceptable. — Photocopy is an actual photograph of the document signed by the magistrate and it is entitled to an equal status of validity, constituting the "duplicate copy" required by the statute. DeFreeze v. State, 136 Ga. App. 10, 220 S.E.2d 17 (1975).

"Reserve deputies," aiding the sheriff in a search of land for contraband, who worked under the supervision and observation of the county deputies and were instructed not to handle any contraband discovered but rather only to alert the officers when the contraband was located, were within the provisions of O.C.G.A. § 17-5-24, which states that the search warrant "shall be directed for execution to all peace officers of this state." Bradford v. State, 184 Ga. App. 459, 361 S.E.2d 838 (1987).

Execution by dentist. — Dental impressions, x-rays, and photographs produced in a search pursuant to a warrant did not have to be suppressed because the warrant was actually executed by a dentist since it would have been unreasonable to require that the actual physical gather-

ing of the evidence, utilizing equipment and procedures requiring expert skill and having a high potential for harm to the person being searched, be done by peace officers. Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991).

Requirement that a copy of the warrant be presented to a resident. — Denial of defendant's motion to suppress evidence had to be reversed; when a search warrant failed to meet the particularity requirement of U.S. Const., amend. XIV on the warrant's face but instead incorporates a supporting document by reference, the failure to leave a copy of that supporting document at the searched premises invalidated the warrant; thus, in the instant case, the warrant did not describe the place or the person to be searched and the agent who executed the warrant did not leave a copy of the supporting affidavit at the searched premises as required by O.C.G.A. §§ 17-5-24 and 17-5-25, and, therefore, the warrant had to be suppressed pursuant to O.C.G.A. § 17-5-30(a)(2). Battle v. State, 275 Ga. App. 301, 620 S.E.2d 506 (2005).

Forensic computer analysis. — No basis existed under O.C.G.A. § 17-5-24 for suppressing the results of forensic computer analysis because the analysis required expert skill, and without such expertise, it was conceivable that evidence could have been overlooked or even destroyed; the computer examination was conducted at the direction of Georgia peace officers to enable the officers to complete the officers' own investigation. Twiggs v. State, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

Cited in Baxter v. State, 134 Ga. App. 286, 214 S.E.2d 578 (1975); Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975); Barrett v. State, 146 Ga. App. 207, 245 S.E.2d 890 (1978); Davis v. State, 261 Ga. 382, 405 S.E.2d 648 (1991); State v. Rocco, 255 Ga. App. 565, 566 S.E.2d 365 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Campus police may search. — Individuals who have been granted arrest powers on premises under the jurisdiction of the Board of Regents are authorized to conduct searches pursuant to Ga. L. 1966, p. 370, § 1 (see O.C.G.A. § 20-3-72). 1969 Op. Att'y Gen. No. 69-172.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, § 299 et seq.

17-5-25. Execution of search warrant generally.

The search warrant shall be executed within ten days from the time of issuance. If the warrant is executed, the duplicate copy shall be left with any person from whom any instruments, articles, or things are seized; or, if no person is available, the copy shall be left in a conspicuous place on the premises from which the instruments, articles, or things were seized. Any search warrant not executed within ten days from the time of issuance shall be void and shall be returned to the court of the judicial officer issuing the same as "not executed."

History. — Ga. L. 1966, p. 567, § 6.

JUDICIAL DECISIONS

Reason for ten-day limitation on executing warrants. — Ga. L. 1966, p. 567, § 6 (see O.C.G.A. § 17-5-25), in limiting the time to ten days from date of issuance in which search warrants may be executed, recognizes the importance of current information. Davis v. State, 127 Ga. App. 76, 192 S.E.2d 538 (1972).

Photocopy equivalent to warrant. — Photocopy is an actual photograph of the document signed by the magistrate and the photocopy is entitled to an equal status of validity, constituting the "duplicate copy" required by the statute. DeFreeze v. State, 136 Ga. App. 10, 220 S.E.2d 17 (1975).

Requirement that a copy of the warrant be presented to a resident. — Denial of defendant's motion to suppress evidence had to be reversed; a new precedent held that if a search warrant failed to meet the particularity requirement of U.S. Const., amend. 14 on the warrant's face but instead incorporates a supporting document by reference, failure to leave a copy of that supporting document at the searched premises invalidated the warrant, and in the instant case the warrant did not describe the place or the person to be searched and the agent who executed the warrant did not leave a copy of the supporting affidavit at the searched premises as required by O.C.G.A. §§ 17-5-24 and 17-5-25, and thus the warrant had to be suppressed pursuant to O.C.G.A. § 17-5-30(a)(2). Battle v. State, 275 Ga. App. 301, 620 S.E.2d 506 (2005).

Delay before leaving copy of warrant on premises. — Suppression of the fruits of a search warrant was not required when a copy of the warrant was not contemporaneously left on the premises where the warrant was executed because: (1) there was only a one- or two-day delay before a copy was left at the residence; (2) no personal property was seized; and (3) no resulting harm was specified. Brundige v. State, 310 Ga. App. 900, 714 S.E.2d 681 (2011), aff'd, 291 Ga. 677, 735 S.E.2d 583 (2012).

Technical violations of duplicate warrant requirement. — Fact that the copy of the search warrant received by the defendant after the defendant provided a DNA sample was lacking the issuing judge's signature as well as the date and time of the original warrant's execution did not warrant suppression of the DNA evidence pursuant to O.C.G.A. § 17-5-31, as any violations of the failure to comply with the duplicate warrant requirement of O.C.G.A. § 17-5-25 were technical at best; further, the defendant made no showing of prejudice or that any substantial rights were affected by such omissions. State v. Stafford, 277 Ga. App. 852, 627 S.E.2d 802 (2006).

Execution of warrant timely. — With regard to a defendant's convictions for trafficking in methamphetamine and possession of marijuana with intent to distribute following a bench trial, the appellate court determined that no staleness issue existed with regard to the warrant issued to search the defendant's apartment since the warrant was executed within ten days of the warrant's issuance. Rocha v. State, 284 Ga. App. 852, 644 S.E.2d 921 (2007).

When an arrestee sued police officers for executing an allegedly expired search warrant at the arrestee's home, the officers were entitled to qualified immunity and, thus, summary judgment dismissing the claim because while O.C.G.A. § 17-5-25 required a search warrant's execution within ten days after the warrant's issuance, it was unclear, as of the warrant's execution, that O.C.G.A. § 1-3-1(d)(3), regarding time computation, did not extend that time period to make that execution timely since the tenth day after the warrant was issued fell on a Sunday, followed by a legal holiday, immediately after which the warrant was executed. Hurley v. City of St. Marys, No. 209-212, 2011 U.S. Dist. LEXIS 7399 (S.D. Ga. Jan. 26, 2011).

Subsequent test or analysis of seized item. — In a sexual exploitation of children case, a defendant's computer was seized within ten days of the issuance of a warrant as required by O.C.G.A. § 17-5-25; there was no requirement that the analysis and examination of the computer take place within the ten-day pe-

riod. Mastrogiovanni v. State, 324 Ga. App. 739, 751 S.E.2d 536 (2013).

Cited in Fowler v. State, 121 Ga. App. 22, 172 S.E.2d 447 (1970); Clyatt v. State, 126 Ga. App. 779, 192 S.E.2d 417 (1972); Wilson v. Hopper, 234 Ga. 859, 218 S.E.2d 573 (1975); Barrett v. State, 146 Ga. App. 207, 245 S.E.2d 890 (1978); State v. Hillman, 146 Ga. App. 418, 246 S.E.2d 434 (1978); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Franklin v. State, 179 Ga. App. 220, 345 S.E.2d 912 (1986); State v. Banks, 185 Ga. App. 760, 365 S.E.2d 855 (1988); McLarty v. State, 238 Ga. App. 27, 516 S.E.2d 818 (1999); Brundige v. State, 291 Ga. 677, 735 S.E.2d 583 (2012); Brown v. State, 330 Ga. App. 488, 767 S.E.2d 299 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Information must be under 11 days old. — Information submitted to the judicial officer as probable cause for the issuance of a search warrant should not be more than ten days old. 1969 Op. Att'y Gen. No. 69-172.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 236, 237, 299 et seq.

C.J.S. — 79 C.J.S., Searches and Seizures, §§ 182 et seq., 193 et seq., 231 et seq., 251 et seq.

ALR. — Preventing, obstructing, or delaying service or execution of search warrant as contempt, 39 A.L.R. 1354.

Propriety of execution of no-knock search warrant, 59 A.L.R.6th 311.

17-5-26. When search warrant may be executed.

The search warrant may be executed at any reasonable time.

History. — Ga. L. 1966, p. 567, § 11.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 189, 302, 303, 309 et seq.

ALR. — Propriety of execution of search warrant at nighttime, 41 A.L.R.5th 171.

17-5-27. Use of force in execution of search warrant.

All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant if, after verbal notice or an attempt in good faith to give verbal notice by the officer directed to execute the same of his authority and purpose:

(1) He is refused admittance;

(2) The person or persons within the building or property or part thereof refuse to acknowledge and answer the verbal notice or the presence of the person or persons therein is unknown to the officer; or

(3) The building or property or part thereof is not then occupied by any person.

History. — Orig. Code 1863, § 4636; Code 1868, § 4660; Code 1873, § 4758; Code 1882, § 4758; Penal Code 1895, § 1244; Penal Code 1910, § 1326; Code 1933, § 27-301; Ga. L. 1966, p. 567, § 8.

Law reviews. — For note, "Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police," see 26 Ga. St. U.L. Rev. 585 (2010).

JUDICIAL DECISIONS

"No-knock" provision should not have been included in the warrant, when there was no allegation of increased peril to the officers or of danger that evidence would be destroyed. Adams v. State, 201 Ga. App. 12, 410 S.E.2d 139 (1991).

Trial court's grant of the defendants' motion to suppress evidence obtained from a house was not clearly erroneous because the "no-knock" provision in the search warrant for the house was unsupported by particular facts and circumstances justifying the need for its use and that no exigent circumstances were shown; a single report of the presence of a firearm over five months before the warrant issued, uncorroborated despite continued surveillance and investigation during that time, was stale. State v. Barnett, 314 Ga. App. 17, 722 S.E.2d 865 (2012).

No knock entry taints entire case. — Officers' entry into a motel room without giving notice of authority and purpose and without knowledge that the room is unoccupied is illegal and taints all subsequent events whether viewed for the purpose of executing the search warrant or viewed as an entry to effect an arrest without a warrant. Barclay v. State, 142 Ga. App. 657, 236 S.E.2d 901 (1977).

No-knock justified if police fear danger or destruction of evidence. — Failure of the police to knock and give verbal notice of their authority and purpose in the execution of a search warrant may be excused when the police have reasonable grounds to believe that forewarning would either greatly increase their peril or lead to the immediate destruction of the evidence. Scull v. State, 122 Ga. App. 696, 178 S.E.2d 720 (1970).

Threat of violence against the police is sufficient to justify the grant of an exemption from the notice requirement, and this is especially true when coupled with the probability of loss of evidence by flushing the evidence down a toilet. Jones v. State, 127 Ga. App. 137, 193 S.E.2d 38 (1972).

When a police officer has reasonable grounds to believe that forewarning parties believed to possess marijuana would lead to immediate destruction of the evidence, the officer's failure to knock and give verbal notice of the officer's authority and purpose in the execution of a search warrant is excused. Neal v. State, 173 Ga. App. 71, 325 S.E.2d 457 (1984).

Compliance with O.C.G.A. § 17-5-27 in the execution of a search warrant is not required when the police have a reasonable, good faith belief that forewarning would increase the peril of the police or lead to the immediate destruction of evidence. Hunter v. State, 198 Ga. App. 41, 400 S.E.2d 641 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 641 (1991).

Trial court erred in granting the defendant's motion to suppress evidence seized from the home during execution of a search warrant as a confidential informant's statement to a police investigator that the defendant had automatic weapons in the house and that defendant "would not go down without a fight" was sufficient to create a reasonable belief that officers could be harmed if the officers announced the officers' presence when executing the search warrant; accordingly, the magistrate acted properly in issuing a "no-knock warrant," pursuant to O.C.G.A. § 17-5-27, and such did not justify suppression of the seized evidence. State v. Cochran, 275 Ga. App. 185, 620 S.E.2d 444 (2005).

Substantial basis existed for the inclusion of a no-knock provision in the issuance of a warrant based on a law enforcement officer's claim that notice would greatly increase the peril to the officers because the defendant had a criminal history that included a prior arrest for the sale of drugs, that drugs were often associated with the presence of firearms, and

that it was believed that there were drugs in the premises to be searched, a substantial basis existed for the inclusion of the no-knock provision in the warrant. Smithson v. State, 275 Ga. App. 591, 621 S.E.2d 783 (2005).

Denial of a defendant's suppression motion was proper as the police officers were authorized to immediately enter a residence, without announcing the officers' presence as required by O.C.G.A. § 17-5-27, as the occupants fled upon seeing the police, into a residence where the police had recently conducted controlled drug buys and the officers had a reasonable belief that the fleeing occupants might retrieve weapons or destroy evidence; once legally inside the residence, the police were authorized to execute a search warrant that led to the discovery of the defendant's involvement in drug sales. Moreover, suppression of evidence was not a constitutionally-required remedy for an improper entry pursuant to an otherwise valid search warrant. Jackson v. State, 280 Ga. App. 716, 634 S.E.2d 846 (2006).

Agent's request for a no-knock warrant was properly granted because the subject had been convicted of theft by receiving stolen property and possession of marijuana with intent to distribute and, further, was the subject of a pending charge for possession of a firearm by a convicted felon. Kimble v. State, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

Requirement of notice waived if requirement would increase peril to officers. — Although O.C.G.A. § 17-5-27 excuses force in the execution of a search warrant only after giving verbal notice of authority and presence, this requirement for notice is waived if giving notice would increase the peril of the officers conducting the search. Anderson v. State, 249 Ga. 132, 287 S.E.2d 195 (1982).

Good-faith belief that magistrate authorized "no-knock" search. — Mere fact that the issuing magistrate did not expressly authorize a "no-knock" search is of no consequence if there is a good-faith belief on the part of the arresting officer that such authorization was intended; and the officer's failure thereby to comply with the formal requirements of O.C.G.A. § 17-5-27 does not justify exclusion of the evidence obtained. Neal v. State, 173 Ga. App. 71, 325 S.E.2d 457 (1984); Hunter v. State, 198 Ga. App. 41, 400 S.E.2d 641 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 641 (1991).

Erroneously included "no knock" provision in the warrant did not require granting a motion to suppress when it appeared that officers entered the premises on the good faith belief that the officers were authorized, because of the peril created by the presence of a dangerous dog, to proceed with a "no-knock" warrant issued by the magistrate. Adams v. State, 201 Ga. App. 12, 410 S.E.2d 139 (1991).

In executing a warrant without a "no-knock" provision, a five to ten second interval between the police officer's knock and the nonviolent opening of the unlocked door (after no one inside responded) was not manifestly unreasonable. Felix v. State, 241 Ga. App. 323, 526 S.E.2d 637 (1999).

Police acted reasonably in delaying entry for three to five seconds. — Police acted reasonably in executing a search warrant at a certain house to look for evidence of drug transactions since the police knocked on the door and announced the identity of the police and the purpose in being there and since the police then waited three to five seconds before entering the home by nonviolent means after no one inside the home responded. Swan v. State, 257 Ga. App. 704, 572 S.E.2d 64 (2002).

Identity of informer may be withheld if reliable and detailed information. — If reasonable grounds for belief that exigent circumstances exist relieving police officers of the officers' duty to give verbal notice of the officers' authority and purpose in the execution of a search warrant are supplied by an informer, the informer's identity need not be disclosed if the information meets the same tests as those for probable cause for the issuance of a warrant, i.e., reliability of the informer shown and the tip sufficiently detailed. Scull v. State, 122 Ga. App. 696, 178 S.E.2d 720 (1970).

Determination of exigent circumstances necessary. — Trial court's conclusion that an announcement simultaneous with entry satisfied O.C.G.A.

§ 17-5-27 was erroneous and remand was necessary to determine if the entry was not forcible and exigent circumstances were present. Hourin v. State, 301 Ga. 835, 804 S.E.2d 388 (2017).

Trial court's determination of notice accepted if sufficient evidence. — When there is sufficient evidence to authorize a finding that verbal notice was given, the trial court's fact and credibility determinations on the issue must be accepted. Strickland v. State, 153 Ga. App. 51, 264 S.E.2d 540 (1980).

No-knock entry not justified. — Trial court erred in denying the defendant's suppression motion as the law enforcement officers executing a search warrant, which did not contain a no-knock provision, for defendant's apartment failed to comply with O.C.G.A. § 17-5-27; defendant's convictions of possession of cocaine and possession of marijuana with intent to distribute were reversed as exigent circumstances to justify a forced entry into the apartment without an announcement were not established merely because a person appeared at a window of the apartment and left, in the absence of any evidence that: (1) the person at the window was defendant; (2) the defendant or the person who peered through the window had a history of violence; (3) either person had threatened violence if law enforcement officers entered; or (4) the defendant had located drugs in the apartment for quick disposal. Poole v. State, 266 Ga. App. 113, 596 S.E.2d 420 (2004).

Cited in Bridges v. State, 227 Ga. 24, 178 S.E.2d 861 (1970); Brooks v. State, 129 Ga. App. 393, 199 S.E.2d 578 (1973); Jackson v. State, 129 Ga. App. 901, 201 S.E.2d 816 (1973); Baxter v. State, 134 Ga. App. 286, 214 S.E.2d 578 (1975); Kent v. State, 134 Ga. App. 573, 215 S.E.2d 331 (1975); Morris v. State, 170 Ga. App. 302, 316 S.E.2d 860 (1984); Moore v. State, 176 Ga. App. 251, 335 S.E.2d 716 (1985); Hout v. State, 190 Ga. App. 700, 380 S.E.2d 330 (1989); Grant v. State, 198 Ga. App. 732, 403 S.E.2d 58 (1991); State v. Smith, 219 Ga. App. 905, 467 S.E.2d 221 (1996); Cook v. State, 255 Ga. App. 578, 565 S.E.2d 896 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 246, 251 et seq.

C.J.S. — 79 C.J.S., Searches and Seizures, §§ 255 et seq., 261 et seq.

ALR. — What constitutes compliance with knock-and-announce rule in search of private premises — State cases, 85 A.L.R.5th 1.

17-5-28. Detention and search of persons on premises.

In the execution of the search warrant the officer executing the same may reasonably detain or search any person in the place at the time:

(1) To protect himself from attack; or

(2) To prevent the disposal or concealment of any instruments, articles, or things particularly described in the search warrant.

History. — Ga. L. 1966, p. 567, § 9.

Law reviews. — For annual survey of criminal law and procedure, see 41 Mercer L. Rev. 115 (1989).

JUDICIAL DECISIONS

Analysis

General Consideration
Types of Searches
Construction of Warrants

PRACTICE AND PROCEDURE

General Consideration

Constitutionality. — This section is not void nor in violation of U.S. Const., amend. 14 in that the statute authorizes a search of the persons of citizens of the United States and of the State of Georgia without probable cause and without particularly describing the person to be searched or the articles to be seized. Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968).

Applicability. — O.C.G.A. § 17-5-28 pertains only to searches conducted pursuant to a warrant. State v. Stephens, 167 Ga. App. 707, 307 S.E.2d 518 (1983).

Section defines how generalized searches can be constitutional. — This section describes the maximum extent to which U.S. Const., amend. 4 permits the particularity of description in a search warrant to be encroached by the practical necessities of the search environment. Wallace v. State, 131 Ga. App. 204, 205 S.E.2d 523 (1974); Campbell v. State, 139 Ga. App. 389, 228 S.E.2d 309 (1976), cert. denied and appeal dismissed, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

Warrantless search permitted when probable cause. — This section does not limit the officer's right to search persons as to whom probable cause for a warrantless search exists. Wallace v. State, 131 Ga. App. 204, 205 S.E.2d 523 (1974); Travis v. State, 192 Ga. App. 695, 385 S.E.2d 779 (1989).

O.C.G.A. § 17-5-28 indicates when officer may search occupants not in warrant. — This section by necessary implication describes the limited circumstances in which the executing officer may search persons not identified in the warrant incident to a legitimate search of premises. Wallace v. State, 131 Ga. App. 204, 205 S.E.2d 523 (1974); Bramblett v. State, 205 Ga. App. 290, 422 S.E.2d 18 (1992).

Inclusion of language in the warrant authorizing the search of "any persons present" on the premises does not broaden the powers of the searching authorities beyond the limited terms of O.C.G.A. § 17-5-28. State v. Holmes, 240 Ga. App. 332, 525 S.E.2d 698 (1999).

Persons entering during search must be authorized. — Right to search those coming in while a search of the premises is going on, when such search is expressly authorized by the warrant, must be shown by the grounds of probable cause or must have been authorized under the provisions of this section. Logan v. State, 135 Ga. App. 879, 219 S.E.2d 615 (1975).

Search of a visitor was not authorized since there was nothing about the visitor's demeanor that would support a reasonable belief or suspicion that the visitor was armed and dangerous and because the visitor was not in a position to assist in the disposal or concealment of drugs sought by the warrant. State v. Holmes, 240 Ga. App. 332, 525 S.E.2d 698 (1999).

Search of non-occupant of premises searched under warrant. — Under Georgia statutory law, the state has no authority to seize or search a non-occupant of the premises to be searched under a search warrant, who is not on the premises at the time of the search, absent probable cause for a warrantless search. State v. Mallard, 246 Ga. App. 357, 541 S.E.2d 46 (2000).

Searching persons not in warrant must be to preserve items in warrant. — This section allows the search of persons not particularly described in the search warrant only when the executing officer may reasonably believe that it is necessary: (1) to protect the officer from attack; or (2) to prevent the disposal or concealment of items particularly described in the warrant. A search for these purposes is permitted as an incident of a lawful arrest without a search warrant. Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968).

Search to protect officer. — Search under paragraph (1) of this section is permissible only when the executing officer may reasonably believe that it is necessary to protect the officer from attack. Smith v. State, 139 Ga. App. 129, 227 S.E.2d 911 (1976).

General Consideration (Cont'd)

State must prove reasons if justifying search through warrant. — If a search is to be upheld on the basis of the warrant, the state must demonstrate that the officer acted under either of the two justifications provided by this section. Smith v. State, 139 Ga. App. 129, 227 S.E.2d 911 (1976); Campbell v. State, 139 Ga. App. 389, 228 S.E.2d 309 (1976), cert. denied and appeal dismissed, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

Searches pursuant to O.C.G.A. § 17-5-28 are valid only if the state can point to particular facts from which the police reasonably inferred that the individual searched was armed and dangerous or was concealing things described in the search warrant. Clark v. State, 235 Ga. App. 569, 510 S.E.2d 319 (1998).

To support a search, officer had to be able to articulate specific facts that would support a reasonable belief or suspicion that the person to be searched was armed and dangerous. It was illegal to search a person not named in the warrant but found on the premises, without independent justification for a personal search. Mercer v. State, 251 Ga. App. 465, 554 S.E.2d 732 (2001).

State must show justification for expanded search. — To uphold a search of a person or vehicle not particularly described in the warrant the state must demonstrate that the searching officer acted under one of the two subdivisions of O.C.G.A. § 17-5-28 justifying the expanded scope of a search. Collins v. State, 187 Ga. App. 430, 370 S.E.2d 648 (1988); Benham v. State, 196 Ga. App. 241, 395 S.E.2d 658 (1990).

When the police officer had no particular reason to suspect that the defendant was armed or was concealing items described in a search warrant, the weapons pat-down search of the defendant was illegal and the marijuana found pursuant to that illegal frisk should have been suppressed. Clark v. State, 235 Ga. App. 569, 510 S.E.2d 319 (1998).

Nexus between person and articles must be shown. — To search other persons under paragraph (2) of O.C.G.A. § 17-5-28, there must be a nexus between what the officers are authorized to search for, based on the criminal activity which the officers had probable cause to believe was and/or still is occurring and which prompted the warrant, the nature of the evidence sought, the environment in which the search is authorized, and the person searched. There must be a connection between that person and the activity which logically leads to a belief that the person is in possession of a targeted item. State v. Hawkins, 187 Ga. App. 826, 371 S.E.2d 668 (1988).

Nexus between person and illegal activities must be shown. — Police officer did not have probable cause to search club visitor's purse since there was no competent evidence to establish a nexus between the visitor and alleged illegal activities at the club, and thus no reasonable basis for suspecting the visitor might be concealing either liquor or marijuana, which was the contraband named in a warrant. State v. Anderson, 195 Ga. App. 793, 395 S.E.2d 50 (1990).

"General" search warrant as to particular defendant. — Search warrant is "general" as to a particular defendant when the defendant is neither listed by name specifically nor described generally, and no additional indicia of probable cause are provided at the scene of the search. State v. Cochran, 135 Ga. App. 47, 217 S.E.2d 181 (1975).

Warrants held not general. — Warrant to search designated premises will not authorize the search of every individual who happens to be on the premises, but a warrant which identifies the premises and the premises' owners or occupants is not void as a general warrant because the warrant authorizes the search of other persons found there who may reasonably be involved in the commission of the crime for which the warrant is issued. Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

Section does not define probable cause or specificity of warrant. — This section deals with the execution of the warrant, and does not purport to deal with the necessary elements of probable cause and particularity in the description of the persons to be searched and the articles to

be seized. Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968).

Presumption that valid warrant exists. — This section implicitly presupposes that a valid warrant is in existence before authorizing a search of other persons present at the place. Patterson v. State, 126 Ga. App. 753, 191 S.E.2d 584 (1972); Brown v. State, 133 Ga. App. 500, 211 S.E.2d 438 (1974).

Control by owner of personal belongings during visit to friend. — Personal belongings brought by an owner on a visit to a friend's house retain their constitutional protection until their owner meaningfully abdicates control or responsibility. Childers v. State, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

No claim for false imprisonment existed since the plaintiffs were being detained briefly pending the execution of a lawful search warrant and the securing of the premises. White v. Traino, 244 Ga. App. 208, 535 S.E.2d 275 (2000).

Cited in Jones v. State, 126 Ga. App. 841, 192 S.E.2d 171 (1972); Patton v. State, 148 Ga. App. 793, 252 S.E.2d 678 (1979); Morris v. State, 170 Ga. App. 302, 316 S.E.2d 860 (1984); Clark v. State, 184 Ga. App. 380, 361 S.E.2d 682 (1987); Harrison v. State, 213 Ga. App. 174, 444 S.E.2d 354 (1994); Moody v. State, 232 Ga. App. 499, 502 S.E.2d 323 (1998); Hunter v. State, 244 Ga. App. 488, 536 S.E.2d 157 (2000); Peterson v. State, 252 Ga. App. 469, 556 S.E.2d 514 (2001).

Types of Searches

Valid warrant permits. — Because the officers are executing a valid warrant, under this section the officers are permitted to make a very limited search of those present in the apartment at the time. Campbell v. State, 139 Ga. App. 389, 228 S.E.2d 309 (1976), cert. denied and appeal dismissed, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

Search of persons on premises. — This section allows a very limited search of persons present on the premises at the time of the search to look only for weapons or for the items particularly described in the warrant. Campbell v. State, 139 Ga. App. 389, 228 S.E.2d 309 (1976), cert. denied and appeal dismissed, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

Frisk of an individual who is a visitor on the premises and who is not named in the warrant must be justified by the officer's reasonable belief that the frisk is necessary. Condon v. State, 203 Ga. App. 163, 416 S.E.2d 802 (1992).

Weapons search. — This section specifically gives the officer the right to search for weapons. This right is limited to a pat down of the person's outer clothing. Campbell v. State, 139 Ga. App. 389, 228 S.E.2d 309 (1976), cert. denied and appeal dismissed, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

When the warrant authorized a search for drugs, police officers could anticipate that those suspected of involvement in the drug trade might be armed, and when the defendant arrived on the scene in a truck, the officer was clearly authorized to direct that the defendant step from the defendant's truck and submit to a frisk for weapons. Condon v. State, 203 Ga. App. 163, 416 S.E.2d 802 (1992).

Weapons search through limited pat down of outer clothing. — Type of weapons search referred to in this section is the limited pat down search of a person's outer clothing. Smith v. State, 139 Ga. App. 129, 227 S.E.2d 911 (1976).

Steps in pat down search. — Two-step process must ordinarily be followed in a pat down search: (1) the officer must pat down first; and (2) then intrude beneath the surface only if the officer comes upon something which feels like a weapon. Wyatt v. State, 151 Ga. App. 207, 259 S.E.2d 199 (1979).

Search to prevent concealment. — Search of defendant's person conducted to prevent concealment of contraband sought pursuant to the search warrant was lawful. Scott v. State, 213 Ga. App. 84, 444 S.E.2d 96 (1994).

Frisk not used to obtain evidence. — Unlike a full search, a frisk is conducted solely for the purpose of insuring the safety of the officer and of others nearby, not to procure evidence for use at a subsequent trial. Brown v. State, 133 Ga. App. 500, 211 S.E.2d 438 (1974).

Illegal search not validated by finding evidence of crime. — If one is un-

Types of Searches (Cont'd)

lawfully searched, the fact that incriminatory matter is found on that person will not render the search legal. Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

Pat down requires demonstrable indications of danger. — O.C.G.A. § 17-5-28 authorizes a defendant's detention and search of the defendant's person to protect police officers from attack after the defendant's companion is seen reaching for an exposed pistol. Rockholt v. State, 129 Ga. App. 99, 198 S.E.2d 885 (1973).

"Pat down" search authorized under this section to protect the officer from attack is permissible only when the executing officer may reasonably believe that the pat down is necessary and the officer must be able to point to particular facts from which the officer reasonably inferred that the individual was armed and dangerous. Wyatt v. State, 151 Ga. App. 207, 259 S.E.2d 199 (1979).

Pat-down search to protect from attack. — Since the testimony of a police officer clearly established that the officers conducting the search reasonably could have concluded that the defendant was armed and dangerous, a pat-down search was authorized under paragraph (1) of O.C.G.A. § 17-5-28. Brown v. State, 181 Ga. App. 768, 353 S.E.2d 572 (1987).

Trial court properly denied the defendant's suppression motion as drug evidence was properly seized during a pat-down search of the defendant's person for weapons, which was justified under O.C.G.A. § 17-5-28 because police were in the process of executing a search warrant to search for drugs; a deputy's removal of a package from the defendant's pants pocket was within the scope of the defendant's consent. Brint v. State, 306 Ga. App. 10, 701 S.E.2d 507 (2010).

Drugs found incidental to pat-down search. — Since the records were totally devoid of testimony or facts showing that the searching officer first conducted a tactile and visual search of defendant's shirt and, only then, finding something that felt like a weapon, extended the search into defendant's shirt pocket, where cocaine was found, the weapons search was not conducted within constitutionally permissible bounds and the seizure of the drugs could not be justified on this basis. Brown v. State, 181 Ga. App. 768, 353 S.E.2d 572 (1987).

Since the defendant refused to exit a vehicle at the officer's request and resisted the officer's efforts to place the defendant against the vehicle, the officer was authorized to conduct a pat-down to determine if the defendant was armed and, when the defendant refused to identify an object the officer felt in the defendant's pocket (subsequently identified as a packet of cocaine), the officer was justified in retrieving the object. McGugan v. State, 215 Ga. App. 535, 451 S.E.2d 460 (1994).

Search of persons suspected of selling drugs. — Although the defendant argued that the defendant was only a visitor at the house being searched, police had the authority to search the defendant when the police had information that two black Haitian males were selling cocaine in the house, and the defendant was the only black Haitian male present. Louis v. State, 188 Ga. App. 435, 373 S.E.2d 231 (1988).

Construction of Warrants

Warrant permitting search of anyone possibly involved is more intrusive than weapons search. — Warrant that permits the search of any person on the premises who might reasonably be involved in the crime of possession of illegal drugs or narcotics is more intrusive than the weapons search authorized by paragraph (2) of this section. Wallace v. State, 131 Ga. App. 204, 205 S.E.2d 523 (1974).

Words "any person present." — Even though the words "and any person present" are in a warrant, the searching authorities may not broaden the authorities' power to search persons not identified in the warrant beyond the limited terms of this section. Wallace v. State, 131 Ga. App. 204, 205 S.E.2d 523 (1974).

Unless warrant states drug users seen, and persons found in room containing concealable drugs. — Searches may be upheld under this section when a warrant states that known drug abusers have been observed by police entering and

leaving the premises, and persons not specified in the warrants are found sitting in the same room with the named suspects when the contraband pills could easily be passed around and concealed; the persons named in the warrant should either be present or actually reside there, and the particular contraband described should be found. Wyatt v. State, 151 Ga. App. 207, 259 S.E.2d 199 (1979).

Warrant containing no language authorizing search of persons. — When the warrant contained no language authorizing the search of any person present on the premises, the defendant was wearing a coat and the defendant's purse was on a table beside the defendant, the police determined that the defendant lived in Cleveland, Tennessee, not in the trailer that was the subject of the search warrant, and they also learned that the trailer belonged to two men, which also indicated that the defendant was a visitor, the search of defendant's purse was illegal and it was, therefore, error to deny the defendant's motion to suppress. Hawkins v. State, 165 Ga. App. 278, 300 S.E.2d 224 (1983).

Independent justification for search of unnamed persons. — Searches of persons not named in search warrant but found on premises to be searched are illegal absent independent justification for a personal search. Childers v. State, 158 Ga. App. 613, 281 S.E.2d 349 (1981); Bundy v. State, 168 Ga. App. 90, 308 S.E.2d 213 (1983); State v. Varner, 239 Ga. App. 347, 521 S.E.2d 247 (1999).

Persons not named in warrant may be searched for weapons. — Person found on the premises, but not named in the warrant, may be searched in a pat down for weapons when the searching officers have information that there are firearms on the premises. Gumina v. State, 166 Ga. App. 592, 305 S.E.2d 37 (1983).

Warrant covering apartment building did not cover individual standing in common area. — Search warrant for an apartment in a multi-unit building was not broad enough to include the search of the individual suspect who was standing outside the premises in a common area, the parking lot which served all four apartment units in the building. Bayshore v. State, 208 Ga. App. 828, 432 S.E.2d 251 (1993).

Practice and Procedure

Two-and-a-half hour search for cocaine in an apartment was not unreasonable on its face since cocaine is a substance which is concealed easily. Riviera v. State, 190 Ga. App. 823, 380 S.E.2d 353 (1989).

If a visitor in a residence makes no threat or gesture which causes the officer to fear for the officer's safety and the officer has no prior knowledge of the visitor, the police officer has no reasonable belief that the visitor is armed or is a threat to the officer's safety, and a search of the visitor is illegal. Bundy v. State, 168 Ga. App. 90, 308 S.E.2d 213 (1983).

Whether police had notice that the police were searching personal effects of a visitor to searched premises must be determined on the facts of each case. Childers v. State, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Search of visitor at apartment was authorized since the officers knew that drug dealing there had been heavy that day and the visitor matched the description of a dealer known to supply drugs to residents of the apartment. Steward v. State, 237 Ga. App. 672, 516 S.E.2d 534 (1999); Hall v. State, 242 Ga. App. 280, 527 S.E.2d 624 (2000).

Police may assume all objects are part of premises. — Without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant. Childers v. State, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Flight from premises. — O.C.G.A. § 17-5-28 does not limit an officer's right to search persons as to whom probable cause for a warrantless search exists; defendant's flight from premises identified in a search warrant, coupled with the defendant's presence at the premises, provided probable cause to believe that the defendant possessed, or was a party to possessing, unlawful contraband, justify-

Practice and Procedure (Cont'd)

ing an officer's stop and search of the defendant. Underwood v. State, 266 Ga. App. 119, 596 S.E.2d 425 (2004).

Search of bags being carried and in pockets. — Searches of paper bag carried under person's arm and of plastic bag in person's pocket are treated as searches of the person. Childers v. State, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Search of purse found near defendant. — Police, executing a search warrant in the home of the defendant's son, properly searched a purse found a few inches away from the defendant, when the son was absent and the purse was by its nature a holding object and one capable of concealment of such items as drugs or weapons. Bonds v. State, 188 Ga. App. 135, 372 S.E.2d 448 (1988).

Defendant's admission during detention for search. — Defendant could not raise an objection to the admission of defendant's spontaneous statement to police officers executing a search warrant that "you've got me" for the first time on appeal absent plain error; there was no plain error in admitting the statement as: (1) the defendant was being detained under O.C.G.A. § 17-5-28, and was not under arrest; (2) the defendant was not being interrogated, making Miranda warnings not required; (3) defense counsel cross-examined the officers on the statement: (4) the statement was admissible as a spontaneous statement; and (5) the statement was admissible under former O.C.G.A. § 24-6-3 (see now O.C.G.A. § 24-3-3) as a part of the res gestae. Zackery v. State, 262 Ga. App. 646, 586 S.E.2d 346 (2003).

Warrantless search not authorized. — Officers did not possess articulable facts that the home harbored any persons who could pose a danger to those on the arrest scene and therefore a protective sweep was not authorized. State v. Mixon, 251 Ga. App. 168, 554 S.E.2d 196 (2001).

Motion to suppress should have been granted. — Detention and search of the defendant's person at defendant's aunt's home where the defendant was visiting at the time police arrived to execute a search warrant was not justified under O.C.G.A. § 17-5-28(2) since the officers failed to articulate facts that justified the defendant's search for safety reasons and defendant was not named in the search warrant. Norton v. State, 283 Ga. App. 790, 643 S.E.2d 278 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 176 et seq., 238 et seq., 260, 278.

ALR. — Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

17-5-29. Written return of items seized; filing and signing of inventory; delivery of copies of inventory.

A written return of all instruments, articles, or things seized shall be made without unnecessary delay before the judicial officer named in the warrant or before any court of competent jurisdiction. An inventory of any instruments, articles, or things seized shall be filed with the return and signed under oath by the officer executing the warrant. The judicial officer or court shall, upon request, deliver a copy of the inventory to the persons from whom or from whose premises the instruments, articles, or things were taken and to the applicant for the warrant.

History. — Ga. L. 1966, p. 567, § 10.

JUDICIAL DECISIONS

Inventory search permitted for custodial purposes, not investigative. — To prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in the accused's possession. An inventory is then necessary both to preserve the property of the accused while the accused is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to the accused. However, the inventory must not be done with an investigative intent, but it should be incident to the caretaking function of the police. Gaston v. State, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

Failure to give magistrate inventory copy not fatal. — When the executing officers gave the defendant an inventory of the items seized, the officers' failure to deliver a similar inventory to the magistrate issuing the warrant as required by O.C.G.A. § 17-5-2 and a return thereof on the warrant as required by Ga. L. 1966, p. 567, § 10 (see O.C.G.A. § 17-5-29), and a delivery to the sheriff of the items seized, and a report to the commissioner of revenue are not cause for the suppression of the evidence. Holloway v. State, 134 Ga. App. 498, 215 S.E.2d 262 (1975).

Failure to swear return before proper officer not fatal. — Absent a showing of prejudicial error to the defendant, the failure to swear to the return before an officer authorized to administer oaths is not such a fatal defect as to vitiate the search warrant. Waters v. State, 122 Ga. App. 808, 178 S.E.2d 770 (1970).

Officer's failure to sign "return of things seized" not fatal. — Defect in the search warrant procedure wherein the officer executing the warrant failed to sign the "return of things seized" is not a fatal defect because of the absence of a showing of prejudicial error to the defendant. Vaughn v. State, 126 Ga. App. 252, 190 S.E.2d 609 (1972).

Failure to make return does not invalidate warrant. — Assuming arguendo that a return was not made as required by O.C.G.A. § 17-5-29, the failure does not affect the validity of the search. Wallace v. State, 165 Ga. App. 804, 302 S.E.2d 718 (1983).

Untimely return not fatal when no showing of prejudice. — Trial court properly refused to suppress blood and urine test records under O.C.G.A. § 17-5-31, although a written return of the warrant was not made in a timely fashion, as provided in O.C.G.A. § 17-5-29, because a defendant received a copy of the inventory of the medical records seized, and made no showing of prejudice as a result of the delayed filing. Stubblefield v. State, 302 Ga. App. 499, 690 S.E.2d 892 (2010).

Affidavit showing nothing on informer's reliability and source. — Affidavit based on an informer's tip is fatally defective as the basis for a search warrant when the affidavit recites absolutely nothing which would show the informer's reliability nor states how the informer obtained the informer's information, and under Ga. L. 1966, p. 567, § 10 (see O.C.G.A. § 17-5-30) evidence obtained must be suppressed. Grebe v. State, 125 Ga. App. 873, 189 S.E.2d 698 (1972).

Cited in Lewis v. State, 126 Ga. App. 123, 190 S.E.2d 123 (1972); Beck v. State, 144 Ga. App. 361, 241 S.E.2d 305 (1977); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, §§ 236, 237.

ALR. — Jurisdiction to quash search warrant and order return of property seized in liquor cases under federal statutes, 65 A.L.R. 1246.

Presence of liquor in vehicle at the time of search and seizure as condition of forfeiture for violating prohibition law, 71 A.L.R. 911.

17-5-30. Motion to suppress evidence illegally seized generally.

(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property, the possession of which is not otherwise unlawful, and to suppress as evidence anything so obtained on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face, there was not probable cause for the issuance of the warrant, or the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing that the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion; and the burden of proving that the search and seizure were lawful shall be on the state. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

(c) The motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which the accusation, indictment, or special presentment is filed and pending.

History. — Ga. L. 1966, p. 567, § 13.

Cross references. — Appeal by state from order, decision, or judgment sustaining motion to suppress evidence illegally seized, § 5-7-1.

Law reviews. — For article discussing limited application of this section by the state appellate courts and advocating a state exclusionary rule, see 11 Ga. L. Rev. 105 (1976). For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990).

For note, "Arizonia v. Evans: Carving Out Another Good-Faith Exception to the Exclusionary Rule," see 47 Mercer L. Rev. 1135 (1996). For note, "United States v. Patane: The Supreme Court's Continued Assault on Miranda," see 56 Mercer L. Rev. 1499 (2005).

For comment on Talbert v. State, 224 Ga. 291, 161 S.E.2d 279 (1968), see 5 Ga. St. B.J. 256 (1968). For comment on Connally v. State, 237 Ga. 203, 227 S.E.2d 352, see 11 Ga. L. Rev. 200 (1976). For comment on warrantless search of defendant's home, see 41 Emory L.J. 321 (1992).

JUDICIAL DECISIONS

Analysis

General Consideration
Searches
1. In General
2. Consent

3. Locations
4. Inventory Search
Informants
Identification Procedures
Applicability
1. In General
2. Drug Evidence
3. Probationers
4. Statements and Testimony
5. Vehicles
A. In General
B. Driving Under the Influence
C. Searches
D. Traffic Stops
6. Videotape
7. Youthful Offenders
Warrants and Affidavits
Evidence Acquired Unlawfully
Requirements for Motion
1. In General
2. Writing
3. Timely Motion
Hearing Procedure
Appeals

General Consideration

Purpose of section procedural. — O.C.G.A. § 17-5-30 authorizes a motion to suppress any evidence illegally seized and thereby forestall a full-blown trial with all a trial's ramifications when the state cannot establish that the state's incriminating evidence is admissible as evidence. Though the invasion of privacy may be the underlying right to be protected, the purpose of that section is procedural, to suppress that which is inadmissible. State v. Johnston, 160 Ga. App. 71, 286 S.E.2d 47 (1981), aff'd, 249 Ga. 413, 291 S.E.2d 543 (1982).

Purpose of motion to suppress. — Motion to suppress is used to suppress evidence (property) illegally seized. Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

Restraint in use of illegally obtained evidence. — O.C.G.A. § 17-5-30 not only affords protection from constitutionally violative searches and seizures but also authorizes restraint in use of illegally obtained evidence. State v. Johnston, 160 Ga. App. 71, 286 S.E.2d 47 (1981), aff'd, 249 Ga. 413, 291 S.E.2d 543 (1982).

Broad range of unlawful search and seizures covered. — Language of O.C.G.A. § 17-5-30 is broad enough to encompass unlawful seizures which do not involve any question of a search in violation of U.S. Const., amend. 4. In fact, the heading of that section states as much. State v. Johnston, 160 Ga. App. 71, 286 S.E.2d 47 (1981), aff'd, 249 Ga. 413, 291 S.E.2d 543 (1982).

Section protects only against unreasonable search and seizure. — Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) furnishes a procedural device for the protection of constitutional guaranties against unreasonable search and seizure only. Hawkins v. State, 117 Ga. App. 70, 159 S.E.2d 440 (1967).

Attacking validity of indictment. — O.C.G.A. § 17-5-30 is not a proper method of attacking the validity of an indictment. Ibietatorremendia v. State, 163 Ga. App. 399, 294 S.E.2d 646 (1982).

Motion to suppress is statutory and relates only to "evidence illegally seized." Goswick v. State, 150 Ga. App. 279, 257 S.E.2d 303 (1979).

Motion not common law. — Because a motion to suppress was not a part of the common law and prior to 1966 "was un-

General Consideration (Cont'd)

known in the law of this state" it has only such scope and jurisdiction as are contained within Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) and it is not error for a court to refuse to hear the motion. Goswick v. State, 150 Ga. App. 279, 257 S.E.2d 303 (1979).

Not applicable to suppression of statements. — Despite a claim that a defendant's motion to suppress inculpatory statements made during a police interview was procedurally defective under O.C.G.A. § 17-5-30(b), the granting of such a motion could not be reversed on that basis as the statute only applied to the suppression of tangible evidence. State v. Lee, 295 Ga. App. 49, 670 S.E.2d 879 (2008).

Suppression motion properly denied. — Trial court properly denied the defendant's motion to suppress evidence found during the execution of a search warrant as the appellate court found that, after reviewing all of the information in the affidavit as a whole, it provided sufficient probable cause for the magistrate to issue the search warrant and that the information provided was not stale. The warrant was executed the same day that the warrant was issued and was supported by a law enforcement affidavit reciting a stop made of the defendant's vehicle for a failure to have tags and various drugs and drug-related items found in the vehicle that served as the basis for obtaining the search warrant for the defendant's home. Cleveland v. State, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

Evidence in plain view was not suppressed. — Suppression of evidence seized from a defendant's home and car was not required as deputies initially entered the defendant's home in search of an assault victim with the defendant's consent, entry into the home was also supported under the exigent circumstances exception to the warrant requirement, blood evidence that was observed in plain view could be seized, photos of evidence inside the home that were in plain view could be taken even if the exigency had expired, photos taken of blood and hair evidence that were in plain view in the defendant's car did not offend U.S. Const., amend. IV, and even if opening the door of the car to assist in taking the photos constituted a warrantless search, it was justified by the exigencies of the case. Lord v. State, 297 Ga. App. 88, 676 S.E.2d 404 (2009).

Trial court did not err in refusing to suppress statements the defendant made after an officer told the defendant that withholding information would make things worse for the defendant because the officer's statement to the defendant was, in context, an admonition not to damage the defendant's credibility but to tell the truth, and the statement did not show the physical or mental torture or the coercion by threats that constitutes the remotest fear of injury forbidden by former O.C.G.A. § 24-3-50 (see O.C.G.A. § 24-8-824); since no promises of lighter punishment were made, such an admonition to tell the truth did not constitute hope of benefit so as to render involuntary any statement made thereafter. Madrigal v. State, 287 Ga. 121, 694 S.E.2d 652 (2010), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Evidence seized from motel room not suppressed. — Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because under the totality of the circumstances, the magistrate was authorized to make a pragmatic, commonsense judgment that there was a fair probability that a search of the suite would produce evidence that the occupants were in possession of drugs; a detective interviewed a member of the hotel's housekeeping staff who had seen drugs in the suite, and the affidavit showed that the witness, who was identified by name in the affidavit, reported that a guest in the room requested that the suite be cleaned while the guests went to get something to eat and that immediately upon entering the suite, the housekeeper observed a large quantity of what appeared to be marijuana and other drugs lying openly on the desk and television. Glass v. State, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Suppression motion denied regarding evidence from briefcase. — Trial court did not err in denying the defen-

dant's motion to suppress evidence officers seized from the defendant's briefcase because the contents of the briefcase were seized pursuant to a valid search warrant based upon information wholly independent from law enforcement's illegal use of the friend to obtain the briefcase and, thus, the search met the criteria for admissibility under the independent source doctrine; although the defendant had a reasonable expectation of privacy in the defendant's locked briefcase and did not abdicate control or responsibility of the briefcase, the investigating officer became aware of the existence of the briefcase and the briefcase's contents based upon the statements of the victim and another woman and was able to obtain a search warrant for the briefcase's contents based upon that information. Wilder v. State, 304 Ga. App. 891, 698 S.E.2d 374 (2010).

Trial court did not err in denying the defendant's motion to suppress a firearm police officers seized from the defendant's person because the officers conducting the initial pat-down of the defendant acted in accordance with the Fourth Amendment, and there was no taint upon the second pat-down leading to seizure of the firearm; because the initial pat-down of the defendant was supported by particularized facts observed by the officers, and the defendant's actions were consistent with the officers' hypothesis that the defendant was contemplating a robbery of a store manager, the trial court was authorized to find that a reasonably prudent person under the circumstances would have been warranted in believing that the defendant posed a danger to his or her safety, such that the officers' act of conducting the initial pat-down search for a weapon was constitutionally permissible. Lewis v. State, 307 Ga. App. 593, 705 S.E.2d 693 (2011).

Denial of suppression motion for saliva testing in rape case. — Trial court did not err in denying the defendant's motion to suppress as there was a substantial basis for concluding that probable cause existed for the issuance of the search warrant for a saliva sample from the defendant because the officer averred in the affidavit that there was probable cause to believe that the defendant had committed the rape of the victim; and the affidavit included averments that the victim's assailant had attempted vaginal penetration repeatedly, and that a rape kit had been completed soon after the assault. Mincey v. State, 332 Ga. App. 690, 774 S.E.2d 752 (2015).

Good-faith exception inapplicable. — Good-faith exception to the exclusionary rule enunciated by the U.S. Supreme Court in United States v. Leon, 468 U.S. 987 (1984) is not applicable in Georgia in light of the legislatively-mandated exclusionary rule found in O.C.G.A. § 17-5-30. Gary v. State, 262 Ga. 573, 422 S.E.2d 426 (1992).

Even though the federally permissible good-faith exception to the probable cause requirement in the execution of a search warrant has been rejected in Georgia, such rule has no bearing when the subject evidence is the fruit of a bona fide investigation of an independent crime witnessed by the arresting officer. King v. State, 211 Ga. App. 12, 438 S.E.2d 93 (1993).

There is no "good faith" exception to the statutory exclusionary rule. State v. Gallup, 236 Ga. App. 321, 512 S.E.2d 66 (1999).

In a criminal prosecution in which the search warrant was invalidated because the warrant had been executed by an assistant magistrate, the state could not claim a good faith exception as none had been provided for in O.C.G.A. § 17-5-30. Beck v. State, 283 Ga. 352, 658 S.E.2d 577 (2008).

Trial court did not err in granting the defendant's motion to suppress because the only possible justification for the search and seizure involving the defendant was the officers' good-faith belief that the defendant was on probation and subject to a valid Fourth Amendment waiver; however, that option was foreclosed by case law as Georgia did not recognize a good faith exception to the exclusionary rule. State v. New, 331 Ga. App. 139, 770 S.E.2d 239 (2015), cert. denied, No. S15C1075, 2015 Ga. LEXIS 429 (Ga. 2015).

Exclusionary rule does not reach as far as does U.S. Const., amend. 4. State v. Young, 234 Ga. 488, 216 S.E.2d 586,

General Consideration (Cont'd)

cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

Entrapment is not a rationale for suppressing evidence, but an affirmative defense to a criminal prosecution. State v. Baker, 216 Ga. App. 66, 453 S.E.2d 115 (1995).

Grant of motion not subject to double jeopardy restrictions. — Because grant of suppression motion is a matter of law for the trial court, it is not subject to double jeopardy restrictions of evidentiary findings, which are not subject to appeal by the state. Chastain v. State, 158 Ga. App. 654, 281 S.E.2d 627 (1981).

Information from informant sufficient to establish probable cause. — Motion to suppress was properly denied because, although an officer possibly could have provided the magistrate with more detail concerning the confidential informant's past reliability, considering the information about the informant's relationship with the defendant and how the informant came to be in the defendant's apartment; that the officer knew the informant and found the information from the informant to be reliable in the past; the recent time frame for when the informant had been in the apartment and viewed suspected drugs and paraphernalia; and the confirmation that the occupants were convicted felons, the information relayed to the magistrate provided a substantial basis for the magistrate's finding of probable cause. Galloway v. State, 332 Ga. App. 389, 772 S.E.2d 832 (2015).

Persons entitled to benefit of section. — Under the express terms of this section, the only persons entitled to the statute's benefit are persons "aggrieved by an unlawful search and seizure." No provision is made in this section for pretrial suppression of evidence deemed illegal for reasons other than unlawful search and seizure. Barnett v. State, 123 Ga. App. 369, 180 S.E.2d 921 (1971).

Pretrial motions to suppress are available only to persons aggrieved by unlawful searches and seizures. Foote v. State, 141 Ga. App. 18, 232 S.E.2d 366 (1977).

Standing. — After defendant was charged with an offense, the essential element of which is possession, the defendant is endowed with automatic standing to challenge the validity of the searches of which the defendant complains. Reece v. State, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Because a murder defendant presented no admissible testimony on the question whether the defendant was aggrieved by an unlawful search and seizure, the defendant could not prove that the defendant had standing to raise a challenge to the legality of the search of a tote bag that had allegedly been stolen from one of the victims. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

Because the defendant's own statements failed to show standing to contest an allegedly defective search warrant affidavit for a house the defendant claimed no connection to, trial counsel's reasonable strategic decision not to move for suppression of the evidence seized as a result was upheld. Lawton v. State, 285 Ga. App. 45, 645 S.E.2d 571 (2007), cert. denied, No. S07C1244, 2007 Ga. LEXIS 670 (Ga. 2007).

Because there was no evidence that the defendant was a subscriber of the phones tapped and no evidence that the defendant's voice was heard during the wiretapped conversations, the defendant lacked standing to seek suppression of the conversations from those wiretaps. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

No standing to object to search. — Passenger in car owned by driver's father has no standing to object to the search. Autry v. State, 150 Ga. App. 584, 258 S.E.2d 268 (1979).

Lack of standing to challenge search of hotel room as not "aggrieved" party. — Order suppressing evidence seized from a hotel room was error because the defendant was a mere invitee visiting the room and, under O.C.G.A. § 17-5-30(a), only a person aggrieved by an unlawful search and seizure was permitted to move to suppress evidence; the defendant had no reasonable expectation of privacy in the hotel room searched, and thus the defendant was not "aggrieved" by the search within the meaning of § 17-5-30(a) and the Fourth Amendment

and lacked standing to contest the search. State v. Carter, 299 Ga. App. 3, 681 S.E.2d 688 (2009).

Hearsay within hearsay. — Mere existence of "hearsay upon hearsay" was not fatal to a search warrant because under the totality of the circumstances, the magistrate was informed of the underlying circumstances involving an undercover buy from the defendant, independent of the double hearsay, which did not depend upon the reliability of the hearsay declarations; further, a known informant's statements to police against penal interest elevated that statements' reliability. Cochran v. State, 281 Ga. 4, 635 S.E.2d 701 (2006).

Motion improper when motion fails to show defendant controls personalty seized or premises. — When the motion to suppress failed to state facts showing that the property was taken from any house or place owned, occupied, or used by the defendant, or that the defendant had any proprietary interest in or right to possession of the property seized, the motion fails to show that the defendant was a person "aggrieved by an unlawful search and seizure" within the terms of Ga. L. 1966, p. 567, § 13. Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

Trial court is the finder of fact on motions to suppress evidence, and the trial court, rather than an appellate court, must judge the credibility of the witnesses and the weight of the evidence; a trial court correctly held that an officer's warrantless entry into the defendant's bedroom without the defendant's consent was illegal, but failed to decide if the defendant's later consent to search was freely and voluntarily given, and thus, the trial court's suppression order was vacated and the case was remanded. State v. Brown, 269 Ga. App. 875, 605 S.E.2d 628 (2004).

Burden of proof. — When a defendant moves to suppress evidence based on an illegal search, the state bears the burden of proving that the search was lawful. State v. Kramer, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

Failure to file motion did not constitute ineffective assistance of counsel. — Defendant's claim that trial counsel was ineffective in failing to move to suppress defendant's post-arrest statement was without merit as trial counsel viewed the statement as exculpatory and failed to make the motion as part of counsel's trial strategy. Ogden v. State, 266 Ga. App. 399, 597 S.E.2d 491 (2004).

Defendant could not show that trial counsel's failure to file a motion to suppress constituted deficient performance because the defendant did not establish that a motion to suppress would have been granted; although the defendant argued that an officer's encounter with the defendant was unsupported by articulable facts of criminal conduct, under the totality of circumstances, the defendant's actions supported a reasonable, particularized suspicion that the defendant was involved in criminal activity. Odom v. State, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Defendant's trial counsel was not deficient for failing to file a motion to suppress evidence because the defendant failed to show that police officers lied under oath during the trial; therefore, the defendant was unable to show that, if defense counsel had filed a motion to suppress on that basis, the trial court would have granted the motion. Bass v. State, 309 Ga. App. 601, 710 S.E.2d 818 (2011).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because the defendant could not show prejudice due to trial counsel's failure to file a motion to suppress the approximately $1,500 discovered when the defendant was searched; even if the evidence had been excluded, the remaining evidence adduced at trial was overwhelming. Lowe v. State, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Trial counsel did not render ineffective assistance by failing to move to suppress evidence found on the defendant's person because any motion to suppress would have been without merit; when the officers lawfully approached and questioned the defendant the smell of alcohol on the defendant's person and emanating from a cup, and the officers' earlier observations

General Consideration (Cont'd)

of the defendant staggering and stumbling in the middle of the roadway, gave the officers probable cause to arrest the defendant for unlawfully walking upon the roadway while under the influence of alcohol, O.C.G.A. § 40-6-95, and the cocaine and digital scales subsequently found in the defendant's pockets were discovered pursuant to a lawful search incident to an arrest. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Trial counsel did not perform deficiently by failing to renew the motion to suppress after evidence was presented at trial because there was no evidence that a renewed motion would have been granted or that the defendant suffered prejudice as a result of counsel's performance. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447 (2011).

Trial counsel was not ineffective for failing to file a motion to suppress because probable cause to arrest the defendant and to search the defendant incident to that arrest had been shown on undisputed facts; therefore, the defendant could not make the requisite strong showing that a motion to suppress the evidence found during that search would have been meritorious. Coney v. State, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

No ineffective assistance with suppression motion on wiretaps. — Motion to remand for a hearing to determine if the defendant had standing or if trial counsel was ineffective for failing to move for suppression of the wiretaps was denied because the defendant lacked standing to seek suppression of the evidence from the wiretaps. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Because the defendant's lawyer elicited testimony from the prosecution witnesses that the defendant was never identified as an owner or subscriber of the three targeted cell phones monitored, nor was the defendant ever identified as a participant of the intercepted conversations, the defendant did not have standing to pursue suppression of the wiretap evidence, and neither the defendant's trial counsel nor counsel on a motion for new trial performed deficiently for failing to raise the suppression issue. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

No ineffective assistance in failing to suppress evidence from cellphones. — Trial counsel was not ineffective for failing to file motions to suppress search warrants for the two recovered cell phones and the information obtained therefrom because, although the warrants erroneously stated the date of the murder as November 6, 2014 rather than November 6, 2013, mere typographical or clerical errors did not ordinarily provide a basis to suppress the evidence; and, even if the error in the warrants was deemed not to be purely typographical or clerical, and the extracted data outside the permissible scope of the warrants, the defendant did not claim, much less show, any specific resulting prejudice. Dent v. State, 303 Ga. 110, 810 S.E.2d 527 (2018).

Cited in Gilmore v. State, 117 Ga. App. 67, 159 S.E.2d 474 (1967); Wood v. State, 224 Ga. 121, 160 S.E.2d 368 (1968); Taylor v. State, 118 Ga. App. 605, 164 S.E.2d 876 (1968); Austin v. State, 121 Ga. App. 244, 173 S.E.2d 452 (1970); Brundage v. Wilkins, 121 Ga. App. 652, 175 S.E.2d 108 (1970); Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); Bridges v. State, 227 Ga. 24, 178 S.E.2d 861 (1970); Pruitt v. State, 227 Ga. 188, 179 S.E.2d 339 (1971); Johnston v. State, 227 Ga. 387, 181 S.E.2d 42 (1971); Huff v. Walker, 125 Ga. App. 251, 187 S.E.2d 343 (1972); Reed v. State, 126 Ga. App. 323, 190 S.E.2d 587 (1972); Traylor v. State, 127 Ga. App. 409, 193 S.E.2d 876 (1972); McCrary v. State, 229 Ga. 733, 194 S.E.2d 480 (1972); Reid v. State, 129 Ga. App. 657, 200 S.E.2d 454 (1973); Mobley v. State, 130 Ga. App. 80, 202 S.E.2d 465 (1973); Cadle v. State, 131 Ga. App. 175, 205 S.E.2d 529 (1974); Rogers v. State, 131 Ga. App. 136, 205 S.E.2d 901 (1974); Nealey v. State, 233 Ga. 326, 211 S.E.2d 286 (1974); Merritt v. State, 133 Ga. App. 956, 213 S.E.2d 84 (1975); Cook v. State, 134 Ga. App. 712, 215 S.E.2d 728 (1975); Ray v. State, 235 Ga. 467, 219 S.E.2d 761 (1975); Cash v. State, 136 Ga. App. 149, 221 S.E.2d 63 (1975); Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976); Faglier v. State, 139 Ga. App. 104, 228 S.E.2d 25 (1976); State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332 (1976);

Ricks v. State, 140 Ga. App. 298, 231 S.E.2d 113 (1976); Dorsey v. State, 141 Ga. App. 68, 232 S.E.2d 405 (1977); Miller v. State, 238 Ga. 560, 233 S.E.2d 793 (1977); Yeldell v. State, 240 Ga. 37, 239 S.E.2d 364 (1977); Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977); Respess v. State, 145 Ga. App. 570, 244 S.E.2d 251 (1978); West v. State, 146 Ga. App. 120, 245 S.E.2d 478 (1978); Watson v. State, 147 Ga. App. 847, 250 S.E.2d 540 (1978); Whitlock v. State, 148 Ga. App. 203, 251 S.E.2d 59 (1978); Mitchell v. State, 150 Ga. App. 44, 256 S.E.2d 652 (1979); State v. Thomas, 150 Ga. App. 170, 257 S.E.2d 28 (1979); Rick v. State, 152 Ga. App. 519, 263 S.E.2d 213 (1979); State v. Hodge, 154 Ga. App. 293, 267 S.E.2d 906 (1980); State v. Sanders, 154 Ga. App. 305, 267 S.E.2d 906 (1980); Woods v. State, 154 Ga. App. 799, 270 S.E.2d 23 (1980); Wallin v. State, 248 Ga. 29, 279 S.E.2d 687 (1981); Sheriff v. State, 158 Ga. App. 506, 280 S.E.2d 904 (1981); Butler v. State, 159 Ga. App. 895, 285 S.E.2d 610 (1981); Hunter v. State, 249 Ga. 114, 288 S.E.2d 214 (1982); Lewis v. State, 161 Ga. App. 209, 288 S.E.2d 278 (1982); Evans v. State, 161 Ga. App. 468, 288 S.E.2d 726 (1982); Hartline v. State, 161 Ga. App. 847, 288 S.E.2d 902 (1982); State v. Johnston, 249 Ga. 413, 291 S.E.2d 543 (1982); Romano v. State, 162 Ga. App. 816, 292 S.E.2d 533 (1982); Hayes v. State, 163 Ga. App. 259, 293 S.E.2d 728 (1982); State v. Smith, 164 Ga. App. 142, 296 S.E.2d 141 (1982); Thompson v. State, 164 Ga. App. 104, 296 S.E.2d 400 (1982); Lavelle v. State, 250 Ga. 224, 297 S.E.2d 234 (1982); Durden v. State, 250 Ga. 325, 297 S.E.2d 237 (1982); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Green v. State, 250 Ga. 610, 299 S.E.2d 544 (1983); State v. Roberson, 165 Ga. App. 727, 302 S.E.2d 591 (1983); Olson v. State, 166 Ga. App. 104, 303 S.E.2d 309 (1983); Recoba v. State, 167 Ga. App. 447, 306 S.E.2d 713 (1983); Sloan v. State, 172 Ga. App. 620, 323 S.E.2d 834 (1984); Amerson v. State, 177 Ga. App. 97, 338 S.E.2d 528 (1985); Kloszewski v. State, 177 Ga. App. 153, 338 S.E.2d 741 (1985); Turner v. State, 178 Ga. App. 888, 345 S.E.2d 99 (1986); Lane v. State, 180 Ga. App. 168, 348 S.E.2d 711 (1986); State v. Oliver, 183 Ga. App. 92, 357 S.E.2d 889 (1987); Doe v. State, 185 Ga. App. 347, 364 S.E.2d 78 (1987); Hernandez v. State, 185 Ga. App. 704, 365 S.E.2d 867 (1988); State v. Stokes, 185 Ga. App. 718, 365 S.E.2d 477 (1988); Hamilton v. State, 185 Ga. App. 749, 365 S.E.2d 542 (1988); Van Huynh v. State, 258 Ga. 663, 373 S.E.2d 502 (1988); Newsome v. State, 192 Ga. App. 846, 386 S.E.2d 887 (1989); Harbin v. State, 193 Ga. App. 248, 387 S.E.2d 367 (1989); State v. Schwall, 193 Ga. App. 694, 388 S.E.2d 705 (1989); Williams v. State, 199 Ga. App. 122, 404 S.E.2d 296 (1991); O'Neal v. State, 199 Ga. App. 757, 406 S.E.2d 247 (1991); Buchanan v. State, 200 Ga. App. 416, 408 S.E.2d 721 (1991); State v. Jackson, 201 Ga. App. 810, 412 S.E.2d 593 (1991); Ruffin v. State, 201 Ga. App. 792, 412 S.E.2d 850 (1991); State v. Suddeth, 207 Ga. App. 103, 427 S.E.2d 76 (1993); Williams v. State, 208 Ga. App. 153, 430 S.E.2d 42 (1993); McCullough v. State, 211 Ga. App. 16, 438 S.E.2d 369 (1993); Tackett v. State, 211 Ga. App. 664, 440 S.E.2d 74 (1994); Bradley v. State, 213 Ga. App. 468, 444 S.E.2d 842 (1994); Stewart v. State, 217 Ga. App. 45, 456 S.E.2d 693 (1995); Brown v. State, 218 Ga. App. 469, 462 S.E.2d 420 (1995); Woods v. State, 243 Ga. App. 195, 532 S.E.2d 747 (2000); State v. Mallard, 246 Ga. App. 357, 541 S.E.2d 46 (2000); State v. Graddy, 262 Ga. App. 98, 585 S.E.2d 147 (2003); Pinch v. State, 265 Ga. App. 1, 593 S.E.2d 1 (2003); Johnson v. State, 261 Ga. App. 98, 581 S.E.2d 715 (2003); McIvory v. State, 268 Ga. App. 164, 601 S.E.2d 481 (2004); Dunlap v. State, 291 Ga. 51, 727 S.E.2d 468 (2012); Moss v. State, 298 Ga. 613, 783 S.E.2d 652 (2016).

Searches

1. In General

Use of ruse to enter. — Ruse or subterfuge may be used to enter premises under warrant. Sherrill v. State, 158 Ga. App. 564, 281 S.E.2d 313 (1981).

Applicability to searches conducted without warrants. — O.C.G.A. § 17-5-30 governs every case in which a defendant challenges a search and seizure, regardless of the grounds upon which the challenge is based, and it covers all searches, not just those involving

Searches (Cont'd)
1. In General (Cont'd)

search warrants. Harvey v. State, 217 Ga. App. 776, 459 S.E.2d 433 (1995), aff'd, 266 Ga. 671, 469 S.E.2d 176 (1996).

Defendant lacked standing to protest search. — State's failure to introduce a search warrant and supporting affidavit at a suppression hearing was immaterial: the defendant lacked standing to challenge the warrant since the defendant had no proprietary, possessory, or privacy interest in the searched premises and the defendant's suppression motion's allegations were insufficient to put the state on notice about how the defendant intended to attack the warrant's validity. Hall v. State, 258 Ga. App. 502, 574 S.E.2d 610 (2002).

"Plain feel" doctrine. — "Plain feel" doctrine was exceeded and the contraband seized should have been suppressed after an officer patted down the defendant during a traffic stop and felt an object in the defendant's pocket that the officer could not identify, but knew was not a weapon, and then removed the object which the officer discovered was a plastic bag containing marijuana. Boatright v. State, 225 Ga. App. 181, 483 S.E.2d 659 (1997).

Because an issue of "plain feel" was not raised in the motion to suppress and the state was not properly placed on notice that this issue would be raised at the hearing on the motion, the evidentiary basis on which the trial court found the search exceeded the bounds of the "plain feel" doctrine was not fully developed, and a second evidentiary hearing was required. State v. Roddy, 231 Ga. App. 91, 497 S.E.2d 653 (1998).

Since the record was devoid of any testimony or evidence that the seizing officer articulated a suspicion that would have reasonably led the officer to believe that the object seized from a coin pocket of the defendant's jeans was contraband, never observed any portion of the plastic bag protruding from the pocket, and never testified that it was immediately apparent that the object was contraband, the "plain feel" exception did not apply and the trial court properly granted suppression of the item seized. State v. Henderson, 263 Ga. App. 880, 589 S.E.2d 647 (2003).

Trial court erred in granting the defendant's motion to suppress evidence of the victim's blood found on the defendant's shoes because, under the "plain view" exception to the warrant requirement, the police had probable cause to believe that the blood the police observed on the defendant's shoes when the police approached the defendant was evidence of defendant's commission of the murder. State v. Tye, 276 Ga. 559, 580 S.E.2d 528 (2003).

Trial court erred in granting the defendant's motion to suppress rings a police officer seized from the defendant's pocket during a pat-down search because the seizure was authorized under the plain feel doctrine; the officer's knowledge that a man matching the defendant's description was suspected of stealing numerous rings shortly beforehand and nearby gave the officer probable cause to believe that the items the officer felt in the defendant's pocket were the stolen rings, and had the rings been in the officer's plain view when the officer detained the defendant, the officer could have seized the rings under the plain view doctrine. State v. Cosby, 302 Ga. App. 204, 690 S.E.2d 519 (2010).

"Plain view" doctrine permits warrantless search. — Motion to suppress evidence obtained during a warrantless search of the defendant's bedroom was properly denied because the homeowner invited the police into the homeowner's house and the police never entered the defendant's room before obtaining a warrant; because the investigator saw the marijuana in "plain view" while standing in a place the investigator had a right to be, there was not an unlawful warrantless search. Phillips v. State, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

Suppression motion properly denied. — Because sufficient exigent circumstances existed to authorize a sheriff's deputy to enter the defendant's backyard and seize a number of animals that the officer observed were malnourished and mistreated, and given the harsh weather conditions and impending holiday, obtaining a warrant would have been unreasonable, the defendant's motions to suppress and in limine seeking to preclude admission of the evidence seized were properly denied. Moreover, the evidence seized af-

ter the defendant's lawful arrest, and observed in plain view by the officer upon being allowed to enter the defendant's residence, was also properly admitted. Morgan v. State, 289 Ga. App. 209, 656 S.E.2d 857 (2008).

Evidence properly admitted. — Motion to exclude was properly denied as the officer's approach and initial inquiries to the defendant amounted to a first-tier encounter that did not have to be supported by reasonable suspicion of criminal wrongdoing and it was during that encounter that the defendant told the officer that the defendant had a crack pipe on the defendant's person, supplying reasonable suspicion for the ensuing detention. Chamblee v. State, 317 Ga. App. 673, 732 S.E.2d 327 (2012).

Terry pat-down search is authorized when the officer reasonably believes that a search is necessary to protect the officer from attack, including the search of passengers in vehicles omitted from the original police notifications. Dowdy v. State, 209 Ga. App. 311, 433 S.E.2d 293 (1993).

In Georgia, a Terry pat-down search is authorized when the officer reasonably believes that a pat-down search is necessary to protect the officer from attack. Williams v. State, 265 Ga. App. 489, 594 S.E.2d 704 (2004).

Pat-down search exceeded permissible scope. — Trial court erred in denying the defendant's motion to suppress evidence seized from the defendant during a Terry pat-down search for weapons as the state failed in the state's burden of proving that the search was lawful pursuant to O.C.G.A. § 17-5-30(b); although the officer had justification to conduct the pat-down search for weapons, when there was no indication that the officer believed that the box found in the defendant's pocket contained a weapon, opening the box exceeded the permissible scope of the search. Cartwright v. State, 265 Ga. App. 520, 594 S.E.2d 723 (2004).

Because a police officer was unable to provide specific facts to justify a concern that the item in the defendant's pocket was a weapon, defendant's Fourth Amendment rights were violated when the officer reached into the defendant's pockets; consequently, the trial court erred in denying the defendant's motion to suppress. Castleberry v. State, 275 Ga. App. 37, 619 S.E.2d 747 (2005).

Because the state introduced no evidence that the defendant consented to an officer's opening of a matchbox retrieved from the defendant's pants, the officer was not concerned that a weapon was hidden in the box, and the box was not readily identifiable as contraband, the search of the defendant's person exceeded the permissible scope of a pat-down for weapons, requiring suppression of the cocaine found inside the matchbox. Mason v. State, 285 Ga. App. 596, 647 S.E.2d 308 (2007).

Officer was justified in conducting a pat-down when the officer testified that the officer observed the defendant place something in the defendant's pocket and then place the defendant's hand in the defendant's pocket; the defendant refused to remove the defendant's hand although the officer repeatedly instructed the defendant to do so; and the officer became concerned for the officer's safety because of the defendant's actions. However, the trial court erred in denying the defendant's motion to suppress since the officer could not identify the object the officer felt as either a weapon, or by its contour and mass, contraband and thus the intrusion into the defendant's pocket was impermissible. Sudduth v. State, 288 Ga. App. 541, 654 S.E.2d 446 (2007).

Because the defendant expressly consented only to a pat-down search for weapons, a police officer could not have lawfully intruded into the defendant's pocket to retrieve an identification card; accordingly, the trial court erred by denying the defendant's motion to suppress. Johnson v. State, 297 Ga. App. 847, 678 S.E.2d 539 (2009).

Requiring removal of shoes was excessive. — While the defendant's nervous behavior, including ignoring the officer's directions not to move the defendant's hands or reach toward the defendant's feet and moving clothing around; the defendant's actions in reaching toward the front of the car while observing the officers through the rear window; and the officer's knowledge of the defendant's prior drug history, provided a reasonable basis to

Searches (Cont'd)
1. In General (Cont'd)

support a pat-down search for weapons under the Terry standard, the search went beyond the Terry-authorized search when the officer directed the defendant to remove the defendant's shoes because the officer never testified the officer felt any object in or around the defendant's shoes to justify requiring the removal of the shoes. State v. Cleveland, 319 Ga. App. 225, 738 S.E.2d 273 (2012).

No authority to conduct pat-down so motion to suppress should be granted. — Trial court erred in denying the defendant's motion to suppress a gun police officers found on the defendant's person because although the officers had a sufficient basis for a brief initial Terry stop since the defendant partially fit the description given by the victim of the person who attacked the victim, the officers had no authority to conduct the pat-down that discovered the weapon on the defendant's person; the fact that the officers suspected that the defendant could have been the one that assaulted the victim did not reasonably give rise to a belief that the defendant was armed and a threat to the officers, and because the record revealed no proof of other circumstances known to the officers when the officers commenced the frisk that would lead a reasonable officer to conclude that the defendant had a weapon or instrument capable of being used as a weapon on the defendant's person, the state did not carry the state's burden of proving the propriety of the search. Daniels v. State, 307 Ga. App. 216, 704 S.E.2d 466 (2010).

Search by officer, who is parent of suspect. — Trial court's order denying the defendant's motion to suppress was reversed and the case was remanded with direction that the trial court determine whether the defendant's father, an officer, had probable cause to search the defendant's vehicle. Pruitt v. State, 263 Ga. App. 814, 589 S.E.2d 591 (2003).

Search incident to lawful arrest. — Police officers had probable cause to arrest the defendant for theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7, based on a determination that the defendant admitted to having received, stored, and disposed of a stolen four-wheeler, the officers' search incident to the arrest was legal and the defendant's subsequent motion to suppress, pursuant to O.C.G.A. § 17-5-30, was properly denied; during the search of defendant's person, the officers recovered methamphetamine and the defendant was convicted of drug-related offenses. James v. State, 265 Ga. App. 660, 595 S.E.2d 359 (2004).

Because the seizure of cash found on the defendant's person was conducted based on a lawful arrest for a domestic violence act of assault, given information by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, the trial court properly denied suppression of the evidence; however, because the defendant maintained a reasonable expectation of privacy in the curtilage surrounding the defendant's residence, absent a warrant or exigent circumstances, suppression of cocaine found in that area was erroneously denied. Rivers v. State, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

Marijuana found in a search of the defendant incident to the defendant's arrest was admissible under O.C.G.A. § 17-5-30 because a police dispatcher's statement to an officer that there was an outstanding arrest warrant for the defendant provided the probable cause necessary to arrest the defendant and, as a consequence, the search incident to the arrest was lawful under O.C.G.A. § 17-5-1. State v. Edwards, 307 Ga. App. 267, 704 S.E.2d 816 (2010).

Search of cell phone incident to lawful arrest was proper. — When evidence showed that the defendant's cell phone was an instrumentality of the crime of cocaine trafficking and that the details of the drug transaction were arranged by telephone, the trial court did not err in denying the defendant's motion to suppress the search of the cell phone because the defendant's cell phone was confiscated during a lawful search incident to the defendant's arrest and because it was an instrumentality of the crime that was probative of criminal conduct. Lopez v. State, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

Officer listening did not rise to interrogation and justify suppression.

— Order denying a motion to suppress the statements the defendant made to police after invoking a right to remain silent and have counsel present was not clearly erroneous as the defendant continued to make unsolicited statements after the invocation, and the officer was not interrogating the defendant by choosing to listen. Mulvaney v. State, 281 Ga. App. 620, 636 S.E.2d 762 (2006).

Computer insurance inquiry insufficient for stop and evidence suppressed. — Because the trial court had ample evidence to support the court's conclusion that the reason police officers supplied as the basis to stop the defendant's vehicle, specifically, an alleged computer insurance inquiry, was "suspect and insufficient", the court properly granted the defendant's motion to suppress the evidence seized from the vehicle as a result of the stop. State v. Starks, 281 Ga. App. 15, 635 S.E.2d 327 (2006).

Forensic computer analysis not suppressed. — No basis existed under O.C.G.A. § 17-5-24 for suppressing the results of forensic computer analysis because the analysis required expert skill, and without such expertise, it was conceivable that evidence could have been overlooked or even destroyed; the computer examination was conducted at the direction of Georgia peace officers to enable the officers to complete the officers' own investigation. Twiggs v. State, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

Suppression of evidence in sexual abuse cases. — Defendant's suppression motion was properly denied as: (1) the search warrant affidavit outlined the information provided by a New Hampshire detective's investigation, including the fact that the defendant had electronically sent the detective sexually explicit photographs of young boys; (2) the officer's affidavit also included information regarding the detective's extensive background and vast experience in the investigation of child sexual exploitation cases; (3) the detective's investigation provided probable cause to search the defendant's residence wherever that was; (4) the warrant sought sexually explicit photographs and other sexually explicit visual depictions of children, as well as the computer hardware and software used to create, store, and distribute those depictions; and (5) the affidavit contained information based on the detective's contact and electronic correspondence with the defendant indicating the likelihood that the defendant's computer files would contain evidence of child sexual exploitation, given that the affidavit stated that those who sexually exploited children often kept sexually explicit photographs and other images in their possession and often stored those images in computer files. Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Evidence of prior conduct between defendant and victim admissible. — Trial court did not err in permitting a witness to testify about the decedent victim's statement concerning the defendant's prior acts of abuse as testimony about prior difficulties between the defendant and a victim was admissible at trial to show the nature of the relationship and to demonstrate motive, intent, or bent of mind of the defendant in committing the act. Banegas v. State, 283 Ga. App. 346, 641 S.E.2d 593 (2007).

Development of film discovered in search incident to arrest. — Trial court did not abuse the court's discretion in refusing to suppress photographs that were developed from film that was in a disposable camera found in the defendant's duffle bag at the time of defendant's arrest because: (1) the defendant lacked standing to challenge the admission of the evidence since the camera belonged to the defendant's brother, most of the photographs had been taken by the brother, and the camera had only been borrowed by the defendant; (2) the film was admissible under the same rationale as an inventory search because police had to develop the film to determine to whom the camera belonged before the police could return the camera to the owner; and (3) the film was the fruit of a search incident to the defendant's lawful arrest because it was found in the defendant's duffle bag in a search incident to the defendant's arrest. Wright v. State, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Application to circumstantial evidence. — Jury should be able to consider

Searches (Cont'd)
1. In General (Cont'd)

and weigh the evidence, even though the evidence may be circumstantial; thus, the defendant's motion to suppress a gun found alongside a highway was properly denied. Ross v. State, 281 Ga. App. 891, 637 S.E.2d 491 (2006).

Evidence seized from employment investigations suppressed. — Trial court properly suppressed the oral and written statements made by the defendant, a public employee, during an internal investigation interview conducted by the Georgia Department of Corrections, and after the defendant was forbidden to seek the advice of counsel as the defendant had an objective belief that a failure to cooperate with the investigation by taking part in the interview and signing a written document entitled "Notice of Interfering with On-Going Internal Investigation" would result in a loss of employment; thus, the defendant's right against self-incrimination was violated. State v. Aiken, 281 Ga. App. 415, 636 S.E.2d 156 (2006).

Search pursuant to arrest for assaulting officers following illegal stop. — Though evidence would not have been admissible if discovered as the result of police officers' unconstitutional roadblock and illegal Terry-stop of the defendant's car before the defendant reached the roadblock, the defendant's gratuitous shoving of police was an aggravated battery, and the discovery of drugs the defendant threw while fleeing from that battery meant the discovery of the evidence was sufficiently attenuated from the illegal stop to justify its admission into evidence and denial of a defendant's motion to suppress. Strickland v. State, 265 Ga. App. 533, 594 S.E.2d 711 (2004).

Technical irregularities in search warrants. — Raising of technical irregularities in search warrants is not favored by the law, especially if the defendant has not timely exercised the defendant's statutory right by a motion to suppress evidence allegedly illegally seized. Parker v. State, 118 Ga. App. 837, 166 S.E.2d 41 (1968).

2. Consent

Scope of consent. — Given that a police officer was granted consent to search the defendant's hotel room to search for the victim's stolen truck keys, upon the officer's receipt of an inconclusive response that a set of keys found could belong to the victim, a continued search, which yielded methamphetamine, was reasonable, and did not exceed the original scope of consent granted; thus, the trial court did not err in denying the defendant's motion to suppress the drug evidence that officers found as a result of a continued search. Shuler v. State, 282 Ga. App. 706, 639 S.E.2d 623 (2006).

Because the consent received by an officer to search the defendant's pockets for weapons did not extend to allowing the officer to remove the contents of those pockets, when the officer testified that the contents did not feel like a weapon or an object immediately identifiable as contraband, the defendant's motion to suppress should have been granted. Foster v. State, 285 Ga. App. 441, 646 S.E.2d 302 (2007), cert. denied, No. S07C1428, 2007 Ga. LEXIS 625 (Ga. 2007).

Defendant was not entitled to suppression of, inter alia, marijuana seized from the trunk of a car in which the defendant was a passenger because a police officer did not exceed the scope of the driver's consent to search, which allegedly was limited to looking in the car, by opening the trunk as the officer had discussed the problems with contraband being transported on the state highways prior to requesting the driver's consent; thus, the driver was on notice that the officer was looking for contraband. Davis v. State, 297 Ga. App. 319, 677 S.E.2d 372 (2009).

Consent established even though defendant handcuffed. — Trial court did not err in denying the defendant's motion to suppress evidence police officers seized from the defendant's apartment because the state satisfied the state's burden of showing that the defendant's consent to the search was not the product of coercion, express or implied, and although the defendant was handcuffed at the time the defendant consented to the search,

voluntary consent could be given while a suspect was handcuffed; the evidence supported a finding that one of the officers requested and received the defendant's consent to search under permissible circumstances, and the officer testified that the officer's gun was not drawn and that the defendant was compliant. Silverio v. State, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

Consent established. — Denial of the motion to suppress was not error as there was some evidence to support the trial court's finding that consent to search was given; the trial court chose to disbelieve the defendant's witness and to believe the testimony of the police officers that the officers received consent to enter and to check the apartment. Yemane v. State, 277 Ga. App. 286, 626 S.E.2d 238 (2006).

Trial court properly denied the defendant's motion to suppress evidence as the drugs located in the residence were found after the defendant voluntarily gave police consent to enter and the drugs were spotted by one officer in plain view. Saadatdar v. State, 277 Ga. App. 339, 626 S.E.2d 552 (2006).

Because the defendant waived the defendant's Miranda rights and because the defendant freely and voluntarily consented to a search of the defendant's premises, to a drug test, and to an interview, the defendant's consent was not the product of coercion; accordingly, the trial court properly denied the defendant's motion to suppress. Handy v. State, 298 Ga. App. 633, 680 S.E.2d 646 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's wallet during a traffic stop of the vehicle in which the defendant was a passenger because the defendant voluntarily consented to the officer's search of the wallet; although the officer did not have a proper basis to frisk the defendant after asking the defendant to exit the automobile, the contraband was not uncovered during the unlawful pat-down, and the prior unlawful pat-down did not operate to invalidate the defendant's later consent to the search of the wallet. Rogue v. State, 311 Ga. App. 421, 715 S.E.2d 814 (2011).

Trial court did not err in denying a motion to suppress evidence a police officer seized in a hotel room because the trial court was authorized to find that the state satisfied the state's burden of showing that the defendant's consent to enter the hotel room was voluntary and not the product of coercion, express or implied; the officer's testimony and the defendant's statement supported a finding that the officer requested and received the defendant's consent to enter the hotel room under circumstances that did not suggest either coercion or threat, and the trial court was authorized to infer that the defendant's consent to search was freely given in the calculated hope that the officer would not find the hidden contraband. Liles v. State, 311 Ga. App. 355, 716 S.E.2d 228 (2011).

Trial court did not err in failing to grant the defendant's motion to suppress a pistol because the search of a residence was properly conducted when the police obtained the consent of the homeowner; the defendant, who was a visitor at the residence, was physically present but failed to express any refusal of consent or any objection to a police search. Rockholt v. State, 291 Ga. 85, 727 S.E.2d 492 (2012).

Trial court properly denied the defendant's motion to suppress with regard to the defendant's drug conviction because the case involved a first-tier encounter wherein the officer asked for consent to search, which was given by the defendant and, therefore, the search was not a seizure and did not require articulable suspicion. Carter v. State, 319 Ga. App. 624, 737 S.E.2d 724 (2013).

Consent must be uncoerced. — Consent to search must be the product of an essentially free and unrestrained choice by the maker. Williams v. State, 151 Ga. App. 833, 261 S.E.2d 720 (1979).

Trial court did not err in granting the defendant's motion to suppress as the defendant's spouse was coerced into giving consent to a police search of the residence since the police had no search warrant or arrest warrant but only an order awarding temporary custody of the children to the state. State v. Fulghum, 261 Ga. App. 594, 583 S.E.2d 278 (2003).

Trial court properly granted the defendant's motion to suppress both the evi-

Searches (Cont'd)
2. Consent (Cont'd)

dence seized upon being stopped and detained by the sheriff's officers and all statements made to any law enforcement officer following such detention given that: (1) law enforcement exceeded the authority to search the defendant; and (2) the evidence showed that any consent given by the defendant was coerced as the consent was obtained when one of the officers pointed a stun gun at the defendant. State v. Williams, 281 Ga. App. 187, 635 S.E.2d 807 (2006).

An officer's statement to the driver of a vehicle that it would be better for the driver if the driver cooperated because a female officer and a drug dog were on the way did not amount to improper coercion so as to render the driver's admission or voluntary relinquishment of cocaine invalid. Darden v. State, 293 Ga. App. 127, 666 S.E.2d 559 (2008).

Consented search needs no probable cause or warrant. — Probable cause and a warrant are not required for a search and seizure which is conducted pursuant to consent. Williams v. State, 151 Ga. App. 833, 261 S.E.2d 720 (1979).

Consent to search given after the defendant had a clear understanding that the defendant was free to go and was not under any compulsion to remain to obey the officer's request was voluntary and, thus, denial of the defendant's motion to suppress was upheld. Daniel v. State, 277 Ga. 840, 597 S.E.2d 116 (2004).

Limited consent established. — Given the defendant's consent to the limited search of the premises, the officers were lawfully in a position to plainly view the items associated with the manufacture of methamphetamine; as a result, the officers developed the probable cause necessary to obtain a warrant and search for additional evidence, supporting denial of defendant's motion to suppress. Wesson v. State, 279 Ga. App. 428, 631 S.E.2d 451 (2006).

Consent given by apartment lessee valid. — Police officers had reasonable suspicion to stop the defendant and question the defendant, based on the defendant's description matching that of a robbery perpetrator, and the officers then had probable cause to pursue the defendant to an apartment that the defendant retreated to; the lessee provided the officers with consent to search, whereupon the defendant's clothing that matched the robber's description and the robber's gun were found and, accordingly, the defendant's motion to suppress evidence pursuant to O.C.G.A. § 17-5-30 was properly denied. Anderson v. State, 265 Ga. App. 428, 594 S.E.2d 669 (2004).

Consent of housing authority director invalid. — City housing authority director's consent to the search of a housing unit was not valid; therefore, an officer's warrantless entry into the premises and seizure of marijuana therein was also invalid. The state failed to show that the terms of the housing unit lease authorized the director to enter the premises under certain circumstances. Bowden v. State, 304 Ga. App. 896, 698 S.E.2d 372 (2010).

Consent by defendant's son to search of defendant's bedroom not valid. — Trial court's grant of defendant's motion to suppress evidence, pursuant to O.C.G.A. § 17-5-30(b), was proper as the defendant's 14-year-old son lacked authority to consent to a search of the defendant's bedroom, although the son resided in the mobile home with the defendant and his girlfriend as the bedroom was not a common area and, accordingly, the second Atkins factor was not met for purposes of U.S. Const. amend. IV; further, the officer who arrived at the home had minimal interaction with the teenager, such that the officer lacked a reasonable belief that the son could validly consent to the search, and the drugs in defendant's bedroom were not available in plain view. State v. McKinney, 276 Ga. App. 69, 622 S.E.2d 429 (2005).

Separate part of parolee's home not subject to search. — Because law enforcement officers lacked any reason to search the defendant's part of a mobile home, which had been permanently divided in half, the officers could not rely on a waiver of rights executed by the defendant's brother, who was on probation at the time, to authorize a search of the defendant's separate part of that home. Further, no exigent circumstances were

present to support a warrantless entry. State v. Kuhnhausen, 289 Ga. App. 489, 657 S.E.2d 592 (2008).

Illegal, warrantless entry into motel room tainted subsequent consent. — Trial court erred by denying the defendant's motion to suppress drug evidence found in a motel room that the defendant was occupying with another as the warrantless entry into the hotel room by the police violated the Fourth Amendment and the illegal entry tainted defendant's consent to search and rendered the consent invalid. The state also failed to carry the state's burden to show that a third party's subsequent consent to search the room was untainted by the illegal entry. Snider v. State, 292 Ga. App. 180, 663 S.E.2d 805 (2008).

Suppression of evidence from consensual activities. — Defendant's motion to suppress was properly denied after the defendant voluntarily consented to police officers searching the bedroom and the officers found the firearm in plain view; moreover, the officers did not threaten the defendant into giving the consent merely by telling the defendant that the officers could obtain a warrant based on the officers' earlier seizure of marijuana in another part of the house. Butler v. State, 272 Ga. App. 557, 612 S.E.2d 865 (2005).

Trial court's order denying the defendant's motion to suppress was upheld on appeal as: (1) the defendant lacked standing to contest a search of a cohort's vehicle; (2) the defendant consented to a subsequent search of the defendant's own residence; and (3) the defendant failed to show harm by the introduction of evidence found in vehicles parked in the yard of the residence, which the trial court clearly found to be innocuous. Valle v. State, 282 Ga. App. 223, 638 S.E.2d 394 (2006), cert. denied, No. S07C0405, 2007 Ga. LEXIS 219 (Ga. 2007), 552 U.S. 849, 128 S. Ct. 108, 169 L. Ed. 2d 78 (2007).

Because the defendant's encounters with the police remained consensual and voluntary, and the defendant consented to a continued detention for further questioning, a motion to suppress the evidence seized based on an illegal detention by the police was properly denied. Smith v. State, 281 Ga. 185, 640 S.E.2d 1 (2006).

Because the defendant's consent to search was not obtained by deceit, the defendant voluntarily accompanied officers to the motel room searched, and the consent was not the product of an illegal detention, suppression of the contraband seized was unwarranted. Miller v. State, 287 Ga. App. 179, 651 S.E.2d 103 (2007).

Because a police officer was authorized to stop the defendant's vehicle based on a suspicion that the defendant had illegally dumped trash, and because the defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, the defendant's ineffective assistance claim failed, and the trial court properly denied the defendant's motion to withdraw the defendant's Alford plea. Bishop v. State, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence seized during the warrantless search of the defendant's residence because the evidence supported the trial court's finding that the defendant and the defendant's roommate freely and voluntarily consented to the search of their residence, and the officers testified that the officers did not coerce, threaten, or offer any hope of benefit to obtain the consents; the roommate gave the officers consent to search the common areas of the residence, and after the defendant arrived at the residence, the defendant likewise consented to the searches of the defendant's bedroom and of the defendant's person. Park v. State, 308 Ga. App. 648, 708 S.E.2d 614 (2011).

Consent product of illegal detention. — State failed to satisfy the state's burden under O.C.G.A. § 17-5-30(b) to show that the son's consent to search the son's room was voluntarily given; as a result of the short period of time that passed between the unlawful detention and the grant of consent, the consent was the product of the son's illegal detention. Black v. State, 281 Ga. App. 40, 635 S.E.2d 568 (2006).

An officer, who knew the defendant, forcibly opened the defendant's vehicle door, thereby physically restraining the defendant's movement so that the defendant's subsequent consent to a search of

Searches (Cont'd)
2. Consent (Cont'd)

the defendant's vehicle, after arriving at a location under surveillance for drug manufacturing, was invalid as the consent was the product of a wrongful detention; thus, the trial court erred in denying the defendant's motion to suppress the evidence seized from the vehicle. Smith v. State, 288 Ga. App. 87, 653 S.E.2d 510 (2007).

Trial court erred in denying the defendant's motion to suppress evidence a police officer found while conducting a search of the defendant's person because the purportedly consensual search of the defendant's person was unlawful when the consent was the product of an illegal detention; even if the defendant's consent was not the product of an illegal detention, the search exceeded the scope of the defendant's consent because the defendant's indication that the defendant did not "have a problem" with the officer searching the defendant's pockets could not be interpreted as having extended so far as to have authorized the officer to, after searching all of the defendant's pockets and finding nothing, push the defendant's abdomen, pull the defendant's waistband forward, and look down inside the defendant's pants for narcotics. Walker v. State, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

Two defendants had a reasonable expectation of privacy in a motel room and the room's safe because the defendants were staying there overnight and had clothing there, although neither was a registered guest, so that the defendants both had standing under O.C.G.A. § 17-5-30(a) to object to a search of the room. Because the male guest was illegally detained, that guest's consent to search the room was not valid. State v. Woods, 311 Ga. App. 577, 716 S.E.2d 622 (2011).

Mere acquiescence to authority of officer did not substitute for free and voluntary consent. — Despite the fact that the trial court concluded that the second of two defendant's warrantless arrest was unauthorized under O.C.G.A. § 17-4-20(a), because mere acquiescence to the authority asserted by a police lieutenant by both the defendants could not substitute for a free and voluntary consent to search, the trial court erred in finding that said acquiescence granted valid consent to the officer. Thus, the trial court's grant of the motions to suppress filed, in part, was reversed. Hollenback v. State, 289 Ga. App. 516, 657 S.E.2d 884 (2008).

Defendant never withdrew consent to search. — With regard to defendant's conviction for possession of methamphetamine, the trial court properly denied the defendant's motion to suppress the drugs found on the defendant's person as the police obtained the defendant's consent to search the defendant's person and the defendant's failure to produce all of the items from the defendant's pockets did not amount to a withdrawal of the consent to search. Allison v. State, 293 Ga. App. 447, 667 S.E.2d 225 (2008).

Consent of parents of adult child staying at parents' home. — With regard to defendant's convictions for armed robbery and possession of a gun during a crime, the trial court properly denied the defendant's motions to suppress the evidence found in the defendant's bedroom and in the vehicle that the defendant operated as the defendant's parents had authority to give consent to the police to search the defendant's unlocked bedroom since the defendant did not pay rent and was only home for the summer from college. As to the vehicle, the parents asked the police to locate their vehicle and the police properly seized the vehicle, impounded the vehicle, and obtained a search warrant; thus, the rifle used during the robberies that was found in the trunk of the vehicle was not the product of an illegal search. Warner v. State, 299 Ga. App. 56, 681 S.E.2d 624 (2009), cert. denied, No. S09C1952, 2010 Ga. LEXIS 35 (Ga. 2010).

Grandfather as head of household with power to consent. — Because the defendant's grandfather, as the head of the household, possessed authority over the entire house, including the defendant's bedroom where the defendant lived rent-free, the trial court properly found that the consent given by the grandfather was properly granted, and hence served as the proper basis to deny the defendant's

motion to suppress the evidence seized in the bedroom; as a result, the defendant's armed robbery conviction was upheld on appeal. Rhone v. State, 283 Ga. App. 553, 642 S.E.2d 185 (2007).

3. Locations

Defendant movant aggrieved by search on defendant's premises. — For a defendant movant to be "aggrieved" by a search on the premises under O.C.G.A. § 17-5-30, the alleged violation must have occurred on the movant's premises or the movant's Fourth Amendment rights must have been infringed in some other manner. Sanders v. State, 181 Ga. App. 117, 351 S.E.2d 666 (1986).

Search of home, arrest therein legal. — Sufficient probable cause for issuance of arrest and search warrants existed based upon an affidavit from an investigative detective in which the detective described the rape and the rapist, stated that the victim identified the man in discarded photographs as her attacker, and explained that a subsequent investigation revealed that the man in the photographs was the defendant. Davis v. State, 209 Ga. App. 755, 434 S.E.2d 752 (1993).

Because the police were entitled to conduct a limited sweep to ensure the safety of the police prior to obtaining consent to search and because the contraband was not discovered during the "protective sweep", the search did not violate the Fourth Amendment; consequently, the trial court properly denied the defendant's motion to suppress. Nelson v. State, 271 Ga. App. 658, 610 S.E.2d 627 (2005).

There was evidence of sufficient exigent circumstances presented to law enforcement officers to justify a warrantless search of the defendant's home since if a warrant would have been obtained many of those individuals could have attempted to drive home, placing both themselves and the general public at risk; moreover, if a warrant would have been obtained, evidence of the crime of furnishing alcohol to minors could have easily been destroyed when the minors left the scene of the crime. Burk v. State, 284 Ga. App. 843, 644 S.E.2d 914 (2007).

Trial court erred in denying the defendant's motion to suppress as there were no exigent circumstances justifying a warrantless entry into the defendant's home after drugs, drug-related items, and a weapon were found in the defendant's car during a traffic stop, even though the defendant did not end a cell phone call immediately as instructed by a police officer; the state did not show that the warrantless entry was required to prevent the destruction of contraband or that securing the home until a warrant could be obtained was not sufficient. Curry v. State, 271 Ga. App. 672, 610 S.E.2d 635 (2005).

Trial court properly granted the defendants' motions to suppress evidence of drugs and drug paraphernalia found at the residence owned by one defendant as officers had already learned that the person the officers were looking for stayed at a trailer next door, and thus officers engaged in an impermissible search of the curtilage when officers found a bag of drugs 45 feet from the defendants' house; as a result, all evidence seized in the course of subsequent searches of the property was obtained as a direct result of the impermissible intrusion into the curtilage and had to be suppressed as fruit of the poisonous tree. State v. Gravitt, 289 Ga. App. 868, 658 S.E.2d 424 (2008).

Under O.C.G.A. § 17-5-30(b), the state bears the burden of proving the lawfulness of a search when it is an unconsented police entry into a home. Since there were no exigent circumstances justifying the entry of the police into the defendant's trailer to arrest persons for underage drinking, the trial court properly granted the defendants' motion to suppress the evidence seized from the unlawful entry. Statements made by the defendants after exiting the trailer were fruits of the poisonous tree and also had to be excluded. State v. Ealum, 283 Ga. App. 799, 643 S.E.2d 262 (2007).

Consent by roommate did not authorize search. — Defendant was entitled to suppression of a gun, money, and drugs seized from the defendant's residence because the search was unreasonable under the Fourth Amendment as the defendant was not informed when the police came to the residence and arrested the defendant on an outstanding warrant that the defendant's roommate had con-

Searches (Cont'd)
3. Locations (Cont'd)

sented to the search of the residence; the defendant could have erroneously believed that the search was incident to the arrest on a driving violation. Preston v. State, 296 Ga. App. 655, 675 S.E.2d 553 (2009).

Improper entry into residence justified. — Denial of a defendant's suppression motion was proper as the police officers were authorized to immediately enter a residence, without announcing the officers' presence as required by O.C.G.A. § 17-5-27 since the occupants fled upon seeing the police into a residence where the police had recently conducted controlled drug buys and the officers had a reasonable belief that the fleeing occupants might retrieve weapons or destroy evidence; once legally inside the residence, the police were authorized to execute a search warrant that led to the discovery of the defendant's involvement in the drug sales. Further, suppression of evidence was not a constitutionally-required remedy for an improper entry pursuant to an otherwise valid search warrant. Jackson v. State, 280 Ga. App. 716, 634 S.E.2d 846 (2006).

Search of apartment where drugs were found in plain view. — Police who entered the defendant's apartment after receiving a report that the defendant was chased into the apartment by a man who had a gun lawfully entered the apartment and had probable cause to seize and test what appeared to be drugs that were in plain view, and the trial court properly admitted the drugs which police found in plain view and other items which police found after police obtained a search warrant and searched the remaining areas of the defendant's apartment. Miller v. State, 261 Ga. App. 618, 583 S.E.2d 481 (2003).

In a cocaine trafficking prosecution, though the defendant testified that an officer kicked in the door to the defendant's residence as the defendant's landlord testified that there was no damage to the front door, and the trial court was entitled to believe the officer's testimony that the door was open, the officer was entitled to seize drugs seen in plain view through the open door. Therefore, the defendant's motion to suppress the drugs was properly denied. Reid v. State, 298 Ga. App. 889, 681 S.E.2d 671 (2009).

Closed refrigerator. — Police officer opened the door of an operating, closed refrigerator in a storage unit, after having been called to investigate vandalism and possible burglary, but these circumstances did not rise to the level of emergency involving immediate threats to life or limb, and the warrantless search of the refrigerator was not justified. State v. Gallup, 236 Ga. App. 321, 512 S.E.2d 66 (1999).

Search of relative's residence. — Trial court properly granted the defendant's motion to suppress evidence recovered from the defendant's brother's townhouse, pursuant to O.C.G.A. § 17-5-30, since it was found that there was no probable cause for issuance of a search warrant of the townhouse merely because the defendant was staying there, as there was no evidence that the defendant had been there at or around the time of committing various crimes and, accordingly, there was no reasonable grounds to believe that evidence of the crimes would be found there. A search warrant must be supported by probable cause or reasonable grounds to believe that evidence of a crime will be found in a particular place. State v. Brantley, 264 Ga. App. 152, 589 S.E.2d 716 (2003).

Search of desk at work. — Trial court erred by failing to suppress the evidence seized by the police from the defendant's desk at work and concluding that no warrant was required for the search of the desk because the desk was unlocked and was in a workspace shared by numerous coworkers. A warrant was required for the search of the desk and, since the warrant authorizing the search was issued without a showing of probable cause based on the tip of an unidentified caller, and there was no exception to the warrant requirement shown, the fruits of the search of the desk had to be suppressed. Harper v. State, 283 Ga. 102, 657 S.E.2d 213 (2008).

Fruits of aerial search admissible. — Since the special protection accorded by U.S. Const., amend. 4 to the people in

their "persons, houses, papers and effects" is not extended to open fields, evidence obtained from an aerial search of an open field is not inadmissible as the product of an illegal search. Reece v. State, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Evidence on defendant's person. — Evidence of guilt which the defendant, either directly or indirectly, was compelled to disclose by an unlawful search and seizure of the defendant's person under illegal arrest is not admissible in a criminal prosecution of the person thus illegally arrested. MacDougald v. State, 124 Ga. App. 619, 184 S.E.2d 687 (1971).

Search of defendant's purse unauthorized and evidence suppressed. — Defendant, who was not suspected of any crime at the time the defendant consented to a search of the defendant's vehicle, was merely a visitor to the house and did not tell the police officer to search for the keys to the vehicle, but only stated where the defendant thought the keys might be. Defendant never specifically consented to a search of the defendant's purse. Under these circumstances, the trial court was authorized to find that a typical reasonable person would not have understood the exchange between the defendant and the officer to grant the officer permission to search the defendant's purse; therefore, the defendant's motion to suppress narcotics found in the purse was properly granted. State v. Fulghum, 288 Ga. App. 746, 655 S.E.2d 321 (2007).

Motion proper if facts indicate defendant was legitimately on codefendant's property. — Motion by a defendant to suppress evidence because of an unlawful search and seizure sufficiently alleges that the defendant had standing to challenge the legality of the defendant's arrest, the seizure of the vehicle and the following search if the facts alleged in the motion can be fairly construed to state that the defendant was legitimately on the premises of a codefendant at the time of their arrest and seizure of the latter's property and therefore the fruits of the search and seizure were to be used against the defendant such that defendant would be aggrieved by an unlawful search and seizure. Bramblett v. State, 135 Ga. App. 770, 219 S.E.2d 26 (1975).

Brass knuckles found during investigatory stop occurring in high school parking lot. — Trial court properly denied a defendant's motion to suppress brass knuckles a police officer found in the defendant's pocket during an investigatory stop in a high school parking lot because under the totality of circumstances, the brief stop was neither arbitrary or harassing but was based on a founded suspicion of criminal activity; it was reasonable for the officer to infer, based on the officer's training, experience, and common sense, that the defendant was looking to engage in criminal activity, and the officer had been hired to secure the lot and to guard against fighting. Esposito v. State, 293 Ga. App. 573, 667 S.E.2d 425 (2008), cert. denied, No. S09C0184, 2009 Ga. LEXIS 267 (Ga. 2009).

Consent given by outbuilding owners and property deemed abandoned. — With regard to a defendant's convictions for sexual abuse of a child, the trial court properly denied the defendant's motion to suppress various items found in an outbuilding that the defendant, the victim, and the victim's parent had been living in as the owners of the outbuilding consented to the entry by the police as well as had brought certain items to the police themselves. The defendant's failure to retrieve the items for over three months, despite repeated requests on the part of the owners to get the items, as well as the defendant moving out of state sufficiently established that the defendant abandoned the property, thus, no illegal search and seizure was possible. Driggers v. State, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

4. Inventory Search

Inventory search is custodial act not subject to motion. — That the making and filing of an inventory pursuant to O.C.G.A. § 17-5-2 is merely a ministerial act not affecting the substantive rights of an accused is borne out by the fact that such failure is not a ground for a motion to suppress under Ga. L. 1966, p. 567, § 13. Williams v. State, 125 Ga. App. 170, 186 S.E.2d 756 (1971).

Searches (Cont'd)
4. Inventory Search (Cont'd)

Inventory search pursuant to standard procedure. — Because the impoundment of the vehicle the defendant had been driving was reasonable and there was evidence to support the trial court's finding that the inventory search, during which bags containing marijuana and cocaine were found, was conducted pursuant to standard police procedure, the trial court's denial of the motion to suppress was not improper. Askew v. State, 326 Ga. App. 859, 755 S.E.2d 283 (2014).

Inventory of personal items of arrestee proper. — Defendant's motion to suppress was properly denied as a search of defendant's wallet was conducted during an inventory of the defendant's personal items after the defendant was arrested and was not investigatory. Morrison v. State, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

Trial court did not err in denying the defendant's motion to suppress evidence officers found during the booking process at the detention center because the court's finding there was probable cause for the defendant's arrest for firing a handgun at a street light at a hotel and was not clearly erroneous when the combined facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed the offense of discharging a firearm on the property of another without permission in violation of O.C.G.A. § 16-11-104(a); the defendant matched the unique description of one of the shooters provided by the eyewitness and communicated to the responding officers, and the defendant was encountered by the officers near the scene of the shooting incident shortly after the incident occurrence. Davis v. State, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Trial court did not err in denying the defendant's motion to suppress because there was evidence to support the trial court's finding that the officers' search of a zippered, red bag found during the inventory search of the defendant's motorcycle was conducted pursuant to State Patrol procedures, which required that all items of value be listed and, thus, did not exceed the permissible scope of the inventory search; there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. Grizzle v. State, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Suppression of data on electronic devices seized during arrest. — Trial court properly suppressed evidence derived from the appellees' electronic devices legally seized at the time of arrest as, relying on persuasive authority from the United States Court of Appeals for the Eleventh Circuit, the 539 day delay between the seizure of the devices and issuance of search warrants for data contained in the devices was unreasonable and violated the appellees' rights under the Fourth Amendment and Georgia law. State v. Rosenbaum, 305 Ga. 442, 826 S.E.2d 18 (2019).

Failure to complain when no inventory made constitutes waiver. — Failure to include in the motion to suppress the police officer's failure to make an inventory of articles seized during a search under Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) is a waiver of that particular ground. Touchstone v. State, 121 Ga. App. 602, 174 S.E.2d 450 (1970).

Property clearly taken for other than protective reasons. — After a bag was placed in custody of another individual by the defendant after the defendant's involvement in a traffic accident (such individual putting the bag in the individual's apartment) and, additionally, after the defendant's boyfriend was willing and able to take custody of the bag, the state could not premise seizure of the bag on the necessity to protect the bag from being lost or stolen or to protect themselves; consequently, the police conducted a warrantless investigatory search without probable cause, under the guise of an inventory search, and the defendants' motion to suppress should have been granted. Gaston v. State, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

Informants

Applicability of state law. — If the informer's privilege to remain anonymous at a probable cause hearing is a state evidentiary question, the court must look to Georgia law. Keith v. State, 238 Ga. 157, 231 S.E.2d 727 (1977).

Information must meet probable cause test. — Sole question is whether the information to support the warrant meets the test for probable cause; there is no need to reveal the informer's identity. Keith v. State, 238 Ga. 157, 231 S.E.2d 727 (1977).

Tip provided by paid confidential informant and then transferred to the officer through the channels of police communication had more indicia of reliability than an anonymous tip and justified the officer's stop of the defendant's vehicle. Beck v. State, 216 Ga. App. 532, 455 S.E.2d 110 (1995).

Informer's anonymity for probable cause purpose is evidentiary. — When the state relied on information supplied by an informer to establish probable cause for a warrant, the informer's privilege to remain anonymous presents a question of evidentiary rather than constitutional magnitude at a motion to suppress, when the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. Keith v. State, 238 Ga. 157, 231 S.E.2d 727 (1977).

Anonymous tip lacked detail. — Defendant's motion to suppress suspected cocaine was properly granted as: (1) police officers lacked probable cause to arrest the defendant for obstruction of justice upon the defendant's flight; (2) an initial uncoercive encounter with the police did not constitute a seizure, and the defendant was free to leave at any time; and (3) the record was devoid of any evidence about the details of an anonymous tip that the defendant was seen selling drugs in the area of the encounter; moreover, given the tip's lack of detail and failure to predict future behavior, observation of the defendant's conduct might have warranted further investigation, but it did not rise to the level of reasonable suspicion needed to briefly detain or even arrest. State v. Dukes, 279 Ga. App. 247, 630 S.E.2d 847 (2006).

9-1-1 call from unidentified informant. — A 9-1-1 call from an unidentified informant did not provide the police with reasonable suspicion to stop the defendant's vehicle, and the stop unreasonably intruded upon defendant's Fourth Amendment rights; as a result, the trial court erred by denying the defendant's motion to suppress. Slocum v. State, 267 Ga. App. 337, 599 S.E.2d 299 (2004).

Direct involvement of confidential informant. — Trial court did not err in denying the defendant's motion to suppress methamphetamine seized in plain view by officers who were given information by a confidential informant, despite the fact that the informant had never provided this type of information to police before as: (1) that information was sufficiently reliable to give law enforcement a reasonable suspicion to detain the defendant and investigate the informant's report that the defendant would be delivering methamphetamine to a specific location at a certain time; (2) the information contained facts unknown to the general public; and (3) the informant personally provided the information to officers and accompanied the officers to the suspected location of the delivery; moreover, because the defendant did not dispute that the methamphetamine was found, and did not claim that the confidential informant could aid in a defense, the trial court did not err by denying disclosure of the confidential informant's identity. Cole v. State, 282 Ga. App. 211, 638 S.E.2d 363 (2006).

No error occurred in the denial of a defendant's motion to suppress evidence based on a claim that the police lacked probable cause to arrest the defendant; information provided by an informant was reliable and established probable cause because the informant used the defendant as a supplier, the informant set up a buy from the defendant under police supervision, the informant described in accurate detail the vehicle the defendant would be driving and where and when the sale would occur, and in telling the police that the informant could lead the police to the defendant, the informant made an inculpatory statement related to the defendant's own drug trafficking charge. Lopez

Informants (Cont'd)

v. State, 292 Ga. App. 518, 664 S.E.2d 866 (2008).

Anonymous tip sufficient. — Because the trial court found that officers acting on an anonymous tip that marijuana was being grown at the defendant's residence were within the officers' rights when the officers saw marijuana from the adjoining property, when the officers smelled marijuana from the driveway, and when the officers went to both the front and the back doors of the house in an attempt to make contact with someone, and the grounds given in the affidavit supporting a search warrant application were wholly unconnected with the defendant's arrest and the two protective sweeps, the trial court did not err in denying the defendant's motion to suppress. Padgett v. State, 287 Ga. App. 789, 653 S.E.2d 102 (2007), cert. denied, No. S08C0415, 2008 Ga. LEXIS 209 (Ga. 2008).

Tip provided by unknown informant sufficient when corroborated. — Denial of motion to suppress was upheld when, contrary to defendant's argument, the affidavit in support of the search warrant provided sufficient probable cause for issuing the warrant; the information provided by the allegedly unreliable, unknown informant was corroborated by the victim's description and an officer's observations of the defendant following the crime. In addition, the affidavit was not insufficient because the affidavit was based on double hearsay provided by the informant to one officer, who then relayed the information to the officer who presented the affidavit. Johnson v. State, 265 Ga. App. 777, 595 S.E.2d 625 (2004).

Tipster's reliability unknown. — Trial court erred in failing to suppress evidence seized in the wake of an invalid stop of defendant's vehicle because the stop of the vehicle was based on a tip; although the officer was able to corroborate the description of the vehicle, the vehicle's location, and the fact that there was a black male driver and female passenger, the tip did not provide any information concerning the defendant's future behavior and related to easily obtained facts; the tipster did not fit the definition of a concerned citizen and was more akin to a known informant of unknown reliability. Rucker v. State, 276 Ga. App. 683, 624 S.E.2d 259 (2005).

Use of "unknown" informant did not justify suppression. — Trial court did not err in denying the defendant's motion to suppress, despite a claim that an informant used to apprehend the defendant was not previously known to police and had never provided any information until helping in the prosecution of the defendant, because the informant's tip predicted some aspects of the defendant's future behavior and contained information not available to the general public that was corroborated by the observations of officers; moreover, the defendant's reckless driving and flight from a congested parking lot, which caused a short high-speed chase to ensue, and the fact that the police learned that the defendant often carried a gun, provided the officers with an additional basis to stop the defendant and make an arrest. Patton v. State, 287 Ga. App. 18, 650 S.E.2d 733 (2007).

Reliable and anonymous tip with sufficient detail. — Defendant was not entitled to suppression of the evidence seized by a police officer making an investigatory stop as the information provided to the officer by a reliable and anonymous tip contained explicit details of the defendant's travel itinerary, which were not known by the general public. Daniels v. State, 278 Ga. App. 263, 628 S.E.2d 684 (2006).

Information provided by confidential informant was reliable. — Denial of the defendant's motion to suppress was upheld when the personal observations of the affiant officer established the reliability of the confidential informant; among other things, the officer ensured that the informant had no illegal drugs when the informant entered the residence and confirmed that the informant possessed crack cocaine when the informant came out. Browner v. State, 265 Ga. App. 788, 595 S.E.2d 610 (2004).

Trial court did not err in denying the defendant's motion to suppress on the ground that a confidential informant was not reliable because the basis for the in-

formant's knowledge was that the informant overheard one of the codefendants discuss that there was going to be methamphetamine at the address to be searched, and evidence of the informant's reliability included that the informant had been known to the deputy and that the informant had previously provided information to narcotics agents leading to the seizure of methamphetamine and marijuana and to several drug-related arrests. Hawkins v. State, 303 Ga. App. 618, 694 S.E.2d 132 (2010).

Trial court did not err in denying the defendant's motion to suppress drug evidence because the basis of an informant's knowledge was the informant's personal observation of marijuana at the defendant's residence, and the informant's reliability was sufficiently established by evidence that the informant had been known by the investigating officer for 11 or 12 years and had been instrumental in obtaining arrests and convictions in numerous prior cases; while the better practice would have been for the officer to include all information relating to the informant's reliability, the informant's failure to provide the informant's prior criminal history and payment history did not invalidate the warrant in light of the other indicia of the informant's reliability. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Because the information provided by a confidential informant was reliable and substantially corroborated by the police officers, probable cause to search the defendant existed; accordingly, because the warrantless search was authorized with or without the defendant's consent, there was no basis to suppress the drug evidence found on the defendant's person. Hall v. State, 310 Ga. App. 397, 714 S.E.2d 7 (2011).

Even if trial counsel was deficient for failing to timely file a motion to suppress, the defendant failed to establish that the defendant was prejudiced by such failure given that a confidential informant's tip was sufficient to establish probable cause without the need for independent corroboration. Williams v. State, 316 Ga. App. 383, 729 S.E.2d 517 (2012).

Previously used informant reliable. — Trial court properly denied the defendant's motion to suppress evidence seized from the defendant's apartment upon execution of a search warrant. The affidavit of a deputy in support of the warrant was based on an informant's tip that established probable cause as the informant had been in the defendant's apartment and had personally viewed the drugs. Further, the deputy had known the informant for at least six months and the informant had been helpful in five other cases, and therefore no independent corroboration of the informant's tip was necessary. Rocha v. State, 284 Ga. App. 852, 644 S.E.2d 921 (2007).

Tip from known reliable informant. — Police had a reasonable, articulable suspicion that justified stopping the defendant's truck based on a tip from a known, reliable informant and there was no requirement to provide a basis for predicting specific future behavior of the suspect. Steed v. State, 273 Ga. App. 845, 616 S.E.2d 185 (2005).

In considering the "veracity" of the persons supplying information, the court should not lose sight of the fact that, whether an individual supplying information of a possible crime is a "concerned citizen" to whom a presumption of credibility is accorded or an "anonymous informant," the information provided by either may support the issuance of a warrant when that information is corroborated by further investigation by officers. State v. Towe, 246 Ga. App. 808, 541 S.E.2d 423 (2000).

Decision on informer's existence by trial judge after questioning police. — Whether or not an informer really exists is a question of evidence to be decided by the trial court after the officers have been thoroughly questioned and cross-examined. Keith v. State, 238 Ga. 157, 231 S.E.2d 727 (1977).

Informant's information not stale. — Search warrant that a police officer executed was valid because the officer's affidavit in support of the warrant contained sufficient, reliable information that was not stale regarding the officer's reliance on a confidential informant. Rogers v. State, 274 Ga. App. 546, 618 S.E.2d 166 (2005).

Trial court did not err in denying the

Informants (Cont'd)

defendant's motion to suppress because the information a confidential informant provided a narcotics agent was not stale, and in reviewing the totality of the circumstances, the magistrate was authorized to conclude that on a certain date, based on a conversation the informant overheard, methamphetamine was going to be manufactured at the defendant's house; regardless of whether the informant actually heard the information on the date in question, the information provided a substantial basis for believing that when the magistrate issued the warrant methamphetamine was being manufactured at the defendant's residence. Hawkins v. State, 303 Ga. App. 618, 694 S.E.2d 132 (2010).

State need not give informers' names. — When the state relied on information supplied by an informer to establish probable cause for a search warrant, the state need not reveal the names of the state's informers at a motion to suppress. Keith v. State, 238 Ga. 157, 231 S.E.2d 727 (1977).

Warrant must give circumstances indicating credibility if informant unidentified. — When a search warrant issues on the basis of information furnished by an unidentified informant the warrant must include underlying circumstances from which the agent concluded that the informant was credible or the informant's information reliable. State v. Mabrey, 140 Ga. App. 577, 231 S.E.2d 461 (1976).

Informant without established reliability. — Informant without an established past reliability may be used to furnish information leading to the issuance of a valid search warrant if the officer making the affidavit satisfies the requirements of supplying to the magistrate the underlying circumstances from which the credibility of the information was determined. State v. Mabrey, 140 Ga. App. 577, 231 S.E.2d 461 (1976).

Present reliability counts more than past. — Past reliability of an informant is important in evaluating present credibility, though it is always present reliability which is at issue when a search warrant is being sought. State v. Mabrey, 140 Ga. App. 577, 231 S.E.2d 461 (1976).

Informant who appears honest with no criminal record. — It is not error to overrule a motion to suppress evidence found as a result of a search after the affiant prosecutor formed the prosecutor's opinion from the demeanor and reputation of and intrinsic corroborative detail furnished by the informer, who was a person with no known criminal record, a mature person, regularly employed, a college student in good standing who demonstrated truthful demeanor, and the detail stated indicated personal knowledge. Davis v. State, 129 Ga. App. 158, 198 S.E.2d 913 (1973).

Because law enforcement had the authority to conduct a warrantless search of the defendant's automobile based upon information supplied to law enforcement from a reliable, honest, and law-abiding informant, which was independently confirmed by officers investigating the tip, the trial court did not err when the court denied a motion to suppress the evidence seized in the defendant's car. Fleming v. State, 281 Ga. App. 207, 635 S.E.2d 823 (2006).

Showing officer's basis for probable cause. — When affidavits fail (1) to give reasons for an informant's reliability; and (2) to either state how the informer obtained the information or that the tip described the criminal activity in such detail that the magistrate may know it is more than a casual rumor circulating in the underworld, or an accusation based merely on an individual's general reputation, a trial judge errs in overruling a motion to suppress. Moreland v. State, 132 Ga. App. 420, 208 S.E.2d 193 (1974).

For court to sustain a police officer's determination of probable cause on the basis of information provided by an informant, the state, at the hearing on the motion to suppress, is required to produce evidence showing that the police officer knew how the informant received the information or else had such detailed information that the officer knew the information to be more than mere rumor or suspicion. State v. Wells, 153 Ga. App. 308, 265 S.E.2d 111 (1980).

Defendant's suppression motion was

properly denied as a search warrant was based on probable cause because Clayton County investigators purchased an illegal video poker machine from a subject in Clayton County, who said the machine was obtained from a particular address in DeKalb County, and both DeKalb and Clayton investigators observed "several other illegal video poker machines" at that address; while the investigators could not tell from looking at the machines whether the machines were legal or not, the test was only whether the evidence established a fair probability that contraband would be found. Jones v. State, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

Because: (1) the state conceded that the state's informant was not reliable as the informant never previously provided information to the state's investigator; and (2) the police failed to independently investigate and corroborate the information provided to the police by that informant in support of a search warrant affidavit, the magistrate lacked a substantial basis for determining that probable cause existed to search the defendant's home; thus, the evidence seized as a result should have been suppressed. St. Fleur v. State, 286 Ga. App. 564, 649 S.E.2d 817 (2007).

Suppression required if informant unreliable. — Court erred in refusing to suppress evidence seized due to a search warrant based on an informant when neither the informant nor the informant's information were shown to be reliable; the convictions at issue were unsupported without the tainted evidence and reversal was required. Land v. State, 259 Ga. App. 860, 578 S.E.2d 551 (2003).

Denial of the defendant's suppression motion was error as a search warrant was based upon the statements of a confidential informant (CI) whose reliability, credibility, and source of information were unknown, law enforcement officers had failed to corroborate the CI's claim that the defendant was selling drugs from the residence, and the officers did not observe the CI's conduct before or after the controlled buy. Chatham v. State, 323 Ga. App. 51, 746 S.E.2d 605 (2013).

Identification Procedures

Photographic identification. — Trial court erred in granting a defendant's motion to suppress a photographic identification as the two steps of the test for determining whether a photographic identification was admissible were erroneously conflated since, without ruling on whether the lineup procedure was impermissibly suggestive, the trial court applied the totality of the circumstances factors and ruled that the victim's identification was without any substantial factual basis; thereafter, the trial court again applied the totality of the circumstances factors and found that there was a substantial likelihood of misidentification of the defendant as the intruder. State v. Norton, 280 Ga. App. 657, 634 S.E.2d 810 (2006).

Trial court did not err in admitting a photograph of the victim with the victim's spouse because the jury observed the victim's spouse when the spouse testified and identified the photograph, and the trial court determined that the admission of the photograph would not give rise to a strong emotion. Haynes v. State, 287 Ga. 202, 695 S.E.2d 219 (2010).

Trial court properly denied the defendant's motion to suppress the victim's identification of the defendant in a pretrial photo array because the array was not impermissibly suggestive; the six men depicted were of the same race or ethnicity, the same general age group, and had similar hairstyles and facial hair. Delgiudice v. State, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Independent source for identification. — Trial court erred in granting the defendant's motion to suppress an identification based on a hearsay recounting that something along the lines of an improper show-up occurred; further, there was an independent source for the identification as the victim knew the defendant and the other suspect and identified the defendant in a photographic array. State v. Byrd, 266 Ga. App. 121, 596 S.E.2d 426 (2004).

Identification evidence not suppressed. — Trial court did not err in denying the defendant's motion to suppress the evidence of the identification during a one-on-one show-up, based on the totality of the circumstances as the victim got a good look at the defendant

Identification Procedures (Cont'd)

from about three feet away, immediately was able to give a description to police, only a short time passed between the robbery and the identification, and the victim had a clear opportunity to see the robber up close during the middle of the day. Fitzgerald v. State, 279 Ga. App. 67, 630 S.E.2d 598 (2006).

Because there was no likelihood of irreparable misidentification, especially since a witness stated that the witness's identification of the defendant was based upon seeing the defendant at the scene of the crime, and because the victim and witness both identified the defendant as the shooter at trial, any error in the admission of the show-up identification was harmless; therefore, the defendant's motion to suppress was properly denied. Lee v. State, 298 Ga. App. 630, 680 S.E.2d 643 (2009).

Trial court properly denied the defendant's motion to suppress identification evidence because the trial court was authorized to find that no substantial likelihood of irreparable misidentification existed; the victim identified the defendant within thirty minutes of the offense, and the victim stated that the victim got a good look at all of the assailants and was one hundred percent sure and knew for a fact that the defendant was the person who demanded money and punched the victim in the face, noting that "it was fresh in his head." Law v. State, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

Trial court did not clearly err in denying the defendant's motion to suppress the victim's pre-trial identification of the defendant as the perpetrator because the trial court's ruling was supported by evidence that the victim: (1) knew the defendant from the neighborhood; (2) described the defendant to an officer on the scene; (3) spent 30 minutes or more with the defendant in an apartment talking with the defendant then defending against the attack; (4) quickly and confidently identified the defendant as the victim's assailant upon seeing the defendant's picture; and (5) identified the defendant at the hearing on the motion to suppress and at trial. Leeks v. State, 309 Ga. App. 724, 710 S.E.2d 908 (2011).

Identification evidence was not subject to suppression on the basis that the lineup procedure was impermissibly suggestive as, even assuming that the officer indicated to the witness that the lineup contained a photograph of the second suspect, there was nothing about the identification procedure that would have inevitably led the witness to identify the defendant as the gunman. The lineup consisted of photographs of six males, all of whom were the same race, appeared to be approximately the same age, and had similar hairstyles, facial hair, and facial features; thus, no one photograph stood out from the others. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

One-on-one identification evidence admissible. — Trial court did not err in denying the defendant's motion to suppress the victim's pre-trial identification of the defendant during a one-on-one show-up at the police station because the victim had the opportunity to view the attacker's face and focused attention thereon, and the victim's description of the attacker was fairly accurate; the existence of some inconsistencies did not render the victim's testimony inadmissible, but rather was a matter for the jury. Butler v. State, 290 Ga. 412, 721 S.E.2d 876 (2012).

Denial upheld when admission of pre-trial identification was not erroneous. — Denial of the defendant's motion to suppress based on an alleged error in the admission of a pre-trial identification was upheld as there was no indication that the photographic line-up was impermissibly suggestive or that the identification was not based solely upon the recognition of the defendant by the victim during the actual robbery. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Applicability

1. In General

Applicability to all motions to suppress. — So as not to create two procedures, one statutory and the other nonstatutory, all motions to suppress should be governed by O.C.G.A. § 17-5-30 to the extent possible. State v. Slaughter, 252 Ga. 435, 315 S.E.2d 865 (1984).

Applicable only to criminal defendants. — Since the companies were not criminal defendants, the company's appeal of the trial court's denial of a motion to suppress was inappropriate as O.C.G.A. § 17-5-30 did not apply; thus, the insurance commissioner did not have to prove the commissioner's authority to conduct an investigation and, since the law was clear on the appealed issues, the commissioner was entitled to a frivolous appeal penalty. Nat'l Viatical, Inc. v. State, 258 Ga. App. 408, 574 S.E.2d 337 (2002).

Applicable only to searches and seizures made by peace officers. — See State v. Young, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

O.C.G.A. § 17-5-30 does not apply necessarily to searches by state officials. — Mere fact that action is taken by state officials is not adequate to invoke the exclusionary rule even if that section violates U.S. Const., amend. 4. State v. Young, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

Applicable to tangible evidence only. — Motion to suppress is to be aimed at tangible evidence only, not to confessions or identification testimony, such that the trial court did not err in failing to grant a motion to suppress the defendant's statements or the victim's identification testimony. Robinson v. State, 208 Ga. App. 528, 430 S.E.2d 830 (1993).

Defendant's purported confused mental state is not an acceptable legal reason for suppression of evidence seized following the defendant's arrest. Rauschenberg v. State, 161 Ga. App. 331, 291 S.E.2d 58 (1982).

No pretrial suppression of unlawful evidence legally seized. — Only persons entitled to the benefit of Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) are persons aggrieved by an unlawful search and seizure. No provision is made in that section for pretrial suppression of evidence deemed illegal for reasons other than unlawful search and seizure. Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967); Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); Reynolds v. State, 147 Ga. App. 488, 249 S.E.2d 305 (1978).

Motion to suppress evidence illegally seized must be based on evidence obtained as a result of an unlawful search and seizure. Davis v. State, 155 Ga. App. 511, 271 S.E.2d 648 (1980).

Waiver as part of drug court contract upheld. — Under the terms of a drug court contract, the defendant waived any right to suppress evidence seized as a result of a warrantless search, and absent evidence to the contrary and bad faith on the part of law enforcement, the waiver remained enforceable. Wilkinson v. State, 283 Ga. App. 213, 641 S.E.2d 189 (2006).

Customer not "aggrieved" by telephone company bill's seizure. — Defendants lacked standing under O.C.G.A. § 17-5-30 since the defendants were not "aggrieved" by the seizure of telephone toll records because the records belonged to the phone company. Van Nice v. State, 180 Ga. App. 112, 348 S.E.2d 515 (1986), cert. denied, 480 U.S. 931, 107 S. Ct. 1568, 94 L. Ed. 2d 760 (1987).

Lack of objective and particularized basis led to suppression. — Trial court properly granted the defendant's motion to suppress evidence seized by law enforcement which showed that the first officer on the scene lacked a particularized and objective basis for suspecting that the defendant was involved in criminal activity, and after a back-up officer arrived, neither officer was placed in fear of the officer's safety by the defendant's actions; thus, the first officer's acts of detaining the defendant and asking for consent to search were unlawful. State v. Lanes, 287 Ga. App. 311, 651 S.E.2d 456 (2007), cert. denied, No. S08C0051, 2008 Ga. LEXIS 85 (Ga. 2008).

Because the evidence sufficiently showed that the defendant's mental condition was clearly vulnerable, and that the defendant: (1) could not read; (2) had to be forcibly restrained while the consent form was initially being read; (3) was weeping while the remainder of the form was read; and (4) never actually signed the consent form, the trial court properly found that any consent to submit to blood and urine tests was not freely and voluntarily given. Moreover, the proper standard of review on appeal, based on the fact that credibility was an issue, was not a de novo stan-

Applicability (Cont'd)
1. In General (Cont'd)

dard, but a clearly erroneous standard. State v. Stephens, 289 Ga. App. 167, 657 S.E.2d 18 (2008).

Not error to deny motion if property not used against defendant. — It is harmless error to deny a motion to suppress if property seized under an illegal search warrant and which appellant sought to have returned to appellant by a motion to suppress is never tendered in evidence. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973).

Since no evidence gathered in the search of the defendant's computer or the defendant's jail cell was tendered and admitted against the defendant, even if the trial court erred in denying the defendant's motion to suppress with regard to those two search warrants, the error was harmless. Glenn v. State, 288 Ga. 462, 704 S.E.2d 794 (2010).

Evidence arising from first level police-citizen encounter. — Trial court erroneously granted a motion to suppress concluding that: (1) police had no particularized objective basis for seizing the men, including the defendant; (2) the officer had no reason to pat down the first man and did so as a pretext to search for drugs; and (3) the defendant did not voluntarily consent to the search; the defendant lacked standing to object to the search, the defendant had no reasonable expectation of privacy in the bag which contained the contraband, and the stop, which led to the seizure, as a first tier encounter, was reasonable. State v. Robinson, 278 Ga. App. 511, 629 S.E.2d 509 (2006).

Trial court did not err in denying the defendant's motion to suppress as a stop by a police officer qualified as a first level police-citizen encounter, and upon learning of an outstanding warrant for the defendant, the officer had probable cause to make an arrest and conduct a search incident thereto; further, the state was not required to introduce the warrant into evidence in order to establish the warrant's validity. Lucas v. State, 284 Ga. App. 450, 644 S.E.2d 302 (2007).

Trial court correctly denied the defendant's motion to suppress on the ground that a police officer lacked reasonable suspicion to stop and detain the defendant because there was testimony indicating that the police encounter with the defendant up to the point of the defendant's arrest was consensual and involved no coercion or detention; therefore, the trial court was authorized to find that the encounter was of the first tier, a communication between the police and a citizen involving no coercion or detention, and did not require a showing that the officer acted with reasonable suspicion of criminal activity, and once the officer learned that the defendant had been driving with a suspended license, the officer had probable cause to arrest the defendant. Grimes v. State, 303 Ga. App. 808, 695 S.E.2d 294 (2010).

Trial court erred in denying the defendant's motion to suppress because the officer lacked reasonable suspicion of criminal activity for an investigatory stop, the defendant's exercise of the right to avoid a first-tier encounter was not relevant to whether the officer had reasonable suspicion of criminal activity, and items the defendant discarded during flight were related to the illegal detention and inadmissible. Walker v. State, 323 Ga. App. 558, 747 S.E.2d 51 (2013).

Probable cause for arrest. — In a case when the defendants were convicted of trafficking in cocaine, the trial court did not err in finding that there was probable cause to arrest the two defendants because after the codefendant met the two defendants in a nearby apartment complex, the defendant returned with the package of cocaine to sell to the undercover agent, and the second defendant parked that defendant's truck facing the area of the anticipated exchange, apparently so that the second defendant and the first defendant could watch the drug deal; therefore, the trial court did not err by denying the first defendant's motion to suppress. Lopez v. State, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

Trial court did not err in denying a motion to suppress as the defendant's presence at the scene of an ongoing robbery, coupled with the defendant's flight from police, supplied sufficient probable cause justifying an arrest, and police

thereafter conducted a lawful Terry pat-down. Vega v. State, 285 Ga. App. 405, 646 S.E.2d 501 (2007).

Trial court did not err in failing to suppress all the evidence discovered as a result of the defendant's arrest because the arresting officer had probable cause to make an arrest for DUI. Caraway v. State, 286 Ga. App. 592, 649 S.E.2d 758 (2007), cert. denied, No. S07C1736, 2007 Ga. LEXIS 686 (Ga. 2007).

Probable cause to support arrest meant no suppression of evidence. — Appeals court rejected the defendant's contention that a written statement should have been suppressed because the statement was obtained after the defendant was arrested without probable cause and improperly detained as the evidence sufficiently showed that the defendant's presence at the scene of an alleged robbery, coupled with the defendant's flight from police, justified the arrest made, therefore supplying the requisite degree of probable cause to support the arrest. McCoy v. State, 285 Ga. App. 246, 645 S.E.2d 728 (2007).

State court lacked jurisdiction over money seized by local authorities, then delivered to federal authorities for a federal forfeiture proceeding pursuant to 21 U.S.C. § 881, the forfeiture section of the Controlled Substances Act. King v. State, 264 Ga. 282, 443 S.E.2d 844 (1994).

Defendants not prejudiced if fruits of search ruled admissible. — If the evidence authorized the trial judge in ruling that the warrantless search was legal in that the search was based on probable cause and exigent circumstances precluded the police officer from obtaining a warrant, the defendants could not argue that the defendants were prejudiced because presentation to the jury of the fruits of the search was improper. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981).

Motion to suppress not deemed motion in limine to exclude testimony. — Trial court correctly ruled that a motion to suppress was moot because no tangible physical evidence was admitted at trial, and even if the trial court granted the motion to suppress, the ruling did not constitute a ruling that all testimony related to the seized vehicle was inadmissible as the defendant's failure to object to the evidence at the time of introduction at trial was a waiver of any illegal search and seizure; thus, the defendant's motion to suppress could not be deemed a motion in limine to exclude testimony regarding the events that occurred after the initial stop. Maxwell v. State, 285 Ga. App. 685, 647 S.E.2d 374 (2007).

Suppression motion improperly granted. — Because a police officer possessed sufficient information regarding both the defendants via a police dispatcher, who was relaying information from a 9-1-1 caller, and after signaling for the defendants to pull the vehicle over, the officer observed both the defendants switch places, the officer observed sufficient and particular facts to investigate both men for driving under the influence; hence, the trial court erroneously ordered suppression of the evidence obtained from the resulting traffic stop. State v. Bingham, 283 Ga. App. 468, 641 S.E.2d 663 (2007).

Because the defendant's apparent violation of O.C.G.A. § 40-6-16(a) gave the investigating officer a reasonable and articulable suspicion to stop the defendant and inquire further, the trial court erred in granting the defendant's motion to suppress a refusal to take a breath test in connection with DUI charges; moreover, the trial court erroneously concluded that the defendant could have had an innocent explanation for a last-minute swerve to avoid hitting the officer's patrol car as the issue went to the question of guilt or innocence and was not the dispositive question on a motion to suppress. State v. Rheinlander, 286 Ga. App. 625, 649 S.E.2d 828 (2007).

Because the evidence gathered while the defendant's residence was under surveillance, including the contents of the defendant's garbage as well as an officer's specific testimony regarding marijuana residue found on a piece of plastic wrap, supported a finding of probable cause necessary to justify the issuance of a search warrant for the defendant's residence, suppression of the evidence seized as a result of the execution of the search warrant was improper. State v. Davis, 288 Ga. App. 164, 653 S.E.2d 311 (2007).

Applicability (Cont'd)
1. In General (Cont'd)

Trial court erroneously granted suppression of the evidence seized in a traffic stop involving two defendants in which an officer, after arresting the first defendant for obstruction, searched the car and found a substance which a field test showed to be cocaine as the stopping officer was authorized to make the stop based on a violation of O.C.G.A. § 40-6-202 and because the officer could search the passenger compartment of the car incident to the arrest of the first defendant. State v. Stafford, 288 Ga. App. 309, 653 S.E.2d 750 (2007), aff'd, 284 Ga. 773, 671 S.E.2d 484 (2008).

Trial court erred in finding that a no-knock warrant lacked probable cause and in granting suppression of the evidence seized pursuant to the warrant because both the warrant's affiant and a credible informant provided sufficient information that drugs were being sold at the location; moreover, a violation of the knock and announce rule did not require suppression of the evidence found in an otherwise valid search. State v. Ballew, 290 Ga. App. 751, 660 S.E.2d 732 (2008).

Suppression motion properly granted. — Police officer unreasonably invaded the defendants' privacy by looking through the defendants' window before knocking on the defendants' door when executing an arrest warrant for a third party when: (1) there was insufficient evidence that the third party lived with the defendants; (2) even if the police were authorized to enter the defendants' home, looking through the window was unreasonable as the officer did not reach the window by traveling the route any visitor would travel to reach the front door; and (3) the officer did not have articulable facts which would warrant a reasonably prudent officer to believe that the third party was a danger. State v. Schwartz, 261 Ga. App. 742, 583 S.E.2d 573 (2003).

Because it was objectively reasonable for the defendant, a deputy sheriff, to have had a subjective belief that a termination from employment in that capacity would result by not cooperating with a GBI agent in an interrogation, the statements the defendant made as a result of the interrogation were properly suppressed as involuntarily made. State v. Stanfield, 290 Ga. App. 62, 658 S.E.2d 837 (2008).

Trial court properly denied the defendant's motion to suppress as the officer was authorized to initiate the traffic stop after observing the defendant's seat belt violation and was thereafter authorized to make a reasonable inquiry and investigation. After learning that the defendant did not have a valid driver's license, the officer had probable cause to arrest the defendant and after observing the defendant reach into a pocket, retrieve a plastic bag, and attempt to conceal the bag, the officer had probable cause to search the vehicle for contraband. Horne v. State, 318 Ga. App. 484, 733 S.E.2d 487 (2012).

Probable cause supported an officer's search of defendant's person based on: (1) an officers' initial detection of the odor of marijuana in a house; (2) the primary resident's lie concerning other people being present in the house; (3) defendant's extreme nervousness in front of officers; (4) the discovery of drug paraphernalia after the primary resident consented twice to a search of the home; and (5) the fact that a crack pipe was found under the cushion on which the defendant was seated. Denial of a motion to suppress evidence found on the defendant after a search of the defendant's person, given those circumstances, was proper. Williams v. State, 265 Ga. App. 489, 594 S.E.2d 704 (2004).

Motion to suppress properly denied. — Trial court did not err in denying the defendant's suppression motion as the affidavit provided probable cause for the issuance of a search warrant under the totality of the circumstances test when: (1) a controlled buy from the defendant was described; (2) the defendant's willingness to turn over the cocaine at the defendant's residence was set forth; and (3) a statement from the person who was with the defendant at the time of the defendant's arrest that defendant had taken the person to the residence to pick up cocaine was set forth. Johnson v. State, 267 Ga. App. 549, 600 S.E.2d 667 (2004).

Trial court properly denied the defen-

dants' motion to suppress the evidence seized from the defendants' home pursuant to a warrant as law enforcement officers were authorized to enter the home based on information the officers received from a 911 call in order to protect the property, investigate whether a burglary had occurred therein, or to learn whether someone inside had been injured. Moreover, despite the fact that evidence was seen in plain view during the short protective sweep, the officers nevertheless erred on the side of the Fourth Amendment, and obtained a search warrant before seizing those items. Love v. State, 290 Ga. App. 486, 659 S.E.2d 835 (2008).

Motion to suppress was properly denied as the trial court did not err in concluding that the officer had reasonable suspicion that the driver was, or was about to be, engaged in criminal activity because the burglary to which the officer responded appeared to be in progress given that someone apparently intended to come back for the air-conditioning units stacked by the open door into the premises; the hour was late, the businesses were closed, and there was no reason for anyone to be driving to the businesses or to the empty properties; the driver was in a pick-up truck capable of transporting several air-conditioning units; and the driver quickly retreated when the driver saw the police car. The above factors were sufficient to give the officer a particularized and objective basis for a reasonable suspicion to stop the vehicle and to investigate. Waldron v. State, 321 Ga. App. 246, 741 S.E.2d 301 (2013).

Second investigatory stop justified search. — Defendant's suppression motion was properly denied, even though an officer lacked a reasonable suspicion of criminal activity to support a first investigatory stop, as the defendant's flight after the officer's general questions, the defendant's suspicious claim that the defendant was biking home from a job ten miles away, and the defendant's proximity to a car with flashing lights consistent with a triggered car alarm, supported a second investigatory stop; the evidence the defendant sought to suppress was obtained after the second investigatory stop. Crowley v. State, 267 Ga. App. 718, 601 S.E.2d 154 (2004).

Identification. — Victim's out-of-court identification of the defendant as the person who robbed the victim was admissible because the victim, a cab driver, had ample time and lighting in which to observe the defendant and identified the defendant shortly after the crime occurred. Hollie v. State, 277 Ga. App. 103, 625 S.E.2d 507 (2005).

Probable cause lacking. — Because the circumstances of the defendant's low-speed flight from an uniformed detective, who was driving an unmarked vehicle, were insufficient to present law enforcement with evidence of a particular crime, the defendant could not be charged with the crime of attempting to elude an officer, and police lacked the probable cause sufficient to warrant an arrest for the offense; thus, the search incident to the arrest was invalid, warranting suppression of the evidence seized. Stephens v. State, 278 Ga. App. 694, 629 S.E.2d 565 (2006).

Suppression motion improperly denied. — In a prosecution for driving under the influence, the trial court erroneously denied the defendant's motion to suppress evidence seized as a result of a traffic stop made by an officer armed with only a "be on the lookout" warning as the officer lacked a particularized and objective basis for suspecting that the defendant was involved in any criminal activity, but admitted to possessing only scant information about the driver, the year and make of the vehicle being driven, and the vehicle's direction of travel; moreover, the mere fact that the defendant's gold Ford truck was located in the vicinity of the alleged crime did not necessarily give rise to articulable suspicion. Murray v. State, 282 Ga. App. 741, 639 S.E.2d 631 (2006).

Because no exigency existed to justify a search after the defendant was handcuffed and placed under the watchful eye of a police officer, and even assuming that the defendant was under arrest while being detained in the kitchen, a search of the defendant's bedroom which yielded a shotgun found under the bed in the bedroom, a box of unspent shotgun shells, and some loose unspent shotgun shells, was not one incident to arrest; thus, the defendant's

Applicability (Cont'd)
1. In General (Cont'd)

possession of a firearm while a convicted felon conviction was reversed, and the case was remanded for a new trial in which the illegally-obtained evidence could not be introduced. Hicks v. State, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Suppression motion properly denied. — Defendant's suppression motion was properly denied as a magistrate's issuance of a search warrant for defendant's home was supported by probable cause for purposes of the Fourth Amendment, Ga. Const. 1983, Art. I, Sec. I, Para. XIII, and O.C.G.A. § 17-5-30 since: (1) witnesses reported seeing the defendant at the victim's home near the time that the victim disappeared; (2) the farm manager who located the victim's body told police that the defendant commonly used the farm for hunting; (3) the defendant had a tumultuous relationship with the victim; and (4) the defendant's mailbox was painted in a similar camouflage as the cattle trough in which the victim was found; as the warrant for the house was proper, the warrant for the defendant's truck was not fruit of the poisonous tree. Fortson v. State, 277 Ga. 164, 587 S.E.2d 39 (2003), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685 (Ga. 2018).

Appellate court's finding that O.C.G.A. § 40-8-73.1 was unconstitutional as no rational connection existed between the residence of the driver of a vehicle and the goal of improving law enforcement officer safety during traffic stops, did not warrant suppression of evidence seized during a traffic stop of the defendant's vehicle because the investigating officer had reason to believe that the vehicle's windows were tinted darker than that permitted by the statute. Ciak v. State, 278 Ga. 27, 597 S.E.2d 392 (2004).

Trial court properly denied the defendant's motion to suppress evidence seized pursuant to a warrant in a prosecution filed against the defendant for various sex crimes, when despite alleging specific ages, given the totality of the circumstances, the affidavit sought information of sexual activity involving minor children and was predicated on information provided by a parent involving sexual activity between the defendant and the victim, who was the parent's daughter. Phillips v. State, 283 Ga. App. 319, 641 S.E.2d 294 (2007).

Defendant's motion to suppress was properly denied as: (1) an investigating officer had a reasonable articulable suspicion to stop the defendant's vehicle, based on a violation of O.C.G.A. § 40-6-40 for driving on the wrong side of the road; and (2) a 25-minute delay in reading the implied consent warning was not unreasonable under the circumstances presented. Dunbar v. State, 283 Ga. App. 872, 643 S.E.2d 292 (2007).

Because: (1) evidence seized from the defendant's residence as a result of an interrogation was sufficiently attenuated from any illegality to be admissible; (2) the duration of the search had no bearing on the subsequent consent given by the defendant's roommate; (3) the consent was not a product of any illegal conduct; and (4) there was no evidence of any flagrant misconduct and coercion on the part of the investigating law enforcement officers involved, the evidence was properly admitted. Spence v. State, 281 Ga. 697, 642 S.E.2d 856 (2007).

Because: (1) it was reasonable for the arresting officers to act upon an investigating deputy's observations; (2) law enforcement had reasonably trustworthy information to warrant law enforcement's belief that the defendant had committed or had participated in committing a burglary; and (3) a determination of probable cause to arrest the defendant could rest on the collective knowledge of the police, given the communication between them, probable cause supported the defendant's warrantless arrest and supported the admission of the seized evidence. Murphy v. State, 286 Ga. App. 447, 649 S.E.2d 565 (2007).

Trial court did not err in denying the defendant's motion to suppress the evidence seized by law enforcement given the totality of the circumstances presented including: (1) an anonymous tip; (2) the two responding officers' personal observations of the defendant's actions at the scene; and (3) the officers' brief investigative detention of the defendant; thus, a

pat-down of the defendant's outer clothing was reasonable. Carter v. State, 287 Ga. App. 597, 651 S.E.2d 759 (2007), cert. denied, No. S08C0246, 2008 Ga. LEXIS 172 (Ga. 2008).

Because a detective's suspicions were raised by the defendant's odd behavior and the detective thought that something might be hidden in the defendant's shoes, the detective was permitted to detain the defendant in order to maintain the status quo while obtaining more information concerning that suspicion; thus, when combined with the defendant's valid consent, suppression of the evidence seized was unwarranted. Lane v. State, 287 Ga. App. 503, 651 S.E.2d 798 (2007), cert. denied, No. S08C0187, 2008 Ga. LEXIS 185 (Ga. 2008).

Because two police officers were validly and lawfully at the back steps leading to the back door of the defendant's residence investigating a possible burglary at the time it became obvious the officers needed to talk to the occupants of the residence to determine the occupants' knowledge of the burglary suspect, and the officers were not required to go the the front door of the residence in order to initiate the inquiry, when the officers saw the defendant in plain view packaging 35 grams of cocaine and 94 grams of marijuana into smaller packages, the trial court did not err in denying suppression of that evidence. King v. State, 289 Ga. App. 461, 657 S.E.2d 570 (2008).

Trial court did not err in denying motions to suppress filed by the two defendants because: the officer (1) had a reasonable and sufficient basis for initiating a traffic stop of the car the defendants were traveling in based on a belief that the license plate on the subject vehicle might have belonged on another car, and hence, was illegally transferred; and (2) did not improperly prolong the stop once the defendants told conflicting stories of their travels and one declined to grant the officer consent to search. Andrews v. State, 289 Ga. App. 679, 658 S.E.2d 126 (2008), cert. denied, No. S08C0963, 2008 Ga. LEXIS 507 (Ga. 2008).

Trial court properly denied the defendant's motion to suppress certain DNA evidence linking the defendant to the crimes charged because the record showed that, when asking for the issuance of a warrant authorizing the state to take the defendant's blood sample, police informed the magistrate about the salient facts known to the police at the time including: (1) the pizza order that lured the victim to an apartment belonging to the defendant's friend; (2) the fact that the defendant used the friend's phone on the night in question; and (3) the defendant confessed to being involved in the crimes. Moreover, when these facts were included with the others considered by the magistrate, probable cause to issue the warrant continued to exist. Carter v. State, 283 Ga. 76, 656 S.E.2d 524 (2008).

Trial court properly denied the defendant's motion to suppress drug evidence because the stop of the defendant's vehicle was justified based on the police having observed the defendant at a residence under surveillance for suspected drug activity: (1) the defendant went in and out of the residence under surveillance in under five minutes; (2) the defendant had a drug seller as a passenger in the defendant's vehicle; and (3) the defendant drove to the passenger's residence. The stop was a second-tier encounter that required reasonable suspicion, and the collective knowledge of the officers involved, based on the officers' observations, justified the defendant's stop. Satterfield v. State, 289 Ga. App. 886, 658 S.E.2d 379 (2008).

Trial court properly denied the defendant's motion to suppress the evidence seized as a result of a pat-down search because the defendant consented to the search and, under the plain-feel doctrine, the officer conducting the search was authorized to retrieve a plastic bag suspected to be illegal contraband from the defendant's watch pocket. Dunn v. State, 289 Ga. App. 585, 657 S.E.2d 649 (2008), cert. denied, No. S08C1021, 2008 Ga. LEXIS 496 (Ga. 2008).

Given that an officer, responding to a disturbance call in a remote location of the precinct involving the defendant, had a reasonable safety concern, and because the call described the defendant as loud, belligerent, and possibly intoxicated, the officer had a sufficient basis to conduct a pat-down search of the defendant; hence,

Applicability (Cont'd)
1. In General (Cont'd)

the defendant's motion to suppress the evidence of a concealed weapon and drugs found following a search was properly denied. Walker v. State, 289 Ga. App. 657, 658 S.E.2d 207 (2008).

Because the defendant committed a traffic violation by crossing a solid yellow line in the roadway, and was not legitimately faced with an obstruction, despite claiming that it was undoubtedly convenient to pass the slow moving van driving ahead, a police officer had a reasonable and articulable suspicion to initiate a traffic stop of the defendant's vehicle; thus, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of that stop. Przyjemski v. State, 290 Ga. App. 22, 658 S.E.2d 807 (2008).

Because the affidavit accompanying a search warrant contained sufficient probable cause and the resulting search was not rendered illegal merely because the date on the warrant post-dated the search by one day, the trial court did not err in denying the defendant's motion to suppress evidence seized pursuant to the warrant. Jones v. State, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

Because law enforcement officers were given permission to enter a landowner's land in order to investigate the presence of possible trespassers for engaging in other illegal activity on the property, and found the defendant and a cohort, the officers gained a reasonable and articulable suspicion that the two individuals were involved in some form of criminal activity, the very least of which was criminal trespass, and therefore had the authority to detain the individuals in a brief investigative stop; thus, suppression of the evidence seized as a result of the encounter was properly denied, after the cohort ran, and the defendant failed to comply with the officers' orders, given that those actions amounted to probable cause to support a warrantless arrest and a search thereafter. Burgess v. State, 290 Ga. App. 24, 658 S.E.2d 809 (2008).

Given that the defendant was unable to offer a credible explanation for being on the grounds of a housing project, and failed to provide a law enforcement officer with a clear answer when asked about the ownership of a car the defendant had been leaning on, the officer had probable cause to make a warrantless arrest of the defendant for loitering; thus, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of that arrest. Boyd v. State, 290 Ga. App. 34, 658 S.E.2d 782 (2008).

Because: (1) the victim's identification of the defendant was based upon independent memory which the victim fairly accurately recalled in developing the composite sketch; (2) there was an independent basis for the victim's identifications; and (3) there was no substantial likelihood of misidentification under these circumstances, the trial court did not err in admitting the identification evidence and the trial court's finding that there was no likelihood of misidentification was supported by the record. Price v. State, 289 Ga. App. 763, 658 S.E.2d 382 (2008).

Given that an officer, responding to a disturbance call in a remote location of the precinct involving the defendant, had a reasonable safety concern, and because the call described the defendant as loud, belligerent, and possibly intoxicated, the officer had a sufficient basis to conduct a pat-down search of the defendant; hence, the defendant's motion to suppress the evidence of a concealed weapon and drugs found following a search was properly denied. Walker v. State, 289 Ga. App. 657, 658 S.E.2d 207 (2008).

Evidence, including the odor of alcohol emanating from the defendant's person, the defendant's slurred speech, and the defendant's bloodshot and watery eyes, was more than sufficient to support the trial court's determination that the defendant's conduct and demeanor resulted from intoxication, supporting probable cause for arrest, and the results of a blood test did not require suppression. Schlanger v. State, 290 Ga. App. 407, 659 S.E.2d 823 (2008).

Defendant's motion to suppress was properly denied as there was sufficient evidence for the trial court to conclude that an officer's initial contact with the defendant was a valid second-tier encoun-

ter since the officer already knew that the defendant's vehicle had an incorrect tag; as part of a valid second-tier encounter, the officer was authorized to conduct a pat-down search for weapons. As the defendant clearly had a large object in the defendant's pocket, and the trial court had the opportunity to observe the actual size and contours of the object, the officer's suspicion that the pocket contained a weapon was reasonable. Shoemaker v. State, 292 Ga. App. 97, 663 S.E.2d 423 (2008).

Trial court did not err in denying the defendant's motion to suppress because the search of the defendant's pockets was valid; the officers had a particularized and objective basis for suspecting that the defendant was involved in criminal activity, and because the pat-down was brief, yielded no evidence, and was not a basis for the further investigative detention, it did not taint the defendant's subsequent consent to the search of the pockets. Mwangi v. State, 316 Ga. App. 52, 728 S.E.2d 729 (2012).

Search and seizure not valid when defendant no longer on probation. — Trial court did not err in granting the defendant's motion to suppress because, given that the defendant was no longer a probationer and had not waived the defendant's Fourth Amendment rights, the warrantless searches and seizures were not valid. State v. New, 331 Ga. App. 139, 770 S.E.2d 239 (2015), cert. denied, No. S15C1075, 2015 Ga. LEXIS 429 (Ga. 2015).

2. Drug Evidence

Sufficient separation between legal and illegal activities by officer. — Although a police officer's initial entry into the defendant's residence was illegal since the officer entered after a guest opened the door and the guest was not authorized to allow the officer to enter, the defendant's Fourth Amendment rights were not violated and the trial court did not err in denying the defendant's motion to suppress as the officer left the residence upon finding the defendant was in the bathroom and did not return until the defendant requested that the officer reenter, at which time the defendant voluntarily consented to the search that later revealed the drugs on the defendant's property; the subsequent search was sufficiently attenuated from the initial illegal search that the trial court properly denied the motion to suppress. Brown v. State, 261 Ga. App. 351, 582 S.E.2d 516 (2003).

Free air search leading to drugs. — Defendant's motion to suppress was properly denied as a "free air search" by a drug sniffing dog around the exterior of a vehicle stopped during a purportedly valid traffic stop in which the police did not have an articulable, reasonable suspicion of any illegal drug activity was valid under Ga. Const. 1983, Art. I, Sec. I, Para. XIII. Bowens v. State, 276 Ga. App. 520, 623 S.E.2d 677 (2005).

Valid first-tier encounter. — Denial of the defendant's motion to suppress was proper; a deputy's initial contact with the defendant was a first-tier encounter, requiring neither reasonable suspicion nor invoking Fourth Amendment protection and, as the defendant admitted that the defendant smoked marijuana upon being asked to explain its odor on defendant's person, the defendant was lawfully arrested and searched. Harding v. State, 283 Ga. App. 287, 641 S.E.2d 285 (2007).

Trial court did not err in denying the defendant's motion to suppress because the initial encounter was a first-tier encounter requiring no suspicion since the defendant was already stopped and the officer did not block the defendant's vehicle, activate the blue lights, or otherwise indicate that the defendant was unable to leave; the subsequent pat-down was proper because the pat-down was performed pursuant to the defendant's consent, which the defendant freely gave when requested by the officer. Kirkland v. State, 316 Ga. App. 310, 728 S.E.2d 907 (2012).

Valid second-tier encounter uncovers narcotics. — Defendant's suppression motion was properly denied because the methadone found in a lockbox was discovered during a valid second-tier encounter for a possible driving under the influence (DUI) violation after: (1) officers found the defendant asleep and unable to be roused at the wheel of a vehicle still in drive in the roadway, with an empty beer

Applicability (Cont'd)
2. Drug Evidence (Cont'd)

can next to the defendant; (2) an officer had not concluded the DUI stop when the officer asked the defendant about the lockbox; (3) the officer was free to ask the defendant additional questions to gather evidence of possible intoxication; and (4) the officer's question was related to the investigation of a possible DUI. Hendrix v. State, 273 Ga. App. 792, 616 S.E.2d 127 (2005).

Independent basis for arrest. — Denial of a defendant's motion to suppress was affirmed as the defendant's flight from an improper Terry stop gave the police officers an independent basis to arrest the defendant; thus, the methamphetamine found in close proximity was admissible. Reynolds v. State, 280 Ga. App. 712, 634 S.E.2d 842 (2006).

Drugs in plain view. — Defendant's motion to suppress methamphetamine was properly denied because exigent circumstances justified an officer in retrieving the defendant's weapon from the vehicle after the defendant admitted that the weapon was concealed and that the defendant did not have a permit for the weapon, and had twice started toward the vehicle to get the weapon personally, and the methamphetamine was in plain view in the bag that contained the weapon. Wright v. State, 272 Ga. App. 423, 612 S.E.2d 576 (2005).

Because the police were authorized to seize marijuana found in plain view, seen through the window of an apartment where the police were executing an arrest warrant on another individual, once the defendant answered a knock on the apartment door, police also had the right to search incident to the defendant's arrest for possession of marijuana and based on the exigency of the circumstances; hence, the trial court erred in granting a motion to suppress the marijuana without explaining the court's interpretation of the evidence or ruling on the credibility of the witnesses. State v. Venzen, 286 Ga. App. 597, 649 S.E.2d 851 (2007).

Trial court did not err by limiting the admissibility of items in a defendant's felony murder trial to those items seized incident to the defendant's arrest in the early morning hours and in plain view during the processing of the crime scene as an approximately 15-minute video recording of the premises, which was viewed by the trial court, supported the officers' testimony that guns, shell casings, significant amounts of cash, and items appearing to be crack cocaine were all in plain view and, under the circumstances, presented probable cause as being contraband or evidence of the crime of the felony murder of an officer. Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008).

Trial court properly denied a defendant's motion to suppress the drug evidence found in the defendant's apartment as the evidence authorized the warrantless entry into the apartment based on the officers observing a marijuana cigarette lying next to the door and immediately smelling the strong odor of burnt marijuana when the door was opened. Lawrence v. State, 298 Ga. App. 94, 679 S.E.2d 94 (2009).

Officer's knowledge of defendant's prior drug conviction. — Because officers had probable cause to arrest the defendant, based on the officers' awareness of the defendant's prior arrest following an explosion at a methamphetamine lab and that the defendant was subject to bond requirements related to such arrest, and, at the time of the search, the defendant was in the company of an individual who was driving on a suspended license and carrying methamphetamine, which was in violation of the defendant's bond conditions, the trial court properly denied the defendant's motion to suppress the evidence seized pursuant to the search incident to a valid arrest. Collins v. State, 281 Ga. App. 240, 636 S.E.2d 32 (2006).

Observations of officers justified. — Evidence in the record supported the denial of a motion to suppress as officers testified regarding their observations, surveillance techniques, experience with drug sales, and the general modes of operation of persons involved in drug sales, the officers were authorized to stop the defendant's vehicle as one involved in a drug sale, acting in concert with another vehicle as counter-surveillance and showing an obvious interest in the endeavor;

further, because the detention lasted at most, 15 minutes, such was not unreasonable and did not amount to an impermissible seizure. Hickman v. State, 279 Ga. App. 558, 631 S.E.2d 778 (2006).

Trial court properly denied a defendant's motion to suppress the drug contraband found under the passenger seat of the vehicle in which the defendant was sitting as the vehicle had sped passed a residence wherein police officers were awaiting the return of an arrestee. The driver's actions in passing the residence warranted an investigative stop based on the belief that the arrestee was in the car and the traffic stop was authorized based on the officers observing the vehicle speeding, thus, the stop of the vehicle was not illegal. McBee v. State, 296 Ga. App. 42, 673 S.E.2d 569 (2009).

Trial court did not err in denying the defendant's motion to suppress because the evidence provided sufficient reasonable articulable suspicion to support a brief detention of the defendant; an officer had a particularized and objective basis for suspecting that the defendant was involved in criminal activity when the officer told the defendant to leave a residence because the officer was aware that the owner of the residence was known for dealing narcotics from a number of prior cases the officer had personally worked on, and the officer believed that the defendant was at the residence to buy marijuana. Hilbun v. State, 313 Ga. App. 457, 721 S.E.2d 656 (2011).

Sale of drugs in officer's presence. — Warrantless arrest of the defendant was authorized on the ground that a sale of cocaine was committed in the officers' presence, and after the defendant retreated into a motel room, the exigencies of the situation demanded an immediate entry into the room for the officer to arrest the defendant without a warrant; hence, there was no basis for suppression of the evidence seized thereafter. Fortson v. State, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Controlled buy observed by officer. — Controlled buy conducted under the observation of the officer alone was sufficient to establish probable cause, and there was no evidence that the officer knew, or should have known, that more than one person resided at the residence. Ibekilo v. State, 277 Ga. App. 384, 626 S.E.2d 592 (2006).

Undercover drug activities by law enforcement. — Because the totality of the circumstances known to the law enforcement officers participating in the drug investigation and the undercover purchase of narcotics supplied sufficient probable cause that contraband would be found inside the vehicle the defendant was driving, suppression of the drug evidence seized during the search of this vehicle was properly denied. Stroud v. State, 286 Ga. App. 124, 648 S.E.2d 476 (2007).

Use of informant in narcotics cases. — Defendant's suppression motion was properly denied as: (1) the police personally heard an individual say to the informant on the telephone that the individual had a kilogram of cocaine in the individual's hotel room that the individual intended to sell to the informant if the informant would come to that certain hotel at a certain time, where that individual would be waiting on the third-floor balcony to throw the informant a key; (2) when the informant arrived at the designated hotel at the designated time, the police observed the defendant standing on the third-floor balcony and further observed the defendant respond favorably to the informant's request not to throw down the key and instead to come to the back door to let the informant in; (3) the police did not arrest the defendant until the defendant appeared at that back door; and (4) the information received from an untested informant might have been helpful and corroborating, but the personal observations and perceptions of the police alone more than sufficed to supply the probable cause needed for a warrantless arrest. Fleming v. State, 282 Ga. App. 373, 638 S.E.2d 769 (2006).

Trial court did not err in denying the defendant's motion to suppress drug evidence because the evidence established the existence of probable cause for the issuance of the search warrant for the defendant's residence; at the suppression hearing, the investigating officer testified as to the same information provided in the

Applicability (Cont'd)
2. Drug Evidence (Cont'd)

affidavit and that the officer had known the informant for 11 or 12 years, the officer had used the informant in at least 20 to 30 prior investigations, and the officer had provided the magistrate with information about the informant's prior work with other officers beyond what was set forth in the affidavit. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because under the totality of the circumstances, the magistrate had a substantial basis for concluding that there was a fair probability contraband would be found at the residence; the affidavit for the search warrant revealed that an informant participated in a drug buy using law enforcement funds, and an officer transported the informant to the premises, where the informant made the purchase, and the informant provided the purchased contraband to the officer. Pass v. State, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Drugs found during pat-down search. — Trial court did not err in denying the defendant's motion to suppress the cocaine found by an officer after a precautionary pat-down as the officer's actions in responding to a suspicious-person complaint and immediately encountering the defendant were reasonable and neither arbitrary nor harassing; hence, the seizure was authorized as incident to a lawful arrest. Simmons v. State, 281 Ga. App. 654, 637 S.E.2d 70 (2006), cert. denied, No. S07C0216, 2007 Ga. LEXIS 77 (Ga. 2007).

Trial court properly denied the defendant's motion to suppress marijuana seized as a result of a pat-down search conducted by an investigating officer as: (1) the officer observed sufficient, articulable facts to believe that an aggravated assault suspect might be leaving town; and (2) upon smelling burnt marijuana, and the possibility that weapons might be present, a pat-down of those individuals present, including the defendant, was supported by the totality of the circumstances known to the officer at the time. Brown v. State, 283 Ga. App. 250, 641 S.E.2d 551 (2006).

Because an officer was authorized to: (1) detain the defendant for investigatory purposes based on a 9-1-1 call reporting a domestic disturbance; (2) pat the defendant down for weapons; (3) seize the cocaine from the defendant's pocket under the plain feel doctrine; (4) search the defendant's vehicle; and (5) seize the contraband found during that search, the trial court properly denied the defendant's motion to suppress. Lester v. State, 287 Ga. App. 363, 651 S.E.2d 766 (2007).

Trial court properly denied a defendant's motion to suppress the evidence of marijuana found on the defendant's person following a traffic stop based on the person's vehicle having a window tint violation as the arrest was lawful based on the officer having probable cause to place the defendant under arrest and subsequently search the defendant's person due to the defendant's admission to having smoked marijuana recently; the smell of marijuana coming from the defendant's person; the bulge in the defendant's pants; the defendant's nervous demeanor; and the defendant's attempt to prevent a lawful pat-down of the defendant's person in the area of the suspicious bulge. Williams v. State, 293 Ga. App. 842, 668 S.E.2d 825 (2008).

Trial court erred in denying the defendant's motion to suppress evidence a police officer found while conducting a search of the defendant's person because the seizure of the drugs was not lawful when the detention of the defendant was unreasonable; the officer articulated no particularized and objective basis for suspecting that the defendant was or was about to be involved in criminal activity, and the officer's stated reasons for detaining the defendant did not constitute an objective basis for suspecting the defendant of involvement in drug activity and justify an investigatory detention when there were no complaints that day of drug activity or of the defendant's involvement in such activity. Walker v. State, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

Trial court erred in granting a defendant's motion to suppress crack cocaine police officers found in the defendant's

pants' pocket during a pat-down search because the officers made a valid Terry stop, and the defendant was not free to leave; the undisputed testimony from the officers was that based on the officers' experience, outside window tinting was often performed on stolen cars, the defendant and the other men were working on a car in a vacant lot, the car had no tag, and the men were gathered around the car in a way that could be construed as trying to conceal a stolen automobile. State v. Miller, 300 Ga. App. 55, 684 S.E.2d 80 (2009).

Trial court did not err when the court denied the defendant's motion to suppress because the contact between the defendant and an officer was a first-tier consensual encounter, and the officer was authorized to seize marijuana from the defendant's pocket since the officer asked for consent to search the pocket, and the defendant gave consent; there was no evidence that the encounter involved coercion or detention, and upon feeling a soft, spongy item in the defendant's pocket, the officer was not automatically authorized to search the pocket, but the officer testified that the officer asked for consent to search the pocket and that the defendant gave the defendant's consent. Ware v. State, 309 Ga. App. 426, 710 S.E.2d 627 (2011).

Traffic stop leading to narcotics. — Trial court properly denied the defendant's motion to suppress the methamphetamine seized as a result of a traffic stop of the vehicle the defendant was a passenger in as sufficient evidence supported the trial court's finding that an officer's stop of the vehicle was justified by the officer's reasonable articulable suspicion of a crime, specifically, a violation of O.C.G.A. § 40-8-20. Richardson v. State, 283 Ga. App. 89, 640 S.E.2d 676 (2006).

Trial court did not err in denying the defendant's motion to suppress cocaine seized after a valid traffic stop had essentially concluded as a state trooper's objective observations, when combined with the extensive experience the trooper possessed in drug interdiction and knowledge of drug smuggling patterns, supplied sufficient facts to conclude that the defendant might have been engaged in criminal activity. Giles v. State, 284 Ga. App. 1, 642 S.E.2d 921 (2007).

Trial court properly denied the defendant's motion to suppress the marijuana seized as the search of the defendant's truck was conducted after a valid traffic stop after the defendant gave the officer consent to conduct the search, and nothing supported the defendant's claim that this consent was coerced because the consent was obtained during a custodial interrogation and without the benefit of Miranda warnings as the officer's questioning did not unduly prolong the traffic stop and did not result in an unauthorized seizure or an equivalent custodial detention for which Miranda warnings were required. Trujillo v. State, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

Trial court did not err in denying the defendants' motions to suppress drug evidence because the defendants failed to establish that the actions of the arresting officer unreasonably expanded the scope or duration of the traffic stop; because the officer's suspicions were piqued by observations of a truck's condition, the strong scent of perfume emanating from the cab, the demeanor of one of the defendants, and the other defendant's responses to the officer's brief questioning, the officer was then prompted and authorized to request a K-9 unit and to run criminal histories on both defendants, and there was no evidence to suggest that the officer delayed in making either query. Young v. State, 310 Ga. App. 270, 712 S.E.2d 652 (2011).

State failed to meet the state's burden, under O.C.G.A. § 17-5-30(b), of proving that the search of the defendant's vehicle, following a stop for a traffic violation, and the seizure of the marijuana that was found in the vehicle was lawful because there was no evidence that the investigative detention of the defendant lasted no longer than was necessary to effectuate the purpose of the traffic stop and there was no evidence that the scope of the defendant's detention was carefully tailored to its underlying justification. Moreover, no evidence was adduced that the prolonged detention was justified by a reasonable, articulable suspicion of other criminal activity. Nunnally v. State, 310 Ga. App. 183, 713 S.E.2d 408 (2011).

Applicability (Cont'd)
2. Drug Evidence (Cont'd)

Trial court erred in granting the defendant's motion to suppress evidence resulting from a police officer's search and seizure because, although the defendant was subjected to a tier-two Terry-type investigative detention, the defendant was not in custody, and the defendant was detained for a reasonable time to investigate in conjunction with the valid stop, and the officer's question regarding whether the defendant was in possession of contraband occurred within a few seconds of the stop, such that no reasonable person could believe that they were under arrest and that they were not free to leave after the officer had been afforded a reasonable time to finish conducting a traffic investigation. State v. Hammond, 313 Ga. App. 882, 723 S.E.2d 89 (2012).

Probable cause to suspect drug possession. — Upon a de novo review, the appeals court found that because law enforcement had probable cause to suspect that the defendant possessed cocaine, a warrantless arrest of the defendant was lawful; thus, an order granting suppression was reversed. State v. Bryant, 284 Ga. App. 867, 644 S.E.2d 871 (2007), cert. denied, No. S07C1242, 2007 Ga. LEXIS 540 (Ga. 2007).

Trial court did not err in denying the defendant's motion to suppress cocaine a detective found in the defendant's pocket because the defendant's presence on the premises being searched and the defendant's apparent attempt to flee from the premises provided probable cause for the detective to believe that the defendant possessed or was, at least, a party to the crime of possessing, the unlawful contraband specified in the warrant, which authorized the detective to detain the defendant and to conduct a warrantless search of the defendant's person. Sheats v. State, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Trial court did not err in denying the defendant's motion to suppress drugs seized from the defendant's person because a narcotics investigator had probable cause to restrain the defendant and order the defendant to spit out the baggy; the investigator observed the defendant make a series of furtive attempts at concealing the clear plastic baggy, which the investigator believed, based on experience, contained drug contraband. Lewis v. State, 317 Ga. App. 391, 730 S.E.2d 757 (2012).

Police gained entry without authorization and drugs not admitted. — Prosecution failed to prove that a search and seizure of drug evidence was lawful as the police went to the defendant's home with the specific intention of obtaining consent to search, the police went at night, in force, and entered the home when the defendant was not there, the police gained entry without proper authorization, and unlawfully detained and handcuffed the people inside the home; consequently, the defendant's subsequent consent upon returning home was not purged of the taint of the illegal entry into the home and the illegal seizure of the defendant's person. Pledger v. State, 257 Ga. App. 794, 572 S.E.2d 348 (2002).

Search of hotel room. — Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because the affidavit supporting the search warrant for a hotel suite recited probable cause to believe that drugs would be found on the premises under the defendant's possession, custody, and control, namely the two-room suite that the hotel designated and rented to the defendant. Glass v. State, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Actions of defendant's attorney. — Trial court did not err in denying the defendants' motion to suppress evidence as the record showed that the defendants' attorneys stated that there was no objection to admission of the cocaine that was seized from the defendants following a stop of the defendants' vehicle; affirmatively stating that there was no objection in effect concedes the point that the motion to suppress evidence was properly denied. Fernandez v. State, 275 Ga. App. 151, 619 S.E.2d 821 (2005).

Suppression motion properly denied following search of vehicle and compartments pursuant to arrest and impoundment. — Trial court did not err in denying a motion to suppress evidence because the defendant lacked standing to

challenge the legality of the search of a bag belonging to a passenger in the defendant's care and, in any event, after the defendant and the passenger were arrested, the police were authorized to search the interior of the car, including closed containers inside the passenger compartment, both as a search incident to the arrests and pursuant to impounding the uninsured car. Driscoll v. State, 295 Ga. App. 5, 670 S.E.2d 824 (2008).

Suppression motion denied to trucker after drug dog alerted. — Trial court properly denied the defendant's motion to suppress because the investigating officer had reasonable articulable suspicion of other illegal activity based upon the drivers' suspicious behavior related to the curtain on the sleeping compartment, the co-driver's criminal drug history, the inconsistency in the logbooks as compared to what the officer would normally expect to see, the lack of a seal on the load, and the alert obtained by the drug dog detection canine. Sherod v. State, 334 Ga. App. 314, 779 S.E.2d 94 (2015), cert. denied, No. S16C0368, 2016 Ga. LEXIS 118 (Ga. 2016), cert. denied, 137 S. Ct. 51, 196 L. Ed. 2d 55 (U.S. 2016).

Inventory search as part of impoundment proper. — Pretermitting whether the search was an appropriate search incident to arrest, the court upheld the propriety of inventory searches subject to a reasonable impoundment in order to protect an owner's property and to protect officers from claims over lost or stolen property. Accordingly, the inventory search was proper. Dover v. State, 307 Ga. App. 126, 704 S.E.2d 235 (2010).

Suppression motion properly granted. — Trial court properly granted a defendant's motion to suppress drug evidence seized from the defendant's apartment as the court found that the defendant nor the defendant's friend had consented to the search and exigent circumstances did not exist since the police had confirmed that the defendant was not one of the robbers the police were pursuing and no sound or movement was coming from within the apartment to have given the police a reasonable basis to search the apartment. State v. Culpepper, 295 Ga. App. 525, 672 S.E.2d 494 (2009).

Trial court did not err in granting the defendant's motion to suppress the contents of a bag a police officer seized because search of the bag was not justified since police officers' initial approach to a vehicle and questioning of the defendant fell within the realm of a first-tier encounter, requiring no reasonable suspicion of criminal activity, and during that encounter, the defendant was free to refuse to answer or ignore the officers' requests and go on the defendant's way; once one of the officers prevented the defendant from exercising that right, the encounter escalated to a second-tier encounter, but the defendant had done nothing to give rise to a particularized and objective basis for suspecting the defendant was involved in criminal activity, and the defendant's subsequent refusal to answer the officer's questions as to what was in the bag, and the defendant's placing the bag back in the cupholder, also gave the officer no basis for an investigatory detention. State v. Jones, 303 Ga. App. 337, 693 S.E.2d 583 (2010).

Suppression motion granted after backpack search. — After the hospital security officers allegedly noticed an odor of marijuana emanating from the defendant's backpack, confiscated the backpack, searched the backpack, found marijuana in the backpack, and called the police, and the responding officer searched the bag without obtaining a warrant, the defendant's motion to suppress was properly granted because the officer did not testify that the officer personally smelled marijuana; the state did not present any testimony from the hospital security officers who allegedly smelled the marijuana, confiscated the bag, searched the bag, and found marijuana in the bag; and the state did not argue that the defendant consented or that there were exigent circumstances justifying a warrantless search. State v. Cook, 337 Ga. App. 205, 786 S.E.2d 876 (2016).

3. Probationers

Search upon execution of probation arrest warrant. — Contraband seized in a search of the defendant's home upon execution of a probation arrest warrant should have been suppressed because

Applicability (Cont'd)
3. Probationers (Cont'd)

the warrant was invalid, having been issued on the basis of an earlier illegal search of the defendant. Boatright v. State, 225 Ga. App. 181, 483 S.E.2d 659 (1997).

Warrantless search of parolee. — Trial court erred in granting the defendant's motion to suppress evidence seized after an automobile search given that law enforcement had reliable information that the defendant was transporting drugs as: (1) the defendant was on parole, and that as a condition thereof, had specifically consented to a warrantless search; (2) the information received from an informant about the defendant's actions was reliable; and (3) no evidence was presented that the officers acted in bad faith or to harass the defendant. State v. Cauley, 282 Ga. App. 191, 638 S.E.2d 351 (2006), cert. denied, No. S07C0420, 2007 Ga. LEXIS 148 (Ga. 2007).

Evidence from probationer's apartment. — Trial court erred in denying a probationer's motion to suppress the evidence seized from the probationer's apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence was seized without a warrant after the probationer was not found in the apartment and had to be excluded under the Fourth Amendment as the search conducted was only permissible insofar as the search involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer's arrest. The probationer was never placed on notice that the probationer was going to be subjected to warrantless searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007).

Consent arising from probationary status. — Trial court did not err in denying the defendant's motion to suppress as a consent to search was properly imposed as a condition of the defendant's probation and did not amount to a waiver of rights; thus, the defendant's tacit acceptance of this special condition provided the police with the authority to search. Peardon v. State, 287 Ga. App. 158, 651 S.E.2d 121 (2007).

Waiver of rights as special condition of probation. — Trial court did not err in denying the defendant's motion to suppress the results of a search of the defendant's person and home because the defendant validly waived the defendant's Fourth Amendment rights under the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XIII when the defendant entered into a negotiated guilty plea to possession of a firearm and possession of marijuana; the transcripts of the defendant's guilty plea revealed that the defendant was informed by the assistant district attorney that a Fourth Amendment waiver was part of the negotiation, neither the defendant nor the attorney objected to the Fourth Amendment waiver during the plea, the trial court explained the Fourth Amendment waiver to the defendant on the record, and the defendant signed a waiver as a special condition of probation. Morrow v. State, 311 Ga. App. 323, 715 S.E.2d 744 (2011), cert. denied, No. S11C1872, 2011 Ga. LEXIS 993 (Ga. 2011).

No hearing required as to suppression motion at probation revocation hearing. — Separate hearing on a defendant's motion to suppress in a nonjury probation revocation hearing is not necessary. Davenport v. State, 172 Ga. App. 606, 324 S.E.2d 201 (1984).

4. Statements and Testimony

Motion not applicable to anticipated testimony. — Testimony is not within the scope of the motion to suppress as authorized by Ga. L. 1966, p. 567, § 13. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973), criticized, Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Motion to suppress directed at anticipated testimony rather than "property" does not lie. Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973), cert. denied, 419 U.S. 877, 95 S. Ct. 140, 42 L. Ed. 2d 117 (1974).

Witness and victim testimony not subject to motion. — Testimony of eyewitnesses and victims of alleged crimes is

outside the scope of a motion to suppress as contemplated under Ga. L. 1966, p. 567, § 13. Baker v. State, 230 Ga. 741, 199 S.E.2d 252 (1973).

Sheriff's testimony not subject to motion. — Testimony of a sheriff concerning the property seized in an illegal search could be objected to at trial but could not be made the object of a motion to suppress. Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

Defendant initiated discussions not suppressed. — Defendant's motion to withdraw the defendant's guilty plea based on the defendant's claim that defense counsel failed to appeal the denial of a suppression motion was properly rejected because it was not ineffective assistance to fail to make a meritless appeal and the motion to suppress was properly denied because the defendant voluntarily reinitiated discussions with law enforcement officers after the interview was terminated due to the defendant's request for counsel. Rios v. State, 281 Ga. 181, 637 S.E.2d 20 (2006).

Hospitalization and pain did not render statement involuntary. — Trial court did not err in admitting the defendant's second statement to police made during a hospitalization and while the defendant was taking pain medication as neither circumstance rendered the statement involuntary. Sanders v. State, 281 Ga. 36, 635 S.E.2d 772 (2006).

Motion denied if statements to police were voluntarily made. — Defendant testified that the defendant changed out of wet clothes after arriving at the police station, was not threatened, was advised of the defendant's rights, and was not intoxicated, and the interviewing officer testified that the defendant did not appear to be intoxicated, understood the questions asked, appeared clearheaded, and waived the defendant's rights, thus, the trial court's finding that the defendant freely and voluntarily made statements after waiving defendant's rights, and that the statements were made free of threats or other improper conduct on the part of law enforcement officers, was amply supported by evidence and was not clearly erroneous. Moody v. State, 277 Ga. 676, 594 S.E.2d 350 (2004).

Police officer's testimony believed. — Trial court properly denied the defendant's motion to suppress as the trial court was authorized to believe the police officer's testimony that the officer was qualified to detect the odor of unburned marijuana based on the officer's training and experience and, thus, that the officer recognized the smell of the ten pounds of unburned marijuana the defendant had in the trunk of the defendant's car despite defense counsel's attempt to impeach the officer with the officer's testimony from a prior case that there was no difference between the smell of burnt and unburned marijuana; accordingly, the motion to suppress was properly denied and the defendant's conviction for a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., was affirmed. King v. State, 267 Ga. App. 546, 600 S.E.2d 647 (2004).

Statements made by possibly intoxicated defendant. — Despite the defendant's possible intoxication, a statement given to police was knowingly and voluntarily made, and a waiver of the rights accorded under Miranda was intelligent; thus, the trial court did not err in admitting the defendant's videotaped custodial statements into evidence. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Suppression of data on electronic devices seized during arrest. — Georgia Supreme Court held that the state may appeal a grant of the defendant's motion to suppress data on electronic devices properly seized during an arrest under O.C.G.A. § 5-7-1(a)(4) because even under a strict construction of § 5-7-1(a)(4), the state has a direct right of appeal when the trial court grants a pre-trial motion to exclude evidence on the ground that the evidence was obtained illegally. State v. Rosenbaum, 305 Ga. 442, 826 S.E.2d 18 (2019).

Voluntary confession held admissible. — Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50 (see O.C.G.A. § 24-8-824), not coerced or

Applicability (Cont'd)
4. Statements and Testimony (Cont'd)

received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Trial court did not err in allowing the defendant's statements to the police into evidence because the evidence supported the findings that the statements were freely and voluntarily made, under noncustodial circumstances; a detective testified that the defendant voluntarily came to the police station for an interview, that the defendant was not in custody during the interview and was free to leave at any time, that the defendant was not threatened or promised anything, and that the defendant was allowed to leave the station after the interview. Beaudoin v. State, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Defendant did not demonstrate any harm as a result of the trial court's denial of the motion to suppress statements the defendant made to the police at a hospital because the defendant's on-the-scene confessions, as well as remarks the defendant made to a police officer en route to the hospital, were spontaneous and unsolicited statements not made in response to any form of custodial interrogation; therefore, the confessions were not subject to the strictures of Miranda and were admissible without the warnings having been given. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Custodial statement of Spanish speaking defendant freely and voluntarily made. — Because a taped recording of the defendant's custodial statement showed that the defendant was fully informed of the defendant's rights in both English and Spanish, the defendant understood those rights, and neither threats nor promises were made in exchange for the custodial statement, the trial court did not err in finding that the statement was admissible as freely and voluntarily given. Pineda v. State, 287 Ga. App. 200, 651 S.E.2d 148 (2007).

Statements made by defendant to polygraph examiner properly admitted. — With regard to a defendant's conviction on three counts of cruelty to children in the first degree based on injuries to the child of defendant's romantic friend, the trial court did not err by admitting the incriminating statements that the defendant used too much force in putting the child into a swing, which the defendant made to the polygraph examiner during the pre-polygraph examination interview as, the examiner and the investigator testified that, prior to making any statements, the defendant was read the defendant's Miranda warnings, had voluntarily signed a waiver of rights form, and had voluntarily signed a form stipulating that the results of the polygraph examination would be admissible evidence and both the waiver of rights form and the stipulation were produced for the trial court's review during a suppression hearing and were introduced into evidence at trial after the defendant's motion to suppress was denied. Legan v. State, 289 Ga. App. 244, 656 S.E.2d 879 (2008).

Effect of fact that evidence taken from non-English speaker. — Trial court is authorized to suppress evidence taken from a non-English speaker when there is conflicting evidence relating to the non-English speaker's consent. State v. Izquierdo, 160 Ga. App. 33, 285 S.E.2d 769 (1981).

Inculpatory statements by illiterate defendant. — Despite an illiterate defendant's claim that the trial court erred by admitting inculpatory statements to investigators, the defendant's statements were properly admitted as the defendant: (1) had no difficulty communicating with investigators; (2) never indicated any confusion or misunderstanding; (3) never invoked a right to remain silent; and (4) was not coerced into talking with investigators. Furthermore, the defendant's illiteracy in and of itself did not demand a finding of a less-than-knowledgeable waiver in the face of evidence to the contrary. White v.

State, 281 Ga. 20, 635 S.E.2d 720 (2006).

Seizure of written confession. — Written confession of the defendant is not property illegally seized, and thus is not subject to a motion to suppress. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973), criticized, Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Confession was not made in confidence to chaplain only. — Trial court did not err when the court denied defendant's motion to suppress the confession defendant made to the police chaplain because the trial court obviously believed the chaplain's adamant denial that the chaplain had repeated defendant's confession to the police. The testimony revealed that defendant confessed to the police officer in the chaplain's presence. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Statements made while blood sample taken. — Fact that a defendant was also subject to a search warrant seeking samples of blood and hair did not amount to an unusual susceptibility to a particular form of persuasion and did not mean the defendant was in custody. Keith v. State, 279 Ga. App. 819, 632 S.E.2d 669 (2006).

Statement induced by written promise not to press additional charges held involuntary. — Defendant was granted a new trial for convictions for felony murder and other crimes after it was determined that the defendant's statement to the detectives as to the location of the gun used in the murder and the defendant's provision of the gun to two coindictees was involuntary and inadmissible under former O.C.G.A. § 24-3-50 (see O.C.G.A. § 24-8-824) as the statement was induced by a written promise not to press any additional weapons charges against the defendant. Foster v. State, 283 Ga. 484, 660 S.E.2d 521 (2008).

Defendant's statement not suppressed. — Defendant was not in custody when incriminatory statements were made to police. An officer found the defendant in an apartment and merely sought to ascertain whether the defendant or any of the apartment's occupants knew about the charged incident, and testimony indicated that neither the defendant nor the occupants were handcuffed or otherwise restrained; thus, the defendant's motion to suppress was properly denied. Navarro v. State, 279 Ga. App. 311, 630 S.E.2d 893 (2006).

Because the record failed to contain any indication that the defendant: (1) informed the officers to end an interview; (2) wished to speak with counsel; or (3) wished to leave the station, and after the statements were made the defendant was driven home by an officer, the appeals court affirmed the trial court's finding that the defendant was not in custody for purposes of Miranda; therefore, admission of these non-custodial statements was proper. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212 (2007).

Spontaneous outburst admissible. — Because the defendant's spontaneous outburst was voluntarily made and not the product of police interrogation, the evidence was not subject to a hearsay exception, Miranda warnings were not required, and the statement was admissible. Tennyson v. State, 282 Ga. 92, 646 S.E.2d 219 (2007).

Given the totality of the circumstances, and the defendant's age, education, and knowledge of both the substance of the charge and nature of the rights to an attorney and the right to remain silent because the defendant voluntarily gave a statement to a police detective about an uncharged armed robbery, absent any threats, coercion, or promises in exchange for doing so, the statement was admissible. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Because a police officer who heard the defendant's statement that the defendant shot someone because the person took some marijuana from the defendant testified that the defendant uttered the statement spontaneously, and the police officer did not question or threaten the defendant, nor did anything to coerce the defendant to make the statement, the trial court's ruling that the defendant made the statement freely and voluntarily was not clearly erroneous. Johnson v. State, 287 Ga. App. 352, 651 S.E.2d 450 (2007).

Suppression not required when defendant not under arrest. — Based on an officer's unequivocal testimony that

Applicability (Cont'd)
4. Statements and Testimony (Cont'd)

the defendant was not under arrest when a challenged statement was made, but the officer was merely investigating the victim's stolen vehicle claim, and hence Miranda warnings were not required, suppression of the statement was not required. Marshall v. State, 286 Ga. App. 86, 648 S.E.2d 674 (2007).

Because testimony from the interrogating officer, and the forms by which the defendant waived Miranda and the right to be represented during questioning by an attorney, supported the trial court's denial of the defendant's motion to suppress, the appeals court found no error in the trial court's decision. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007).

Because the evidence sufficiently showed that the defendant made a rational and intelligent choice to waive the rights outlined under Miranda and speak with police detectives on two separate and distinct occasions, the trial court did not err in denying a motion to suppress those statements. Starks v. State, 283 Ga. 164, 656 S.E.2d 518 (2008).

With regard to a defendant's convictions for aggravated sexual assault and child molestation, the trial court properly denied the defendant's motion to suppress the custodial statement made because the defendant was not in custody when the defendant agreed to speak to the detectives in the defendant's office when the defendant admitted to touching the victim and that the statement was subsequently repeated at the station after the defendant was read the defendant's Miranda rights. The statement was made voluntarily and was not the sort of in-custody interrogation forbidden by Miranda. Ellison v. State, 296 Ga. App. 752, 675 S.E.2d 613 (2009).

Trial court did not err in denying the defendant's motion to suppress statements the defendant made during an on-scene police investigation because Miranda warnings were unnecessary when the defendant's initial statements on-the-scene were voluntarily made under noncustodial circumstances; the defendant voluntarily admitted to stabbing the victim in the defendant's apartment after an officer advised the defendant that the officer was investigating a report of a possible dead body, and even if the defendant was a suspect while in the presence of police, there was no evidence that the defendant was under any form of restraint or that the defendant had been placed under arrest. Additionally, the trial court did not err in denying the defendant's additional motion to suppress the defendant's post-Miranda written statement to a detective as not knowingly, voluntarily, and intelligently made because upon being advised that a dead body had been recovered at the defendant's apartment, the detective advised the defendant of the defendant's Miranda rights, and the defendant then waived and gave the defendant's written confession immediately thereafter; nothing of record supported the defendant's claim that the defendant was subjected to an interview lasting "three to four hours," and the defendant did not otherwise contend that the defendant's confession was coerced or induced upon hope of benefit. Rowe v. State, 302 Ga. App. 239, 690 S.E.2d 884 (2010).

Trial court did not err in failing to suppress a statement the defendant made to the police because the statement was made during the course of a subsequent interview that the defendant initiated and was admissible; the defendant contacted the case detective and requested a meeting, the detective met with the defendant and again advised the defendant of the defendant's right to counsel, and the defendant waived the defendant's right to counsel and made an incriminating statement. Haynes v. State, 287 Ga. 202, 695 S.E.2d 219 (2010).

Trial court did not err by denying the defendant's motion to suppress an in-custody statement the defendant made after waiving the defendant's rights under Miranda because the preponderance of the evidence supported the trial court's findings that the officers read the defendant the defendant's rights in the defendant's home in the presence of the defendant's parents and explained the rights to the defendant and that the defendant voluntarily agreed to talk to the officers, and the fact that the defendant was initially

found incompetent to stand trial did not demand the conclusion that the defendant lacked the mental capacity to knowingly and voluntarily waive the defendant's rights; the true analysis is whether the totality of the circumstances show that the statement was free and voluntary. Fife v. State, 306 Ga. App. 425, 702 S.E.2d 454 (2010).

Officer's inquiry on address not suppressed. — Trial court did not err in denying the defendant's motion to suppress statements the defendant made in response to questioning at the time of the defendant's arrest regarding whether the defendant lived at an apartment and where the defendant's bedroom was located therein because a police officer testified at the suppression hearing that the officer asked the defendant where the defendant lived in order to determine whether the defendant could give consent to search; inquiring as to a suspect's address is a question commonly associated with arrest and custody and provides no basis for suppression of the response. Silverio v. State, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

Trial court properly denied the defendant's motion to suppress statements the defendant made to police officers because the trial court did not err when the court determined, under the objective circumstances attending the police officers' interrogation of the defendant, that a reasonable person in the defendant's position would not have understood that the defendant was in custody at the time the defendant gave the defendant's statements to the officers. Crawford v. State, 288 Ga. 425, 704 S.E.2d 772 (2011).

Because the defendant failed to compile a record that demonstrated all that transpired in the trial court with regard to the defendant's motion to suppress statements the defendant made to police officers, the supreme court presumed that the evidence before the trial court supported the court's decision to deny the motion; the appellate record contained no transcription of the defendant's interview as recorded on DVDs, and the defendant failed to make application for the transmission of the DVDs to the supreme court pursuant to Ga. Sup. Ct. R. 71(1). Crawford v. State, 288 Ga. 425, 704 S.E.2d 772 (2011).

Trial court did not err in refusing to suppress the defendant's custodial statement because the two officers who interviewed the defendant testified that the defendant was read, and that the defendant understood the defendant's Miranda rights, that the defendant agreed to talk with the police, that the defendant was not coerced or threatened in any way, that the defendant was not offered any hope of benefit in order to convince the defendant to talk to the police, and that the questioning of the defendant ceased as soon as the defendant asked for a lawyer. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011).

Right to remain silent equivocal thus no suppression. — Trial court did not err in finding the defendant's statements to a police officer admissible because the defendant's invocation of the defendant's right to remain silent, if any, was equivocal since that statement conflicted with the defendant's immediately preceding verbal indication that the defendant was willing to speak with the detective; thus, the officer had no obligation to stop questioning the defendant, and the officer's attempt to clarify whether the defendant wished to speak with the officer was not improper. Law v. State, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

Superior court did not err in denying the defendant's motion to suppress statements the defendant made to law enforcement officers because the defendant's initial statement to a detective was non-custodial, unsolicited and was supported by the record and, therefore, the defendant's capacity to understand the substance of the defendant's rights under Miranda in regard to the first statement was irrelevant; the defendant's initial patrol car statement that the victim's death was an accident was made while the defendant was not in custody, and the defendant's statement was not given in response to any questioning by the detective. Barrett v. State, 289 Ga. 197, 709 S.E.2d 816 (2011).

Conversation voluntarily started with officer thus no suppression. — Trial court did not err in denying the

Applicability (Cont'd)
4. Statements and Testimony (Cont'd)

defendant's motion to suppress a statement the defendant made in response to an officer's interrogation regarding the ownership of a vehicle because the trial court's determination that the defendant's statements were not solicited and, therefore, were not protected under Miranda were not clearly erroneous since the trial court's findings of fact were supported by the testimony of the officer; the defendant voluntarily started a conversation with the officer by admitting that the defendant was not who the defendant previously stated the defendant was, and the defendant stated that the defendant did not know whose vehicle it was but that the defendant gave somebody drugs so that the defendant could use the car. Bone v. State, 311 Ga. App. 390, 715 S.E.2d 789 (2011).

Trial court did not err in denying the defendant's motion to exclude the defendant's out-of-court statement to a detective because the record supported the ruling that the detective reasonably suspected that the defendant was or had been engaged in criminal activity, and the defendant was not under arrest; the detective not only witnessed the defendant engage in a drug transaction, but on the morning of the stop, the defendant obtained a written statement from another party to the transaction confirming the defendant's involvement. The detective also recognized the defendant and the defendant's vehicle from the scene. Arnett v. State, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Trial court did not err in admitting into evidence statements the defendant made in an interview with a television correspondent because the defendant was not in custody for Miranda purposes when the statements were made; the correspondent was not an agent of the state, and a reasonable person in the defendant's position would have believed that he or she was free to terminate the interview and leave. Anguiano v. State, 313 Ga. App. 449, 721 S.E.2d 652 (2011).

Immigrant's statement not suppressed. — Trial court did not err in refusing to suppress the in-custody statements the defendant, who was a Lithuanian immigrant, made to the police because during the interrogation, officers answered the defendant's questions, and the defendant told the officers that the defendant understood what was being said; at no time did the defendant invoke the right to silence or right to counsel. Milinavicius v. State, 290 Ga. 374, 721 S.E.2d 843 (2012).

Even assuming that the trial court erred by admitting the statements the defendant made to the police at a hospital as not tainted by a Miranda violation, the error was harmless in light of the fact that the police statements were cumulative of other unchallenged confessions by the defendant; the defendant repeatedly identified oneself at the scene as the sole perpetrator. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Court of appeals did not err in reversing an order granting the defendant's motion to suppress the defendant's confession under former O.C.G.A. § 24-3-50 (see O.C.G.A. § 24-8-824) because police officers did not induce the defendant's confession with a "hope of benefit" within the meaning of former § 24-3-50; the defendant could not have reasonably understood the officers' statements to mean that the defendant would never be charged or arrested for the defendant's crimes, and even if the defendant's confession was induced by the defendant's hope that the officers would, as promised, let the defendant go home after the interview, it was not per se inadmissible under former § 24-3-50. Brown v. State, 290 Ga. 865, 725 S.E.2d 320 (2012).

Trial court did not err by denying the defendant's motion to suppress the defendant's statement because the information the codefendant provided to the police was corroborated by the facts and circumstances that police officers had independently gathered from the scene of the victim's shooting; as the result of the codefendant's confession, the officers had reasonably trustworthy information to conclude that the defendant was involved in the victim's murder. Alatise v. State,

291 Ga. 428, 728 S.E.2d 592 (2012).

Defendant's statement should not have been suppressed. — Trial court erroneously suppressed the statements given by the defendant to law enforcement because given the totality of the circumstances apparent from the record, the defendant voluntarily waived the defendant's Miranda rights. The defendant: (1) spoke clearly; (2) did not appear to be under the influence of alcohol or drugs; (3) appeared to understand what was read; (4) was not threatened or coerced in any way; (5) appeared very calm; (6) was not promised anything by police in exchange for the defendant's cooperation; (7) did not appear to have any mental issues; (8) had only been detained for approximately 20 minutes before the defendant was Mirandized; and (9) asked the investigator to come back to speak with the defendant after a brief interruption in the interview. The mere fact that there was no written Miranda waiver or electronic recording of the interview did not render the waiver involuntary. State v. Hardy, 281 Ga. App. 365, 636 S.E.2d 36 (2006).

Trial court properly suppressed those statements made by the defendant in violation of Miranda, and after the defendant invoked the right to counsel, as mere act of allowing the defendant to meet with an attorney did not permit law enforcement to re-initiate any conversation with the defendant at a later time without defense counsel present. State v. Sammons, 283 Ga. 364, 659 S.E.2d 598 (2008).

Trial court erred in suppressing statements the defendant made during an interview with detectives after the defendant invoked the defendant's right to counsel because the defendant's admissions were not elicited by interrogation, much less coerced, and were admissible at trial since the defendant repeatedly initiated conversation and interrupted the detectives to discuss various topics, including the defendant's concern for the victim and the defendant's account of what had happened at the crime scene, and at no point in the interview did the detectives expressly question the defendant about the crimes, even after the defendant invited such discussion by beginning to talk about the crimes; although the detectives remained in the room with the defendant for a few minutes after the defendant invoked the defendant's right to counsel, the record of the interview unequivocally showed that the detectives did not engage in any coercive conduct by doing so, and once the detectives took the defendant into custody, the detectives were not obliged to stop listening to what the defendant chose to say or to immediately leave the room so that the detectives could not hear the defendant. State v. Brown, 287 Ga. 473, 697 S.E.2d 192 (2010).

Trial court erred in granting the defendant's motion to suppress a confession because the investigators' statements that the defendant would go home after the interview did not offer the defendant a "hope of benefit" that would otherwise render the defendant's confession inadmissible, and even if the complained-of statements did constitute an improper "hope of benefit," the investigators did not actually induce the defendant's confession; the investigators' statement that the defendant would not be arrested on the spot was collateral and not the type of "hope of benefit" contemplated by former O.C.G.A. § 24-3-50 (see O.C.G.A. § 24-8-824). State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63 (2011), aff'd, 290 Ga. 865, 725 S.E.2d 320 (2012).

Defendant's statement should have been suppressed. — Trial court erred by denying the defendant's motion to suppress the defendant's statement to police that the defendant was in the victim's subdivision on the night of the murder because the defendant unambiguously requested the presence of the defendant's lawyer, and any questioning should have stopped immediately; any ambiguity was created solely by the investigator's subsequent questioning. Manley v. State, 287 Ga. 338, 698 S.E.2d 301 (2010).

Defendant's admission that the defendant sold vacuum cleaners that had been stolen from a daycare center should have been suppressed because after producing drug paraphernalia, admitting to owning the paraphernalia, and admitting to recently buying and using drugs, a reasonable person would certainly perceive himself or herself to be in police custody, and the officer's questioning was clearly aimed

Applicability (Cont'd)
4. Statements and Testimony (Cont'd)

at establishing the defendant's guilt; there was a reasonable possibility that the improperly admitted evidence contributed to the jury's verdict because there was testimony that the daycare center was located in a neighborhood subject to high crime and drug activity, and the witnesses gave inconsistent descriptions about the color of the vacuum cleaners and the suspect's clothing. Thompson v. State, 313 Ga. App. 844, 723 S.E.2d 85 (2012).

Defendant's statement suppressed when defendant did not understand rights. — Trial court did not err in granting the defendant's motion to suppress a statement the defendant gave to the police following the defendant's arrest because the trial court could have accepted the defendant's testimony from the hearing on the motion to suppress that the defendant did not understand the defendant's rights or any waiver of those rights when at least some evidence existed to support the finding that the defendant's signature on a waiver of rights form did not indicate that the defendant understood the defendant's rights and wished to waive those rights; the trial court could have concluded that the defendant signed the form at a detective's direction because the detective made no effort to ascertain whether the defendant understood the defendant's rights and did not testify that the detective believed the defendant understood the rights, when the defendant asked whether the form represented the charges against the defendant the detective responded that the document merely stated that the defendant was a suspect and that the defendant needed to sign the document so the defendant could clear things up, and at no time did the conversation cease, allowing the defendant a clear opportunity to read the form. State v. Floyd, 306 Ga. App. 402, 702 S.E.2d 467 (2010).

Uncontradicted witness statement can still be rejected. — Trial court's order granting the defendant's motion to suppress was affirmed as the trial court did not believe the uncontradicted testimony that an officer had a good faith, reasonable, articulable suspicion that the defendant had made an illegal U-turn; the trial court was not required to believe a witness, even if the testimony was uncontradicted, and could accept or reject any portion of the testimony. State v. Hester, 268 Ga. App. 501, 602 S.E.2d 271 (2004).

Objection that statements stem from illegal arrest must come during trial. — When a motion to suppress avers that the statements were secured by police officers as a result of an illegal arrest and detention, not as a result of an unlawful search and seizure, such statements should have been made the basis of objections at the trial and not the basis of a pretrial motion to suppress under Ga. L. 1966, p. 567, § 13. Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971).

Illegally seized property and testimony tested by different procedures. — Admissibility of property seized in an unlawful search and the admissibility of testimony are tested by different rules and procedures. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973), criticized, Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Non-custodial spontaneous statement held admissible. — Trial court did not err in admitting a spontaneous remark the defendant made to a police officer in serving an arrest warrant for the crime charged as the remark was admissible as a non-custodial statement which was not obtained as the result of police interrogation. Bettis v. State, 285 Ga. App. 643, 647 S.E.2d 340 (2007), cert. denied, No. S07C1535, 2007 Ga. LEXIS 862 (Ga. 2007).

Testimony challenged at trial. — When testimony is tendered relative to the property seized, the testimony's admissibility is not tested by a motion under Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30), but by a proper objection made when the evidence is tendered at the trial. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973), criticized, Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

When testimony is tendered relative to the property seized, the testimony's admissibility is not tested by a motion under Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30), but by a proper objection made when the testimony is tendered at the

trial. If an order has been granted, the order affords a basis or ground for making the objection to the testimony. If the motion was denied, an objection may nevertheless be lodged on the ground that the testimony relates to property which was illegally seized during an unlawful search, and if the objection is overruled, the ruling may become a proper subject of an enumeration of error on appeal. Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Conflicts in testimony. — Trial judge, as the finder of fact on the motion to suppress, is authorized to resolve conflicts in testimony. Brooks v. State, 129 Ga. App. 393, 199 S.E.2d 578 (1973).

Suppression of statements impacted by timing of Miranda warnings. — Defendants' motions to suppress were granted and denied in part as it was error to exclude a statement the defendant made while not in custody; however, delayed Miranda warnings cannot be considered to be effective under Missouri v. Seibert, 542 U.S. 600 (2004), and the trial court did not err in suppressing the defendants' oral and written statements made after the detectives administered Miranda warnings. State v. Pye, 282 Ga. 796, 653 S.E.2d 450 (2007), overruled on other grounds by State v. Abbott, 303 Ga. 297, 812 S.E.2d 255 (2018).

Because a defendant's motion to suppress specifically requested the suppression of all statements made by the defendant's codefendants as products of defendant's illegally-obtained confession, the state could not now complain that the state did not receive reasonable notice that the defendant intended to seek suppression of their live testimony at trial. Stidham v. State, 299 Ga. App. 858, 683 S.E.2d 906 (2009).

5. Vehicles

A. In General

Radar speed detection devices. — Admissibility of evidence gained by use of radar speed detection device properly may be raised by a motion in limine although the motion may be styled as, or in the form of, a motion to suppress, and the trial court has discretion to hear the motion pretrial or to reserve the ruling on the admissibility of such evidence until it is offered as evidence during trial. Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982). See also Carver v. State, 199 Ga. App. 842, 406 S.E.2d 236 (1991) (holding that the fifth element for admissibility stated in Wiggins no longer applies to state enforcement officers).

Roadblocks. — Trial court erred in denying the defendant's motion to suppress in a case in which the defendant was subsequently convicted of three offenses based on evidence that was obtained at a roadblock that a police officer working in the field authorized; the trial court should have granted the motion because supervisory personnel, and not an officer in the field, were required to approve roadblocks given the fact that a roadblock involved a warrantless stop of a vehicle. Thomas v. State, 277 Ga. App. 88, 625 S.E.2d 455 (2005).

Trial court properly denied a motion to suppress evidence seized from a roadblock as the roadblock's primary purpose was to check for drivers' licenses, seat belts, and vehicle registrations, and not general law enforcement. Cater v. State, 280 Ga. App. 891, 635 S.E.2d 246 (2006).

Trial court did not err in denying the defendant's suppression motion as the arresting officer was authorized to conclude that in turning off a roadway to evade a roadblock, the defendant committed a possibly illegal backing maneuver, upon which the officer was permitted to investigate; moreover, the officer's honest belief that a traffic violation was committed, even if ultimately proven incorrect, could nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for a traffic stop. Terry v. State, 283 Ga. App. 158, 640 S.E.2d 724 (2007).

Trial court did not err in denying the defendant's motion to suppress on grounds that a roadblock was unlawful as the state presented sufficient evidence that the checkpoint was set up for a legitimate purpose and the decision to implement the roadblock was made by law enforcement supervisory personnel. Wright v. State, 283 Ga. App. 393, 641 S.E.2d 605 (2007).

Applicability (Cont'd)
5. Vehicles (Cont'd)
A. In General (Cont'd)

Because a form document, entitled the "Henry County Police Department Roadblock & Safety Checkpoint Record," introduced at a motion to suppress hearing by the state was properly admitted as a business record under former O.C.G.A. § 24-3-14 (see O.C.G.A. § 24-8-803), and the testimonial evidence regarding the primary purpose of the roadblock passed constitutional muster in that the roadblock was legitimately conducted as part of a statewide "zero tolerance" campaign, the defendant's motion to suppress the evidence seized as a result was properly denied. Yingst v. State, 287 Ga. App. 43, 650 S.E.2d 746 (2007).

Trial court properly denied a defendant's motion to suppress the evidence obtained from a police roadblock with regard to the defendant's conviction for driving under the influence as the trial court properly determined that the roadblock was conducted for a legitimate primary purpose, namely to check for valid licenses, insurance, impaired drivers, and safety concerns, which were consistent with the purposes set forth in the initiation form. Further, a variance in the location of the roadblock to an intersection of a street instead of on the actual street was insignificant and did not invalidate the roadblock. Coursey v. State, 295 Ga. App. 476, 672 S.E.2d 456 (2009).

Denial of the defendant's motion to suppress was supported by the evidence as a roadblock was proper. All vehicles were stopped at the roadblock and were delayed only one to two minutes unless a violation was noted. The evidence was sufficient to show that the defendant was stopped 17 minutes after the roadblock began. McGlon v. State, 296 Ga. App. 77, 673 S.E.2d 513 (2009), cert. denied, No. S09C0996, 2009 Ga. LEXIS 359 (Ga. 2009).

Trial court did not err in denying the defendant's motion to suppress evidence obtained during a roadblock because the evidence was sufficient to show that the decision to implement the roadblock was made by a supervisory officer, which prevented the field officers from exercising unfettered discretion in stopping the drivers since the lieutenant and corporal who implemented the roadblock testified that they were supervisors in the traffic unit of the county sheriff's office; the trial court was authorized to find that the purposes of the roadblock, which were to serve as a traffic safety checkpoint and to check driver's licenses and to identify drivers driving under the influence, were as stated by the lieutenant and corporal, and each of the identified purposes set forth in the order for the roadblock was a legitimate primary purpose. Rappley v. State, 306 Ga. App. 531, 702 S.E.2d 763 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence obtained at a roadblock because given the evidence presented, the trial court was authorized to conclude that the sergeant issued the order for the roadblock properly and initiated, authorized, and supervised the roadblock and that the sergeant's decision to implement the roadblock was made at the programmatic level for a legitimate primary purpose; the evidence supported the trial court's findings of fact that the information on the roadblock approval form, which stated the reasons for the roadblock, did not conflict with any evidence presented as to when the roadblock was to be conducted or by whom the roadblock was authorized. Owens v. State, 308 Ga. App. 374, 707 S.E.2d 584 (2011), cert. denied, No. S11C1036, 2011 Ga. LEXIS 498 (Ga. 2011).

Trial court did not err in denying the defendant's motion to suppress evidence seized at a roadblock because the state met the state's burden of establishing the legitimate purpose of the roadblock by introducing a certified copy of a department of public safety roadblock approval form; the programmatic purposes set out in the roadblock form were supported by the other evidence at the suppression hearing, and the police officers' actions at the scene were in line with those purposes. Hite v. State, 315 Ga. App. 221, 726 S.E.2d 704 (2012), cert. denied, No. S12C1286, 2012 Ga. LEXIS 1020 (Ga. 2012).

Police checkpoint for traffic. — While the defendant claimed the trial

court should have granted the defendant's motion to suppress evidence on the ground that a police checkpoint was established for the illegal purpose of looking for evidence of burglaries or thefts, the unrefuted evidence established that the officers were authorized to stop the defendant when the officers witnessed the defendant commit traffic offenses by driving in the wrong lane at an excessive rate of speed; the trial court did not err in denying the defendant's motion to suppress. Yarbrough v. State, 264 Ga. App. 848, 592 S.E.2d 681 (2003).

Search incident to arrest. — Search of a vehicle was authorized as a search incident to a lawful arrest as the officers reasonably believed that the vehicle possibly contained evidence of the crime under investigation, in that the officers saw the defendant and another individual, for whom the officers had an arrest warrant, driving in a vehicle similar to one seen leaving a crime scene, and the officers saw clothing on the backseat matching the description of the clothing worn by the two gunmen at the time of the crime. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Improper expansion of scope of traffic investigation justified suppression. — Police officers impermissibly expanded the traffic stop without reasonable, articulable suspicion, resulting in an illegal detention of both the driver of the vehicle and the passenger and the defendant's consent to search the vehicle was the product of this illegal detention; thus, the evidence obtained as a result of the illegal search was rightfully suppressed. Specifically, the police officer requested permission to search the car "before you guys take off" after returning the defendant's license and giving a warning, but while continuing to detain and question the defendants; thus, it was doubtful that any reasonable person in these circumstances would have felt free to disregard the police officer and go. State v. Conner, 288 Ga. App. 517, 654 S.E.2d 461 (2007).

Suppression of evidence after violation of § 40-5-33. — Violation of O.C.G.A. § 40-5-33 did not justify the defendant's continued detention by the police and the officer's decision to detain the defendant while the officer waited for another officer to bring a written warning book was unreasonable; thus, under the totality of the circumstances, the officer did not have specific, articulable facts that could constitute a particularized and objective basis for suspecting that the defendant was involved in any criminal activity thereby making the search unreasonable under the Fourth Amendment and requiring suppression of the evidence seized from the vehicle. Bennett v. State, 285 Ga. App. 796, 648 S.E.2d 126 (2007).

B. Driving Under the Influence

Consent to test. — Trial court erred in denying the defendant's motion to suppress the results of a state-administered breath test given after the defendant initially refused to take such a test as there was no evidence that the defendant was asked a second time whether the defendant would consent to the test or that the defendant rescinded the defendant's refusal and thereafter consented. Howell v. State, 266 Ga. App. 480, 597 S.E.2d 546 (2004).

Trial court was not required to suppress evidence of the defendant's breath test results, although the defendant refused to take a breath test when asked at the scene, the defendant rescinded that refusal by agreeing to take the test at the police station. Stapleton v. State, 279 Ga. App. 296, 630 S.E.2d 769 (2006).

Trial court erred in suppressing the defendant's refusal to submit to a state-administered chemical breath test as the implied consent notice given by a sheriff's deputy was substantially accurate and timely given, and irrespective of whether the refusal resulted from the defendant's confusion, it nevertheless remained a refusal. State v. Brookbank, 283 Ga. App. 814, 642 S.E.2d 885 (2007).

Because the defendant: (1) was not in custody for the purposes of Miranda when asked to perform field sobriety tests; (2) did not make any statement or take any overt act which would have caused a reasonable person to believe that the encounter was anything more than a temporary detention; and (3) voluntarily submitted to field sobriety tests, suppression of the results of the tests was properly denied.

Applicability (Cont'd)
5. Vehicles (Cont'd)
B. Driving Under the Influence (Cont'd)

McDevitt v. State, 286 Ga. App. 120, 648 S.E.2d 481 (2007), overruled on other grounds by State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

Admission of drunkenness. — Despite the defendant's claim that an officer's detention was illegal and that any statement uttered while detained should have been suppressed, suppression of the statement was properly denied given that: (1) the officer encountered the defendant after responding to a 9-1-1 call reporting a crime at a specific location; and (2) the officer's personal observations, when coupled with the defendant's admission as to being drunk and driving a car onto the curb, as the 9-1-1 dispatcher stated, supplied the officer with probable cause to arrest the defendant. Moore v. State, 281 Ga. App. 141, 635 S.E.2d 408 (2006).

Implied consent warning. — Trial court did not have to find that the officer read the implied consent warning before arresting the defendant in order to grant the motion to suppress as the court's grant of the motion was adequately supported by the state's failure to meet the state's burden of proving that the implied consent warning was read after the arrest. The state failed to meet the burden because the trial court found the officer's testimony lacked credibility and there was no other evidence showing that the warning was given after the defendant's arrest. State v. Stelzenmuller, 285 Ga. App. 348, 646 S.E.2d 316 (2007).

Trial court did not err in denying the defendant's motion to suppress the results of a blood test as the notice given to the defendant by a state trooper under the implied consent law, O.C.G.A. § 40-5-67.1(a), was sufficiently accurate to permit the defendant to make an informed decision about whether to consent to testing, and the evidence failed to show that the defendant requested an independent test. Collins v. State, 290 Ga. App. 418, 659 S.E.2d 818 (2008).

Trial court did not err in denying the defendant's motion to suppress and motion in limine to exclude the defendant's field sobriety test results because the implied consent warning was timely given; a HEAT Unit officer gave the defendant the warning immediately after the defendant's arrest. Waters v. State, 306 Ga. App. 114, 701 S.E.2d 550 (2010).

Probable cause to believe defendant less safe driver. — Denial of the defendant's motion to suppress was not error because the police officer who pulled the defendant over had probable cause to believe that the defendant was a less safe driver because defendant was all over the road, smelled of alcohol, and threw up all over and the officer could have arrested the defendant under O.C.G.A. § 40-6-391, rather than wait for a DUI officer. Abrahamson v. State, 276 Ga. App. 584, 623 S.E.2d 764 (2005).

Sufficient evidence existed for the arresting officer to believe that the defendant was under the influence of alcohol, specifically: the defendant's erratic driving; detecting the odor of alcohol on the defendant's breath; observing that the defendant was very emotional, had been crying, and had a flushed face and watery eyes; and that the defendant admitted to consuming alcohol. The trial court properly denied suppression of the evidence. Slayton v. State, 281 Ga. App. 650, 637 S.E.2d 67 (2006).

Trial court did not err in denying the defendant's motion to suppress evidence seized by a state trooper who was lawfully investigating a serious injury accident the defendant was involved in as evidence the trooper found, including some steel wool and prescription drugs, when coupled with other information the trooper possessed concerning the nature and cause of the crash, provided sufficient probable cause for the trooper to believe that the defendant was driving under the influence; further, the appeals court agreed that the evidence would have been inevitably discovered. Cunningham v. State, 284 Ga. App. 739, 644 S.E.2d 878 (2007).

Because a sheriff's deputy lawfully stopped the defendant for twice crossing the center line in violation of O.C.G.A. § 40-6-48(1) and given: (1) the deputy sheriff's specialized DUI training; and (2) the defendant's admission of ingesting al-

cohol, failure to maintain lane, bloodshot eyes, performances on several field sobriety tests, and strong odor of alcohol, the evidence seized in connection with the stop was admissible; moreover, the defendant's claim that the state failed to establish a violation of § 40-6-48(1) and the defendant's eventual acquittal of failure to maintain a lane were not determinative of whether the traffic stop was lawful. Steinberg v. State, 286 Ga. App. 417, 650 S.E.2d 268 (2007), cert. denied, No. S07C1725, 2008 Ga. LEXIS 113 (Ga. 2008).

Defendant's claim that the trial court erred in denying a motion to suppress because an officer lacked probable cause to arrest the defendant failed. Given the defendant's conduct while driving, coupled with the defendant's physical condition at the scene, including stumbling, slurred speech, confusion, and difficulty balancing, the officer had probable cause to arrest the defendant for driving under the influence. Castaneda v. State, 292 Ga. App. 390, 664 S.E.2d 803 (2008).

No probable cause for DUI arrest. — Although the defendant had glassy and watery eyes, smelled of alcohol, and admitted to drinking a glass of wine, other testimony supported an inference that the defendant was not an impaired driver; accordingly, the defendant's motion to suppress was properly granted based on a finding that there was no probable cause to arrest the defendant for violating O.C.G.A. § 40-6-391(a)(1). State v. Goode, 298 Ga. App. 749, 681 S.E.2d 199 (2009), disapproved, Hughes v. State, 296 Ga. 744, 770 S.E.2d 636 (2015).

Officer's observation of defendant's intoxicated state. — Trial court properly refused to suppress evidence based on the defendant's initial encounter as a deputy initiated a first-level police-citizen encounter, not a seizure, when the deputy approached the defendant's stopped car and asked the defendant to get out; it was only after the deputy smelled alcohol on the defendant and noticed the defendant's bloodshot eyes that the officer acted upon a reasonable suspicion that the defendant might be intoxicated. Johnson v. State, 268 Ga. App. 426, 602 S.E.2d 177 (2004).

Statements made by defendant during initial encounter. — Because a reasonable person in the defendant's position would not have believed any freedom of action had been more than temporarily curtailed by an officer's investigation for a possible DUI, and the defendant was not in custody or arrested until after the field sobriety tests were performed, at which point the officer had probable cause for the arrest and read the implied consent rights, the trial court did not err in denying suppression of the defendant's statement made to the officer or the field sobriety evaluations. Amin v. State, 283 Ga. App. 830, 643 S.E.2d 4 (2007).

Test of defendant's choice. — Denial of the defendant's motion to suppress for failure to give the defendant a reasonable opportunity to have an additional breath test performed by a person of the defendant's own choosing pursuant to O.C.G.A. § 40-6-392(a)(3) was not error; complying with the defendant's request would have taken a trooper away from an accident with injuries that required the trooper's presence, the location requested by the defendant was over 40 miles away and outside the trooper's territory, and there was no evidence that defendant had made arrangements for a test by defendant's personal physician. Smith v. State, 277 Ga. App. 81, 625 S.E.2d 497 (2005).

Because the trial court found that the arresting officer made a reasonable effort to accommodate the defendant's request for an independent blood test pursuant to O.C.G.A. § 40-6-392(a)(3), the court did not err in denying the defendant's motion to suppress the test. Whittle v. State, 282 Ga. App. 64, 637 S.E.2d 800 (2006).

Because the arresting officer failed to make a reasonable effort to accommodate the defendant's request to obtain an independent blood test in accordance with O.C.G.A. § 40-6-392(a)(3), but instead rebuffed every suggestion the defendant made in order to secure the independent test, and, despite security risks, accommodations could have been made, the trial court did not err in granting the defendant's motion in limine to suppress the results of the state-administered breath test. State v. Howard, 283 Ga. App. 234, 641 S.E.2d 225 (2007).

Trial court did not err in granting the defendant's motion to suppress evidence

Applicability (Cont'd)
5. Vehicles (Cont'd)
B. Driving Under the Influence (Cont'd)

of a state-administered breath test because the state failed to reasonably accommodate the defendant's request for an independent blood test; when an officer learned that the defendant did not have sufficient cash for a blood test at one of the recommended hospitals the defendant should have been offered the opportunity to use a telephone to make other arrangements, and the officer's unilateral determination that the defendant would be unable to pay for the blood test, without confirming the hospitals' policies regarding payment and without offering to accommodate the defendant in obtaining a method of payment, was insufficient. State v. Davis, 309 Ga. App. 558, 711 S.E.2d 76 (2011).

Breath test results properly admitted. — Trial court did not err in denying the defendant's motion in limine to suppress the results of a state-administered breath test as an officer's implied consent warning was substantively accurate so as to allow the defendant to make an informed decision about whether to consent to the test, and solely referred to the defendant's privilege to drive within the State of Georgia with a Georgia driver's license, and not the defendant's Pennsylvania license; further, the officer's initial statement was nothing more than an attention-grabbing preface, and as such did not constitute a substantive change that altered the meaning of the implied consent notice thereafter recited to the defendant. McHugh v. State, 285 Ga. App. 131, 645 S.E.2d 619 (2007).

Because the evidence sufficiently showed that the defendant asked for a blood test in response to the officer's request to submit to the state-administered breath test, clearly attempting to designate the state-administered test, not request an independent test, and the defendant understood that the type of test that would be done was solely of the state's choosing, the trial court properly denied a motion to suppress the breath test results obtained. Brooks v. State, 285 Ga. App. 624, 647 S.E.2d 328 (2007).

Defendant's motion in limine claiming that an intoxilyzer's seizure of the defendant's breath samples was unlawful because the intoxilyzer's electronic components and operating parts were not properly attached and in good working order as required by O.C.G.A. § 40-6-392 was subject to the requirements of O.C.G.A. § 17-5-30, relating to motions to suppress. State v. Carter, 292 Ga. App. 322, 665 S.E.2d 14 (2008).

Fact that a defendant did not have sufficient breath to complete the second of two breath tests did not require suppression of the first test, which indicated a blood alcohol level of .146. Thrasher v. State, 292 Ga. App. 566, 666 S.E.2d 28 (2008).

Trial court did not err in admitting the results of the defendant's portable alco-sensor test because even though the defendant was in custody for purposes of Miranda, the portable test was administered in response to a demand from the defendant, not the officer; thus, the situation was more akin to a spontaneous outburst from an unwarned suspect or a test conducted pursuant to the Georgia Implied Consent Statute, O.C.G.A. § 40-6-392. Hale v. State, 310 Ga. App. 363, 714 S.E.2d 19 (2011), overruled on other grounds by State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

Defendant's speeding, bloodshot eyes, and the odor of alcohol coming from the car gave the officer reasonable and articulable suspicion to detain the defendant for the purpose of administering the horizontal gaze nystagmus test, which the defendant failed, giving the officer probable cause to arrest the defendant and supporting the denial of the defendant's motion to suppress. Harkleroad v. State, 317 Ga. App. 509, 732 S.E.2d 278 (2012).

Court erred in suppressing results of state-administered breath tests. — Trial court erred in granting the defendant's motions in limine to suppress the results of the state's breath tests as the police officer who arrested defendant properly read to defendant the implied consent rights; the trial court erred because the court found that the defendant was not read those rights at the scene of the arrest, but the defendant was arrested

in a local park for criminal trespass, not DUI, and the defendant was read the implied consent rights after the defendant was taken to a detention center and arrested there for DUI. State v. Jones, 261 Ga. App. 357, 583 S.E.2d 139 (2003).

Because the defendant was informed of the Miranda rights in a timely manner and the procedure employed to gain the defendant's consent was fair and reasonable, the trial court erred in suppressing the results of the state-administered breath test. State v. Allen, 272 Ga. App. 169, 612 S.E.2d 11 (2005).

Intoxilyzer results improperly excluded when inspection certificate available. — Intoxilyzer test results were improperly excluded under O.C.G.A. § 40-6-392 since the state produced a properly prepared and executed certificate of inspection certifying that the electronic components and operating parts of the device were properly attached and in good working order. Any failure of the device to have pass an operational requirement by registering a 0.074 reading in the device's analysis of the control solution during the difference check went to the weight, not the admissibility, of the test results. State v. Carter, 292 Ga. App. 322, 665 S.E.2d 14 (2008).

Court should have excluded breath test. — Trial court erred in not suppressing the results of the state-administered breath test that the defendant gave after the defendant was arrested for driving under the influence of alcohol; the defendant exercised the defendant's right to also request that an additional test be performed by asking that the defendant be given an independent urine test, and since that right was not honored, the state-administered breath test was not admissible to support the defendant's conviction. Johnson v. State, 261 Ga. App. 633, 583 S.E.2d 489 (2003).

Sequential breath tests admissible despite intervening failed test. — Because an intervening failed breath test, due to the defendant's inability to provide an adequate sample, did not render otherwise valid breath alcohol test results inadmissible, and given that the fact of an intervening failed breath test went to the weight, not the admissibility, of the test results, suppression of the results was properly denied; moreover, the appeals court declined to hold that the word "sequential" also meant without any gaps in the procedure due to the test taker's inability to give an adequate breath sample. Davis v. State, 286 Ga. App. 443, 649 S.E.2d 568 (2007).

Printout of sequential breath tests. — Trial court erred, in effect, granting part of the defendant's motion to suppress by ruling that a printout related to the defendant's sequential breath tests had to be redacted to reflect the results of the first, lower test only, as O.C.G.A. § 40-6-392(a)(1)(B) contemplated the admission of both sequential tests results even though the lower of the two results was determinative for certain purposes. State v. Kruzel, 261 Ga. App. 90, 581 S.E.2d 711 (2003).

Blood test results improperly admitted. — Trial court erred in denying the defendant's motion to suppress the results of a blood test as the defendant was erroneously advised by a police officer that the implied consent statute was applicable due to the seriousness of the injuries sustained in the accident; although the officer's statement was correct at the time of the accident, the Georgia Supreme Court has since then ruled that O.C.G.A. § 40-5-55(a) was unconstitutional, and since the defendant had not been arrested for a violation of O.C.G.A. § 40-6-391 at the time the consent to the blood test was given. Buchanan v. State, 264 Ga. App. 148, 589 S.E.2d 876 (2003).

Trial court erred in granting the defendant's motion to suppress results from a blood test performed prior to any arrest as: (1) the evidence showed that the defendant was involved in a car wreck resulting in serious injury before blood was drawn; and (2) a sheriff's deputy had probable cause to suspect that the defendant had been driving under the influence of alcohol; moreover, contrary to the defendant's assertion, the fact that a loss of consciousness was temporary did not cause the blood test to fall outside the ambit of O.C.G.A. § 40-5-55(c). State v. Umbach, 284 Ga. App. 240, 643 S.E.2d 758 (2007).

Suppression of blood test not required. — In a prosecution for DUI, the

Applicability (Cont'd)
5. Vehicles (Cont'd)
B. Driving Under the Influence (Cont'd)

trial court did not err in denying the defendant's motion to suppress the blood test evidence as the trial court properly allowed the discovery of notes, memoranda, graphs, or computer printouts pertaining to the blood sample taken, as well as all chain of custody documentation, because such items were the only items deemed relevant to the prosecution; suppression of the blood test results was not required as the defendant waived error on appeal as to the absence of one of the two lab testers. Cottrell v. State, 287 Ga. App. 89, 651 S.E.2d 444 (2007), cert. denied, No. S07C1894, 2007 Ga. LEXIS 816 (Ga. 2007).

Trial court did not err in denying the defendant's motion to suppress the results of a blood-alcohol-content test that was obtained via the seizure of the defendant's blood samples and pursuant to a search warrant because the warrant was narrowly drafted to seek only the blood samples and medical records from the hospital where the defendant was treated on the night of the accident; even if the warrant could be construed as authorizing a broader seizure of all of the defendant's medical records instead of only those relevant to the defendant's treatment related to the accident, the defendant failed to show that any such broader seizure occurred and, thus, failed to show any harm. Jones v. State, 313 Ga. App. 590, 722 S.E.2d 202 (2012).

Chemical test results. — Order denying suppression of chemical test results admitted against a defendant was proper under the implied consent statute, O.C.G.A. § 40-5-55. The test was requested based on sufficient probable cause and valid consent was given. A formal arrest of the defendant prior to reading the implied consent rights was not required. Hannah v. State, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

Trial court properly granted the defendant's motion to suppress the results of a chemical test of blood based on the undue delay between the arrest, after a traffic stop, and the reading of the implied consent warnings as: (1) the state trooper was presented with numerous opportunities to issue the warnings to the defendant, but did not; and (2) the trial court rejected the trooper's rationale for not reading the defendant the implied consent warnings at any other earlier opportunity, implicitly determining that the trooper's testimony was not credible. State v. Austell, 285 Ga. App. 18, 645 S.E.2d 550 (2007).

Trial court did not err in denying the defendant's motion to suppress and motion in limine to exclude the defendant's field sobriety test results because the officers who stopped the defendant's vehicle were not required to advise the defendant of the defendant's Miranda rights prior to the field sobriety testing since although the defendant was not free to leave, the defendant was not handcuffed or placed in the patrol car during the investigation, and in addition to informing the defendant of the reason for the stop, the officers told the defendant that the officers had to wait for a HEAT Unit officer to determine whether the defendant was too impaired to safely operate the defendant's vehicle; based upon the circumstances, the trial court was authorized to find that a reasonable person would believe that the defendant's freedom of action was only temporarily curtailed pending further investigation during the traffic stop, and the delay of approximately twenty-five minutes between the initial stop and the HEAT Unit officer's arrival at the scene did not automatically convert the investigation into a custodial situation. Waters v. State, 306 Ga. App. 114, 701 S.E.2d 550 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence of the results of field sobriety tests on the ground that the tests were administered without the defendant having the benefit of a Miranda warning because the defendant was not in custody until after the field sobriety tests were complete; the defendant was allowed to walk around and was not put into handcuffs or a patrol car while the defendant and the first officer awaited the arrival of the second officer, and a reasonable person in the defendant's position could conclude that the

person's freedom of action was only temporarily curtailed and that a final determination of the person's status was simply delayed. DiMauro v. State, 310 Ga. App. 526, 714 S.E.2d 105 (2011).

Chemical test results inadmissible. — Trial court erred in denying the defendant's motion to suppress the defendant's chemical test results that were obtained under the implied consent statute, O.C.G.A. § 40-5-55(a), as the defendant was not arrested after a fatal crash for any offense in violation of O.C.G.A. § 40-6-391 nor was there probable cause to arrest the defendant for any such violation. Costley v. State, 271 Ga. App. 692, 610 S.E.2d 647 (2005).

Error in admitting chemical test results harmless in light of other evidence. — While the appeals court agreed that the trial court erred in denying the defendant's motion to suppress the results of the chemical test of the defendant's blood, the error was harmless as other evidence presented by the state, specifically the defendant's admission to being intoxicated and the testimony of other witnesses describing the witnesses' observations, proved the defendant's intoxication. Harrelson v. State, 287 Ga. App. 664, 653 S.E.2d 98 (2007).

Intoxilyzer 5000 test results. — Trial court did not err in denying suppression of the results of the defendant's Intoxilyzer 5000 and other field sobriety tests administered upon a defendant's arrest for driving under the influence of alcohol in violation of O.C.G.A. § 40-6-391 as: (1) the arguments concerning the officer's ability to manipulate the Intoxilyzer 5000 test went to the weight, and not admissibility of the evidence; (2) the officer was sufficiently trained to administer the tests; (3) the state showed substantial compliance with the required procedures; and (4) no due process violation resulted from the evidence being admitted. Stewart v. State, 280 Ga. App. 366, 634 S.E.2d 141 (2006).

Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because no surprise occurred when the defendant's attorney had already been shown the breath test slip and cross-examined a police officer about the slip at the motion hearing, and the state agreed to provide the defendant a copy; although the better practice would have been to provide the defendant a copy of the slip before the trial date, the record demonstrated that the state provided a copy at the hearing on the pretrial motion. State v. Tan, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because the state was not required to produce the breath test slip to the defendant ten days before trial as a part of discovery since the breath test slip did not constitute a written scientific report within the meaning of O.C.G.A. § 17-16-23; no test or analysis was performed because the sample was insufficient, and the breath test slip did not show any test results but reflected only a measurement of breath volume. State v. Tan, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Results of improperly obtained intoximeter test. — Results of improperly obtained intoximeter test are subject to motion to suppress or, alternatively, subject to objection at time evidence is offered as this is consistent with the mandate of O.C.G.A. § 40-6-392 that the use of such tests in criminal trials shall be subject to the strictest protections, and is also within the parameters of O.C.G.A. § 17-5-30. State v. Johnston, 160 Ga. App. 71, 286 S.E.2d 47 (1981), aff'd, 249 Ga. 413, 291 S.E.2d 543 (1982).

Burden of proof concerning intoximeter test's legality. — State has burden of proving that seizure of appellee's breath resulting in the intoximeter results is in accordance with mandated procedures. State v. Johnston, 160 Ga. App. 71, 286 S.E.2d 47 (1981), aff'd, 249 Ga. 413, 291 S.E.2d 543 (1982).

Although a breath machine was taken out of service after the defendant's test, the state submitted circumstantial evidence in accordance with O.C.G.A. § 40-6-392(f) that the machine was in good working order during the test; therefore, the trial court erred in granting the defendant's motion to suppress. State v. Rackoff, 264 Ga. App. 506, 591 S.E.2d 379 (2003).

Applicability (Cont'd)
5. Vehicles (Cont'd)
B. Driving Under the Influence (Cont'd)

Inappropriate ground for suppressing intoxilyzer results. — In a prosecution for driving under the influence of alcohol, the defendant's motion to suppress intoxilyzer results premised solely on the contention that the defendant was not guilty of the offense of striking a fixed object, which the officer was initially investigating, was not an appropriate ground for the motion. Goddard v. State, 244 Ga. App. 730, 536 S.E.2d 160 (2000).

Failure to raise constitutional issue as to intoximeter results. — Defendant was not entitled to a pretrial hearing pursuant to O.C.G.A. § 17-5-30 since the defendant's motion to suppress intoximeter results did not raise any grounds involving constitutional guarantees against unreasonable search and seizure. Stanley v. State, 195 Ga. App. 706, 394 S.E.2d 785 (1990).

Properly conducted tests admissible. — Trial court did not err in denying a defendant's motion to suppress the results of the defendant's horizontal gaze nystagmus (HGN) field sobriety test and of the Intoxilyzer 5000 breath test as the administrating officer testified to the officer's experience and training as well as the testing and scoring method used regarding the HGN test, and the defendant's constitutional challenges to the admissibility of the Intoxilyzer 5000 breath test results had already been decided in prior case law precedent adversely to the defendant. Laseter v. State, 294 Ga. App. 12, 668 S.E.2d 495 (2008).

Use of HGN test results. — Trial court erred in suppressing the results of the defendant's breathalyzer test because the court failed to consider the horizontal gaze nystagmus test results when deciding whether the officer had probable cause to arrest the defendant. State v. Tousley, 271 Ga. App. 874, 611 S.E.2d 139 (2005).

HGN test results admissible. — Trial court erred in excluding the defendant's horizontal gaze nystagmus (HGN) test results because there was error only with two of six clues and a score of four out of six constituted evidence of impairment, and the state laid a proper foundation by showing that the officer was sufficiently experienced in administering the test and that the officer properly administered and interpreted the test with regard to four of the clues found. State v. Tousley, 271 Ga. App. 874, 611 S.E.2d 139 (2005).

Suppression motion properly denied. — Trial court properly admitted an Intoxilyzer 5000's certificate of inspection as non-testimonial as well as the defendant's breath test results; even if error was presented, it was harmless since the defendant was acquitted of driving under the influence with an unlawful blood alcohol concentration. Moreover, the incident report was properly admitted under the rule of completeness as the trial court was authorized to find that it was necessary for the state to admit all relevant parts of the incident report in evidence to show that the omissions noted by the defendant were not so material as to have effected the accuracy of the report. Phillips v. State, 289 Ga. App. 281, 656 S.E.2d 905 (2008).

C. Searches

Automobile exception to warrant requirement. — Trial court did not err in denying the defendant's motion to suppress items that were found in the trunk of the defendant's car after the defendant was apprehended on suspicion of shoplifting despite the defendant's claim that the defendant did not consent to the search of the car as the trial court weighed the credibility of the testimony and the record supported the trial court's finding that the defendant freely and voluntarily consented to the search; moreover, even if the defendant did not consent to the search, the search was valid under the automobile exception to the warrant requirement, which allows a warrantless search of a vehicle when there is probable cause, because the police had probable cause to search the vehicle in light of information from a store manager who saw the defendant place store items in the defendant's trunk without paying for the items and in light of the defendant's subsequent conduct of shoplifting at another store down the road within 30 minutes of the original

incident. Horne v. State, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Trial court committed no error in denying the defendant's motion to suppress physical evidence officers seized from a pickup truck because the search was authorized under the automobile exception to the warrant requirement when under the totality of the circumstances, the officers had probable cause to believe that the truck contained the illegal crystal methamphetamine that was to form the basis of the drug deal; a narcotics investigator's conversations and interactions with the defendant, combined with the observations of the undercover agents who maintained continuous surveillance of the pickup truck and the movements of the defendant and a codefendant, would have led a reasonable person to believe that the drug contraband was in the truck. Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Trial court erred in granting the defendant's motion to suppress cocaine an officer found in the defendant's car because the defendant's consent, a search warrant, or exigent circumstances were not required in order to render the search constitutional since the search of the car was authorized under the automobile exception, which applied even if the car was not stopped along a highway but was stationary in a place not regularly used for residential purposes; the officer had probable cause to believe that the car contained crack cocaine, and the officer's observation of what the officer suspected, based upon the officer's law enforcement experience, to be crack cocaine would have led a reasonably discrete and prudent person to believe that drug contraband was in the car. State v. Sarden, 305 Ga. App. 587, 699 S.E.2d 880 (2010).

Intensive search of cars. — After a valid stop for following too closely, the deputies' actions throughout the detention were reasonable and motivated by a genuine concern for the protection of others on the interstate that arose from the totality of the rapidly escalating situation confronting the deputies. Montoya v. State, 232 Ga. App. 24, 499 S.E.2d 699 (1998).

Open car door provided plain view. — Because the defendant was already stopped at the side of a road and a police chief, lawfully wanting to question the defendant about the incorrect vehicle tag number that the defendant had given earlier, walked passed an open car door and saw a gun in plain sight, there was no stop and the chief had a right to retrieve the gun; consequently, the trial court did not err by refusing to suppress the evidence of the gun. Eldridge v. State, 270 Ga. App. 84, 606 S.E.2d 95 (2004).

Investigatory stop. — Trial court properly denied the defendant's motion to suppress as the police officer had a sufficient, articulable suspicion necessary to make an investigatory stop of the defendant's vehicle since the police observed during a surveillance that the occupants of the car, including the defendant, were engaged in a number of hand-to-hand transactions in an area known as an open-air drug market. Kates v. State, 271 Ga. App. 326, 609 S.E.2d 710 (2005).

Trial court erred by granting the defendant's motion to suppress the evidence of a DUI violation obtained during the traffic stop of the defendant's vehicle by committing clear error in finding that the officer lacked a reasonable, articulable suspicion to stop the defendant's car as the officer had received a radio dispatch and had obtained information from a fast-food restaurant employee that suspicious persons in a vehicle were banging on the windows and cursing at the fast-food restaurant. Such actions involved engaging in disorderly conduct, which was an allegation of a crime that gave the officer grounds for conducting a brief traffic stop of the defendant's vehicle for investigatory purposes. State v. Melanson, 291 Ga. App. 853, 663 S.E.2d 280 (2008).

Trial court did not err in denying the defendant's motion to suppress due to alleged illegal traffic stops as even though police officers did not actually see a drug transaction involving the defendant, the circumstances justified an investigative stop of another vehicle driven by individuals observed in an exchange with the defendant in a parking lot. The officers were acting on information that tied a vehicle of the same make and model of the defendant's vehicle to illegal drug activity. Darden v. State, 293 Ga. App. 127, 666 S.E.2d 559 (2008).

Applicability (Cont'd)
5. Vehicles (Cont'd)
C. Searches (Cont'd)

Trial court did not err in granting the defendant's motion to suppress all evidence seized after the vehicle the defendant was driving was stopped because the defendant did not abandon the car or lose any reasonable expectation of privacy with regard to the car; when the defendant ran away after the traffic stop, the police officer had just observed the defendant park the car within a parking space of an apartment complex, where the person to whom the car's registered owner had entrusted the vehicle, and because the evidence from which the officer ascertained the defendant's identify derived from documents found during the unlawful search of the car, the trial court did not err in rejecting the state's argument that the items retrieved from the sidewalk were admissible in a trial against the defendant. State v. Nesbitt, 305 Ga. App. 28, 699 S.E.2d 368 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from the defendant's vehicle because the evidence supported the trial court's finding that the officer did not unreasonably prolong the stop of the vehicle, and once the drug dog alerted to the vehicle, the officer had probable cause to search the vehicle; a brief detention was authorized because it was reasonable for the officer to be suspicious in light of the defendant's furtive movement at the initial point of the stop, and that suspicion was heightened when the defendant attempted to explain that the defendant was looking for the defendant's wallet but then retrieved the defendant's license from a different part of the car, and when the defendant revoked the defendant's consent to search. Hardaway v. State, 309 Ga. App. 432, 710 S.E.2d 634 (2011).

Officer had probable cause to believe that, by lying about whether weapons were in a vehicle, the defendant had violated O.C.G.A. § 16-10-20 because at the time the defendant produced the rental agreement for the vehicle, the officer saw a firearm in the center console of the rental car, which the defendant apparently tried to conceal by quickly closing the console; when the officer asked the defendant whether any weapons were in the car the defendant denied it, and that was a reason for the officer to detain the defendant and to secure the firearm for the officer's own safety. Culpepper v. State, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Trial court erred in denying the defendant's motion to suppress as the officer simply did not have reasonable suspicion that the defendant was engaged in or about to be engaged in a violation of the law after the officer found the defendant sleeping in a car in the parking lot of a funeral home, with the permission of the funeral home's owner, the officer did not see or smell any illegal substances; the officer did not question the defendant regarding the defendant's appearance or demeanor; the officer did not determine if the defendant had consumed alcohol; and the officer did not perform any field tests to determine if the defendant was under the influence of anything. Martin v. State, 316 Ga. App. 220, 729 S.E.2d 437 (2012).

Search based on lawful arrest. — Because an officer had probable cause to arrest a vehicle's occupants, including the defendant, after encountering a truck matching the description in a be-on-the-lookout bulletin, with the same number of occupants as advised therein, traveling on the road and in the direction identified, and from a location known by the officer to be the scene of an armed robbery, a search based on a lawful arrest was upheld; as a result, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of a search incident to the arrest. Boone v. State, 282 Ga. App. 67, 637 S.E.2d 795 (2006).

Search of vehicle incident to lawful arrest. — Officer's search of the defendant's vehicle incident to the defendant's arrest was lawful because the crime for which the defendant was under arrest was the possession of bagged marijuana in the defendant's pocket, and it was reasonable to believe that evidence relevant to the offense could be found in the vehicle from which the defendant exited.

Kirkland v. State, 316 Ga. App. 310, 728 S.E.2d 907 (2012).

Consensual automobile search when the defendant a passenger. — Trial court erred in granting the defendant's motion to suppress; since the police had probable cause to search the driver's vehicle because a police officer had smelled the odor of burning marijuana coming from the car following a valid traffic stop and the driver had given consent to search the car, the police did not need to establish that probable cause existed to search individual containers in the car which might contain contraband since the probable cause that existed to search the car gave the police the right to also search each of the car's containers, and, thus, the trial court should not have suppressed evidence of contraband found in the book bag of the passenger, the defendant. State v. Selph, 261 Ga. App. 541, 583 S.E.2d 212 (2003).

Trial court erred in suppressing evidence found in a consensual search of a car in which the defendant was a passenger as the police officer did not impermissibly expand the scope or the duration of a valid traffic stop for an improperly displayed tag in violation of O.C.G.A. § 40-2-41 by determining the status of the driver's license and whether the driver or defendant had outstanding warrants against them; even though 26 minutes into the stop the officer had not yet written the driver a ticket for the improperly displayed tag, the officer was not required to write the ticket and conclude the stop prior to diligently completing the background checks, which were delayed by the driver's admission that the driver might have had an outstanding warrant in another county that the officer had not discovered, and investigating the officer's reasonable suspicions regarding alcohol and open containers arising out of the officer's knowledge of another officer's encounter with the men earlier in the evening. State v. Williams, 264 Ga. App. 199, 590 S.E.2d 151 (2003).

Consensual automobile search. — Trial court did not err in denying a defendant's motion to suppress evidence gathered in the search of the defendant's vehicle, which resulted in the seizure of a plastic bag containing additional baggies that tested positive for methamphetamine, in light of the state's evidence indicating that the defendant was driving under the influence; while the state introduced evidence indicating that the defendant had been driving under the influence, the state's evidence also showed that the arresting officer asked for and got the defendant's consent only after the defendant convinced the officer that the defendant was in full possession of the defendant's faculties. Davis v. State, 287 Ga. App. 478, 651 S.E.2d 750 (2007), cert. denied, No. S08C0176, 2008 Ga. LEXIS 179 (Ga. 2008).

Trial court correctly denied the defendant's motion to suppress evidence obtained during a traffic stop because: (1) there was probable cause for the initial stop, based on an officer's observance of a traffic violation—a nonfunctional tag light; (2) the officer sought and obtained the defendant's voluntary permission to search the car; (3) there was no evidence that the stop was unreasonably prolonged by questioning; and (4) there was no evidence that the officer performed a pat-down search nor that the officer ever put the officer's hands in the defendant's pocket. Carnes v. State, 293 Ga. App. 549, 667 S.E.2d 620 (2008).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's vehicle because the defendant's consent to search the vehicle was not the product of an illegal detention since after returning the defendant's driver's license and issuing a warning ticket, the officer told the defendant that the defendant was free to leave, but the defendant remained on the scene and engaged in casual conversation about the high level of drug activity in the area and the fact that the defendant worked nearby; the defendant's conduct showed that the defendant did not feel intimidated by the officer's presence, and under the circumstances, the initial traffic stop had de-escalated into a consensual encounter when the officer requested consent to search, which the defendant readily provided, and there was no evidence that the officer coerced the defendant's consent, tricked the defendant, or con-

Applicability (Cont'd)
5. Vehicles (Cont'd)
C. Searches (Cont'd)

veyed a message that the defendant's consent to search was required. Davis v. State, 306 Ga. App. 185, 702 S.E.2d 14 (2010).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found during the search of the defendant's car because the evidence showed that the defendant was legally detained when the officer requested consent to search; the officer's testimony reflected that the officer sought consent to search immediately after issuing a verbal warning. Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Defendant's motion to suppress was properly denied because the officer had reasonable articulable suspicion to conduct a traffic stop based on an alert from the license-plate recognition system showing that a wanted person could be driving the subject vehicle, the defendant's driving on a suspended license provided probable cause for an arrest, and the defendant consented to a search of the vehicle. Hill v. State, 321 Ga. App. 817, 743 S.E.2d 489 (2013).

Consent to search of vehicle. — Trial court properly denied the defendant's suppression motion as the defendant's car was searched with the defendant's consent while the officer was investigating the officer's reasonable suspicion that the defendant might be transporting drugs or stolen merchandise, even though the defendant had been given a traffic citation at the time that the consent was requested; the officer testified at the suppression hearing that the officer still needed to verify the VIN of the car and to verify that the car was an actual rental vehicle and not a stolen car when the consent was requested, and that the defendant was free to leave, but that because of the officer's concerns about the car, the car was not going anywhere. Vaughn v. State, 263 Ga. App. 536, 588 S.E.2d 330 (2003).

Because the defendant committed two traffic violations, an ensuing stop of the defendant's vehicle was not unjustifiably extended, the defendant voluntarily granted the officers consent to search, and a canine free-air search was undertaken immediately and as a result of the defendant's consent, the trial court properly denied suppression of the evidence seized as a result of the stop. Noble v. State, 283 Ga. App. 81, 640 S.E.2d 666 (2006).

Trial court properly denied the defendant's suppression motion as the evidence showed that once an officer obtained the defendant's consent to conduct a free air search around the vehicle the defendant was driving, a drug dog alerted for contraband within the vehicle, and once this occurred, the officer had probable cause to believe the defendant was transporting drugs. Garvin v. State, 283 Ga. App. 242, 641 S.E.2d 176 (2006).

Trial court did not err in denying either the defendant's motion to suppress the methamphetamine seized during the consensual search of the defendant's vehicle or a motion to suppress the defendant's voluntary custodial statement as the testimony of the arresting and investigating officers established that the defendant did not display any problems with the understanding of the English language as did videotapes of the vehicle search and the in custody interview, which likewise showed the defendant having no problems with the English language. Therefore, the defendant's consent to the search of the vehicle nor the defendant's waiver of the defendant's Miranda rights were invalidated. Serrano v. State, 291 Ga. App. 500, 662 S.E.2d 280 (2008).

Trial court did not err in denying the defendant's motion to suppress because an officer did not extend the duration of a traffic stop; the officer's testimony supported the conclusion that the officer asked for consent to search during the time that the officer was issuing citations, and the officer's questioning did not extend the duration of the defendant's detention. Arroyo v. State, 309 Ga. App. 494, 711 S.E.2d 60 (2011).

Officer's basis for stop. — Denial of the defendant's suppression motion was upheld on appeal as: (1) the defendant's vehicle was not stopped by the investigating officer; (2) the defendant voluntarily pulled into a driveway and stopped; (3) the officer did not prevent the defendant's

departure; and (4) the officer had a reasonable and objective basis to conclude that the defendant committed the traffic offense of improper backing in violation of O.C.G.A. § 40-6-249(a). Collier v. State, 282 Ga. App. 605, 639 S.E.2d 405 (2006), cert. denied, No. S07C0542, 2007 Ga. LEXIS 217 (Ga. 2007).

Search of vehicle justified by officer's observations. — Search of a van was lawful under the independent basis of the automobile exception to the warrant requirement since the objective facts known to the deputy after the deputy lawfully stopped the van, including needle marks on the occupants' arms, drug paraphernalia, and evidence of drug usage on the floor of the front seat, gave the deputy probable cause to believe that the van contained contraband. Autry v. State, 277 Ga. App. 305, 626 S.E.2d 528 (2006).

Officers' initial approach of the defendant's vehicle and request for consent to search were warranted, even without an articulable suspicion of criminal activity at the time of the officers' approach; moreover, even if a reasonable articulable suspicion of criminal activity had been required to briefly detain the defendant, the officers had such suspicion upon seeing: (1) individuals approach defendant's car in an area known for drug activity; (2) the individuals turn and walk away upon seeing the police; and (3) the defendant's passenger swallowing what appeared to be a crack rock as the police approached. Sego v. State, 279 Ga. App. 484, 631 S.E.2d 505 (2006).

Traffic stop by a sheriff's deputy was not unreasonably prolonged without a reasonable articulable suspicion of criminal activity based on evidence that: (1) a rental agreement in the defendant's possession had expired; (2) the officer was justified in calling for the drug dog because the officer did not know whether the car was stolen and because the defendant was nervous, backed toward the car when the defendant declined consent to search, and confessed to an open container violation; and (3) the trial court properly credited testimony from the dog's handler that the dog alerted when the dog showed interest in the passenger door, although the dog's response was not an active alert; thus, the trial court properly rejected the defendant's motion to suppress. Tanner v. State, 281 Ga. App. 101, 635 S.E.2d 388 (2006).

Defendant failed to establish that trial counsel's failure to timely file a motion to suppress evidence a police officer seized from the defendant's vehicle prejudiced the case because the warrantless search of the vehicle was lawful under the automobile exception to the warrant requirement; the objective facts known to the officer after the car was lawfully stopped gave the officer probable cause to believe that the car contained contraband, and those facts included the smell of marijuana in the car, flakes of what the officer suspected to be marijuana on the floorboards of the car, and the defendant's visible agitation during the traffic stop. Brown v. State, 311 Ga. App. 405, 715 S.E.2d 802 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant and the friend appeared to be nervous when the officer spoke with the defendant and the friend; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. Culpepper v. State, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Trial court did not err by denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the suspected contraband was in plain view from outside the vehicle, and once the officer smelled the odor of marijuana on the recovered item, the officer had even stronger grounds to search the vehicle; because the officer saw the item before returning the defendant's license or issuing the ticket, the officer was not exceeding the scope of the initial traffic stop by seizing the object. Arnold v. State, 315 Ga. App. 798, 728 S.E.2d 317 (2012).

Applicability (Cont'd)
5. Vehicles (Cont'd)
C. Searches (Cont'd)

Search of vehicle not justified by officer's observation. — Trial court erred by denying two defendants' motion to suppress the drug evidence found in the vehicle in which one defendant was driving, and the other defendant was a passenger, because the search of the vehicle was conducted after the defendants were illegally detained after a traffic stop. The officers were justified in stopping the vehicle upon observing the vehicle speeding but by only observing nervousness and an expandable baton, the officers exceeded the scope of a permissible search by continuing to detain the defendants without any cause to believe the defendants were dangerous; thus, the search was not justified. Bell v. State, 295 Ga. App. 607, 672 S.E.2d 675 (2009).

Standard for inventory searches. — Contents of an impounded vehicle are routinely inventoried to protect the property of the owner, protect the officers against claims for lost or stolen property, and protect the police from potential danger, and the validity of such conduct is not dependent upon the absolute necessity for the police to take charge of property to preserve the property, but depends instead on whether the police conduct was reasonable under the Fourth Amendment in light of the circumstances confronting the police at the time; thus, police were authorized to impound and later perform a routine inventory of the defendant's car when the defendant was arrested at the home of a friend in connection with a murder and the disappearance of the defendant's spouse, the defendant's car was at the home of the friend, and police knew that the defendant had been planning to leave the state with the friend and that the defendant's car was wanted in an investigation in another county because, under the circumstances, the police had reason to believe that the defendant's detention would be lengthy and the officers were not required to trust that the car would remain untouched if they left the car at the friend's home. Wright v. State, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Inventory search of vehicle. — Defendant's motion to suppress evidence of cocaine and crack pipes found during an inventory search of the car was properly denied as: (1) the police impound was not unlawful; (2) waiting a reasonable time, usually 20 minutes, prior to having the car towed, was not unreasonable as a matter of law; and (3) the officers were not required to call the defendant's relatives first. Carlisle v. State, 278 Ga. App. 528, 629 S.E.2d 512 (2006).

Because an officer was authorized to arrest the defendant for weaving, a decision to impound the vehicle the defendant was driving was not unreasonable and an inventory search of the vehicle was authorized; thus, the trial court did not err in denying the defendant's motion to suppress the evidence seized as a result of the search. Lopez v. State, 286 Ga. App. 873, 650 S.E.2d 430 (2007).

Trial court did not err in denying the defendant's motion to suppress because the trial court's finding that the impoundment of the defendant's motorcycle was reasonably necessary under the circumstances was supported by the evidence because the defendant was arrested for attempting to elude police and for several traffic offenses, including driving with an expired license, the defendant was not going to be allowed to drive the motorcycle under any circumstances. Grizzle v. State, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Impoundment of defendant's car was reasonable under U.S. Const., amend. IV, and the resulting inventory search was proper as the defendant and the defendant's companion were arrested, no one remained to take custody of the car, and the car was on the shoulder of an exit ramp where the car would have impeded a large truck attempting to exit the highway. Scott v. State, 316 Ga. App. 341, 729 S.E.2d 481 (2012).

Trial court erred in denying the defendant's motion to suppress because the inventory search of a van was unreasonable under the Fourth Amendment due to a lack of evidence of police policy; the record contained no evidence about the police department's policy or procedures

on inventory searches, but rather, the officers simply testified that the officers' searches of a flatbed wrecker, the van, and the van's contents were inventory searches pursuant to the impoundment. Capellan v. State, 316 Ga. App. 467, 729 S.E.2d 602 (2012).

Search after suspect abandoned vehicle. — Probable cause existed to search a vehicle, which was left behind when a suspect fled a drug transaction upon seeing a police officer approach; it was of no consequence that the car was impounded before the warrant was issued for the car's search. Scott v. State, 277 Ga. App. 126, 625 S.E.2d 526 (2006).

Because a motion to suppress the evidence seized from the vehicle that the defendant and the defendant's cohorts were riding in would have been futile as the evidence showed the defendants abandoned the vehicle on foot after being involved in a high-speed chase with police, the defendant's trial counsel could not have been ineffective in failing to file the motion. Skaggs-Ferrell v. State, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Trial court did not err in denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the evidence undisputedly showed that the defendant had abandoned the vehicle, and since the defendant abandoned the defendant's car, the defendant had no standing to assert the claim that the search was invalid as a warrantless search incident to an arrest; the defendant abandoned the defendant's vehicle when the defendant fled to escape police, leaving the vehicle parked in a stranger's driveway with the door open, and before searching the open vehicle, an officer even confirmed with the landowner that the defendant's vehicle was not parked there with the owner's permission. Johnson v. State, 305 Ga. App. 635, 700 S.E.2d 612 (2010).

Search proper as inventory and as incident to driver's arrest. — Because an inventory search of a codefendant's vehicle after impoundment was reasonable, and because the search was performed incident to the codefendant's lawful arrest, there was no basis to suppress the evidence seized from the search. Williams v. State, 308 Ga. App. 464, 708 S.E.2d 32 (2011).

Evidence found during search of vehicle after accident admissible. — When the defendants were taken to a hospital after a one-party automobile accident, leaving the vehicle posing a threat to public safety, and the officer conducted an investigative inventory before a private wrecker towed the vehicle, evidence of cocaine discovered by the officer during the normal investigative search will not permit a motion to suppress under O.C.G.A. § 17-5-30. State v. Izquierdo, 160 Ga. App. 33, 285 S.E.2d 769 (1981).

Trial court erred in granting the defendant's motion to suppress evidence including cocaine and a pistol found in a duffel bag on the floorboard of the defendant's vehicle after the car was involved in an accident killing a deer since the defendant was unable to provide proof that the vehicle was insured, and impoundment was therefore valid; thus, the items seized were both admissible through the inventory search of the lawfully impounded vehicle, and via a search incident to the defendant's arrest for operating the vehicle without insurance and driving on a suspended license. State v. Howard, 264 Ga. App. 691, 592 S.E.2d 88 (2003).

Car being towed. — There was no error in denying a motion to suppress as an officer's direction removing the defendant from a car following a traffic stop, which led to the discovery of cocaine, was reasonable given the circumstances. Though the officer had no basis for suspecting unlawful activity, the defendant could not remain in the car because the car was going to be towed. Carter v. State, 297 Ga. App. 608, 677 S.E.2d 792 (2009).

D. Traffic Stops

Stop based on erroneous facts. — It was not error to admit evidence and statements showing intoxication, even though the stop of the defendant's automobile was due to an error on the part of the officer or the dispatcher who "ran the tag" and erroneously determined that the automobile was stolen. Cunningham v. State, 231 Ga. App. 420, 498 S.E.2d 590 (1998).

Reasonable belief justifying stop. — Trial court's denial of the defendant's mo-

Applicability (Cont'd)
5. Vehicles (Cont'd)
D. Traffic Stops (Cont'd)

tion to suppress evidence that was found in a car the defendant was driving was not clearly erroneous when the initial stop of the defendant by officers was made with a reasonable articulable suspicion of criminal activity when the defendant, the defendant's companion, and the car met descriptions that the police were searching for in connection with the burglaries. When the defendant immediately fled on foot when police stopped the vehicle, probable cause to search the car, which turned out to be stolen, existed. Porter v. State, 264 Ga. App. 526, 591 S.E.2d 436 (2003).

Motion to suppress was properly denied when the officer had a reasonable basis to make an investigatory stop of defendant's vehicle; it was reasonable for the officer to infer, based on the officer's training, experience, and common sense that the person driving the truck who stopped, looked at the officer while the officer was at the house attempting to serve the warrant, and then took off, could have been the person the officer was trying to find and arrest. Howard v. State, 265 Ga. App. 835, 595 S.E.2d 660 (2004).

Despite the defendant's claim that a sheriff's deputy lacked a specific and articulable suspicion of criminal activity necessary to execute a traffic stop of the defendant's vehicle and thus that the evidence seized thereafter had to be suppressed, the appeals court found otherwise as sufficient facts had been conveyed to the deputy prior to the stop for the deputy to have a reasonable belief that the defendant had been involved in a domestic dispute and might be under the influence of alcohol to justify a finding that the resulting stop was valid; hence, suppression was properly denied. Lacy v. State, 285 Ga. App. 647, 647 S.E.2d 350 (2007), cert. denied, No. S07C1514, 2007 Ga. LEXIS 620 (Ga. 2007).

Because a concerned citizen reported that a suspected drunk driver was driving a specific vehicle in a specific location, a police officer had a reasonable, articulable suspicion to justify an investigative traffic stop; accordingly, the defendant did not show a basis for reversing the trial court's order denying the defendant's motion to suppress. Adcock v. State, 299 Ga. App. 1, 681 S.E.2d 691 (2009).

Trial court did not err in denying the defendant's motion to suppress when a police officer was authorized to stop the vehicle the defendant was driving because of a perceived traffic violation and to continue the officer's investigation because the defendant did not have a driver's license; the particularized and objective basis for the initial stop was the information from the Georgia Crime Information Center that the male owner of the registered vehicle defendant was operating had a suspended driver's license, and once the stop was made, and it was ascertained that the defendant was not the owner of the car, the officer had a duty to further investigate only because the defendant could not produce a driver's license. Humphreys v. State, 304 Ga. App. 365, 696 S.E.2d 400 (2010).

Trial court did not err in denying the defendants' motion to suppress evidence police officers seized pursuant to search warrants for a residence and vehicles and a traffic stop because all of the facts, taken together, justified the stop based on a reasonable articulable suspicion that the occupants of the vehicles were involved in an active marijuana growing operation; a search warrant for the residence was pending based on probable cause to believe that an active marijuana growing operation was being conducted inside, the officers had information from multiple sources that the residence was a marijuana grow house, the house exhibited the physical characteristics of other grow houses that had been recently discovered, and the officers observed the defendants driving away from the residence in tandem with a truck and large recreational trailer, which had been obscured in the backyard behind a privacy fence. Prado v. State, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Statute later rendered unconstitutional did not invalidate stop. — Trial court did not err in denying the defendant's motion to suppress after finding that the excessive-window-tinting statute, O.C.G.A. § 40-8-73.1(b), was unconstitu-

tional because an officer had a reasonable articulable suspicion to justify the traffic stop; the officer observed that the defendant's vehicle had darkly tinted windows and reasonably believed that to be in violation of § 40-8-73.1, and the fact that the statute was later found to be unconstitutional did not render the stop invalid. Christy v. State, 315 Ga. App. 647, 727 S.E.2d 269 (2012).

Trial court did not err by denying the defendant's motion to suppress evidence obtained during a traffic stop because there was some evidence that the defendant attempted to avoid a roadblock; the defendant made an immediate, sudden turn into a driveway, reversed course, and drove away from the checkpoint at the same time that the police officer noticed the defendant's headlights. Blakely v. State, 316 Ga. App. 213, 729 S.E.2d 434 (2012).

Both initial stop and unrelated questions permissible. — Denial of the defendant's motion to suppress was proper because the officer's observation of the defendant's car crossing over the lane line without a signal and of an inoperable third brake light gave the officer probable cause that a traffic violation had occurred and the officer's questioning of the defendant unrelated to the stop did not prolong the stop. White v. State, 319 Ga. App. 540, 732 S.E.2d 107 (2012).

Second investigatory stop justified. — Trial court erred in granting the defendant's motion to suppress evidence since the vehicle was properly stopped a second time after the police officer stopped the vehicle originally for a traffic violation and observed that the defendant's female companion appeared to be the driver, and let the defendant go with a warning; however, the officer had a reasonable suspicion of criminal activity that warranted the second investigatory stop when the officer saw the car stall as the woman tried to drive away, as the officer suspected that the woman had never driven that type of car, and that the defendant actually had been driving at the time the officer stopped the vehicle for the first offense the officer observed. State v. Trammel, 270 Ga. App. 395, 606 S.E.2d 613 (2004).

Terry stop of vehicle on information from police dispatch. — Police dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene. When a police officer received a dispatch on suspicion of drunk driving describing the defendant and the defendant's vehicle, and the officer saw the defendant in the defendant's vehicle matching that description immediately after receiving the dispatch, the officer had a reasonable, articulable suspicion to justify a Terry stop and it was error to grant the defendant's motion to suppress the stop even though the stop was made without the officer observing any traffic violations. State v. Harden, 267 Ga. App. 381, 599 S.E.2d 329 (2004).

Dispatcher's descriptions of vehicle justified stop. — Because police officers saw a vehicle matching a dispatcher's description shortly after receiving the dispatch, and the vehicle attempted to elude the officers, in violation of O.C.G.A. § 40-6-395(a), the officers had a specific and articulable reason to stop the vehicle; consequently, the trial court properly denied the defendant's motions to suppress, in limine, and for a new trial. Francis v. State, 275 Ga. App. 164, 620 S.E.2d 431 (2005).

Trial court did not err in denying a defendant's motion to suppress evidence because a traffic stop of the defendant was authorized; an officer had a particularized and objective basis for suspecting the defendant of criminal activity based on the officer's knowledge that the officer was to be on the lookout for a car similar in description to the car the defendant was driving and the officer's observations of the defendant's suspicious driving. Aponte v. State, 296 Ga. App. 778, 676 S.E.2d 279 (2009).

Stop based on be-on-the-lookout bulletin. — Motion to suppress was properly denied in a defendant's trial for driving under the influence of alcohol and violating the open container law as an officer's be-on-the-lookout (BOLO) bulletin provided reasonable suspicion of criminal activity sufficient to authorize the stop of the defendant's vehicle; the BOLO provided particularized information de-

Applicability (Cont'd)
5. Vehicles (Cont'd)
D. Traffic Stops (Cont'd)

scribing the color, manufacturer, and model of the vehicle, the number and race of the vehicle's occupants, and the vehicle's location and direction of travel. Faulkner v. State, 277 Ga. App. 702, 627 S.E.2d 423 (2006).

Trial court properly granted the defendant's motion to suppress as the investigating officer lacked any particularized basis to suspect the defendant of any criminal activity, and information contained in a "be on the lookout" alert for a certain vehicle failed to supplant the officer's belief that the defendant was involved in a reported burglary given that: (1) the description of the vehicle being driven and the suspect were inadequate; (2) no information was provided about the lapse of time between the crime occurring and the traffic stop; (3) no information was provided about the number of persons about in the area; and (4) the defendant was not engaged in any activity which would have otherwise authorized a traffic stop. State v. Dias, 284 Ga. App. 10, 642 S.E.2d 925 (2007).

Stop justified despite ulterior motives. — Defendant was properly convicted of trafficking in methamphetamine because the trial court did not err in denying the defendant's motion to suppress items police officers seized as a result of a traffic stop of the defendant's vehicle when the stop was lawful under the circumstances; because the officer witnessed the defendant commit a traffic violation, the officers' action in pulling over the vehicle after the defendant committed the traffic violation was valid, even though the officers had ulterior motives in initiating the stop. Gonzalez v. State, 299 Ga. App. 777, 683 S.E.2d 878 (2009).

No justification for stop. — Because: (1) an investigating officer did not have a particularized and objective reason to suspect the defendant of any criminal activity before stopping the defendant's vehicle; and (2) the act of driving at night, lawfully, on a public road, and in a high crime area, did not justify the stop in the absence of additional circumstances, the trial court erred in denying the defendant's motion to suppress. Young v. State, 285 Ga. App. 214, 645 S.E.2d 690 (2007).

Trial court did not err in granting the defendant's motion to suppress because the trial court was authorized to find that the police officer who initiated the traffic stop lacked an articulable suspicion to believe that the defendant was impeding the flow of traffic in violation of O.C.G.A. § 40-6-184(a) when under the facts, the officer's belief that the defendant was impeding the flow of traffic was an insufficient basis for initiating an investigative stop; the court of appeals would not disturb the trial court's findings, which was based upon conflicting witness testimony, that at the time of the traffic stop, the defendant was traveling above the posted minimum speed limit and only a few miles below the posted maximum speed limit when the defendant's vehicle was passed by two vehicles that were speeding. State v. Parke, 304 Ga. App. 124, 695 S.E.2d 413 (2010).

Trial court properly granted the defendant's motion to suppress evidence a deputy sheriff obtained in the course of a traffic stop because the court's findings that the deputy did not really believe at the time of the stop that the absence of side view mirrors supplied proper grounds for a stop and that the deputy did not, in fact, see anyone toss anything from the car were not clearly erroneous; the factual findings were based not only upon a video that was absent from the record on appeal but also upon an assessment of the credibility of the deputy. State v. Reid, 313 Ga. App. 633, 722 S.E.2d 364 (2012).

Tags being old and worn not justification. — Because it was evident that the officer's claim of the tag's condition as being worn and old and appearing more than 30 days out of date, which was the sole articulated basis for the investigatory stop, was found by the trial court to lack credibility, and the appellate court found no clear error in the trial court's credibility determination, the state failed to adduce credible evidence that the officer observed a tag that appeared more than 30 days old, and supplied no basis to disturb the trial court's decision to grant the defendant's motion to suppress. State v.

Castillo, 330 Ga. App. 828, 769 S.E.2d 571 (2015).

Stop was not pretextual. — Defendant's motion to suppress was properly denied because an investigatory stop was not pretextual, but was based on a reasonable, articulable suspicion after corroboration of a tip from a known tipster, along with a traffic offense; the tip contained details as to future actions that were not easily predicted, and a detective corroborated the tip before ordering the stop by verifying the vehicle's make, model, year, color, route, location, and occupant. Wright v. State, 272 Ga. App. 423, 612 S.E.2d 576 (2005).

Trial court did not err in denying the defendant's motion to suppress items police officers seized as a result of a traffic stop of the defendant's vehicle because the stop was lawful under the circumstances; because the officer witnessed the defendant commit a traffic violation, the officers' action in pulling over the vehicle after the defendant committed the traffic violation was valid, even though the officers had ulterior motives in initiating the stop. Gonzalez v. State, 299 Ga. App. 777, 683 S.E.2d 878 (2009).

Traffic stop initiated by conversation with concerned citizen improper. — Because a traffic stop of the defendant's vehicle was not based on the commission of a traffic violation or illegal act, but instead was based on the unreliable information provided by a concerned citizen to a police sergeant which amounted to hearsay gleaned from an overheard conversation, and did not provide the officer with the type of "inside information" that would not have been known to the public at large, the defendant's motion to suppress the marijuana seized as a result of the traffic stop was properly granted. State v. Holloway, 286 Ga. App. 129, 648 S.E.2d 473 (2007).

Search of person on reasonable suspicion after routine traffic stop. — Motion to suppress was properly denied when an officer, who pulled over a van on a traffic stop for following too closely, had justification to investigate the driver and the driver's passenger since a reasonable suspicion of criminal activity accompanied the totality of the facts on the stop: (1) the officer noticed an unusual amount of activity when the officer turned the officer's lights on to pull the car over; (2) the van did not pull over for a mile or two after the officer turned the officer's lights on, which was highly unusual; and (3) the driver and the passenger were extremely nervous when questioned and the driver and the passenger gave conflicting reports on why the driver and the passenger were traveling in the area. Rucker v. State, 266 Ga. App. 293, 596 S.E.2d 639 (2004).

Search after investigative stop for DUI. — When the state presented uncontradicted evidence that the police stopped the defendant for driving while under the influence after seeing the defendant's vehicle weaving over the yellow centerline, this was sufficient to support the legality of a search and seizure. State v. Haddock, 235 Ga. App. 726, 510 S.E.2d 561 (1998).

Defendant's continued detention proper. — Defendant's motion to suppress was properly denied as the defendant's continued detention after an investigatory stop was justified based on a marijuana smell in the vehicle, the defendant's nervousness, and that the defendant twice attempted to go to the vehicle to get the defendant's gun, which was in a bag with methamphetamine. Wright v. State, 272 Ga. App. 423, 612 S.E.2d 576 (2005).

Trial court erred in finding that the defendant's continued detention after a license check was without legal justification as a police sergeant, after detecting an odor of alcohol from the defendant's vehicle, was legally justified to determine whether the defendant was driving while under the influence, and could not do so without conducting field sobriety tests; moreover, a search of the defendant occurred only after the defendant granted the officer consent to do so and the consent was voluntarily given. State v. Johnson, 282 Ga. App. 102, 637 S.E.2d 825 (2006), cert. denied, No. S07C0374, 2007 Ga. LEXIS 58 (Ga. 2007).

Trial court properly denied a defendant's motion to suppress the evidence of drug contraband found in the defendant's vehicle after the vehicle was stopped due to a broken taillight as the officers had the right to detain the defendant while await-

Applicability (Cont'd)
5. Vehicles (Cont'd)
D. Traffic Stops (Cont'd)

ing word as to possible outstanding warrants; a certified drug recognition expert questioned the defendant and observed the defendant having bloodshot eyes, droopy eyelids, and displaying relaxed inhibitions; and the defendant sufficiently and voluntarily consented to the search of the vehicle as was shown on a videotape of the traffic stop, despite the defendant being handcuffed at the time. Maloy v. State, 293 Ga. App. 648, 667 S.E.2d 688 (2008).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found in a vehicle in which the defendant was a passenger because the defendant was legally detained when the officer sought the driver's consent to search, and the officer made the officer's request shortly after completing the officer's check of the occupants' identification, which was within six minutes of initiating the stop; having found that the defendant was not subject to an illegal detention, the trial court did not err in further concluding that the defendant lacked standing to challenge the search on other grounds. Baker v. State, 306 Ga. App. 99, 701 S.E.2d 572 (2010).

Detention not prolonged. — Trial court did not err in denying the defendant's motion to suppress because the officer was authorized to perform a traffic stop; since the officer asked the defendant about marijuana around the same time the officer was verifying the defendant's license, the officer did not unreasonably prolong the detention. Parker v. State, 317 Ga. App. 93, 730 S.E.2d 717 (2012).

Order granting the defendant's motion to suppress was reversed because the undisputed evidence showed that the open-air dog sniff occurred while the officer conducted the mission of the traffic stop, and it did not prolong the traffic stop since the K-9 handler conducted the search while the officer was still checking the driver's license. State v. Herman, 344 Ga. App. 359, 810 S.E.2d 183 (2018).

Search incident to an arrest following a traffic stop. — Trial court did not err in denying the defendant's motion to suppress the crack cocaine found in a search incident to an arrest of the defendant for having an open container of alcohol following a traffic stop because the defendant's car was parked in a high crime area so that the traffic stop was legally permissible. Welch v. State, 263 Ga. App. 70, 587 S.E.2d 220 (2003).

Defendant's motion to suppress was properly denied because methamphetamine and an illegal weapon found in the defendant's vehicle gave an officer probable cause to arrest the defendant; the resulting search of the defendant's vehicle, which yielded additional methamphetamine and a large quantity of marijuana, was justified as a search incident to a lawful arrest. Wright v. State, 272 Ga. App. 423, 612 S.E.2d 576 (2005).

Trial court did not err in denying a defendant's motion to suppress evidence in the defendant's prosecution for financial transaction card theft under O.C.G.A. § 16-9-31; the defendant's repeated reaching into the glove compartment while trying to find a car rental agreement, coupled with the defendant's initial lack of cooperation when asked to exit the car and the fact that the defendant reached to the defendant's waistband several times, provided a police officer with the basis for conducting a pat-down search, which led to a broader search when the officer observed a bag of marijuana sticking out of the defendant's waist band resulting in the defendant's arrest. Leonard v. State, 281 Ga. App. 184, 635 S.E.2d 795 (2006).

Inability to read license plate justifying stop. — Trial court erred in granting the suppression motions filed by both the first and second defendant, who occupied the vehicle stopped as a violation of O.C.G.A. § 40-2-41 provided a sufficient reason for the traffic stop; moreover, the trial court erred in ruling that some portions of O.C.G.A. § 40-2-41 did not apply to the out-of-state license plate on the subject vehicle and by ruling that even though the word "Carolina" on the license plate was not legible and, hence, there was no violation of the statute because the police officer testified about an inability to recognize it as a South Carolina license plate. State v. Davis, 283 Ga. App. 200,

641 S.E.2d 205 (2007).

Investigatory stop for taillight violation. — Grant of the defendant's motion to suppress was not clearly erroneous as the officer stopping the defendant's automobile for an investigatory stop provided no factual basis for believing that the defendant's older model automobile violated the taillight specifications in O.C.G.A. § 40-8-23(e) simply because newer models violated the statute; further, the trial court could have found that the officer's testimony that the officer had conducted research into the newer models' taillights was less than credible. State v. Keddington, 264 Ga. App. 912, 592 S.E.2d 532 (2003).

Dark tinted windows. — Defendant's vehicle was properly stopped for following too closely to another vehicle even though the police officer making the stop indicated at the suppression hearing that the officer initially followed the vehicle only due to the vehicle's excessive window tint. Perry v. State, 274 Ga. App. 551, 618 S.E.2d 172 (2005).

Trial court erred in granting the defendants' motion to suppress the drug evidence seized following a traffic stop for a violation of O.C.G.A. § 40-8-73.1 as an officer's observations of a vehicle's dark tinted windows, and belief that the windows violated the statute were sufficient to justify the stop; moreover, a free air search by a drug-sniffing dog did not violate the defendants' Fourth Amendment rights. State v. Simmons, 283 Ga. App. 141, 640 S.E.2d 709 (2006).

Stop based on seat belt violation. — Consensual search upon a traffic stop for a seatbelt violation supported the trial court's denial of a motion to suppress as the search conducted pursuant to the defendant's consent was not a search based solely on the defendant's failure to wear a seatbelt. Blitch v. State, 281 Ga. 125, 636 S.E.2d 545 (2006).

Because sufficient evidence existed to support a finding that the arresting officer had a clear and unobstructed view of the defendant not wearing a seat belt as required by O.C.G.A. § 40-8-76.1(f), the officer's subsequent stop of the defendant's vehicle was supported by probable cause, making suppression of the evidence thereafter seized unwarranted; as a result, reconsideration of the court's ruling did not amount to an abuse of discretion. Schramm v. State, 286 Ga. App. 156, 648 S.E.2d 392 (2007).

Traffic stop ended prior to consent. — Defendant was entitled to suppression of marijuana found in a potato chip bag in a car in which the defendant was a passenger because a police officer improperly asked the driver for consent to search the vehicle after handing the driver a citation for a seatbelt violation; the traffic stop ended before the driver gave consent. State v. Felton, 297 Ga. App. 35, 676 S.E.2d 434 (2009).

Speeding justified stop. — Defendant's motion to suppress was properly denied; the stop of the defendant was reasonable because the defendant was exceeding the speed limit and crossed the center line twice. Morrison v. State, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer obtained through a traffic stop of a driver's vehicle because the stop of the defendant and the driver was valid since the officer's observation that the vehicle was traveling 40 miles per hour in a 35-mile-per-hour zone authorized the officer to initiate the traffic stop, and the officer was on the lookout for the vehicle based on information relayed by the county drug squad; the stop was not illegally extended because it did not matter whether the request to search came during the traffic stop or immediately thereafter, and there was no illegal detention since the questioning was almost instantaneous, all indications were that the search of the vehicle was by consent of the driver. Hammont v. State, 309 Ga. App. 395, 710 S.E.2d 598 (2011).

Purpose of stop not related to later offense. — Fact that the charge against the defendant of driving as an habitual violator of motor vehicle laws was not related to the original purpose of the stop did not require the exclusion of the arresting officer's testimony relating to the charge if the stop was proper. State v. Roe, 211 Ga. App. 129, 438 S.E.2d 186 (1993).

Suppression of evidence following impoundment without basis. — Trial

Applicability (Cont'd)
5. Vehicles (Cont'd)
D. Traffic Stops (Cont'd)

court properly granted the defendant's motion to suppress evidence obtained after the defendant's car was impounded during a traffic stop because, even though the officer had reasonable articulable suspicion to initiate the traffic stop based on criminal database search results that the defendant's car was not insured, once the defendant provided proof of insurance in an acceptable manner, the officer did not have probable cause to arrest the defendant or issue the defendant a citation; and, without probable cause to issue the citation, the officer had no basis for impounding the defendant's vehicle. State v. Lewis, 344 Ga. App. 630, 811 S.E.2d 436 (2018).

Defendant's continued detention after traffic stop improper. — Trial court erred in denying the defendant's motion to suppress evidence deputies seized from the defendant's car because the deputies did not have reasonable grounds upon which to continue to detain the defendant after the deputies called for a drug dog; the state offered no evidence that the deputies still were investigating the defendant's failure to properly signal a right turn when the deputies called for a canine unit to come to the scene and detained the defendant until the dog arrived or that the deputies had a reasonable suspicion that the defendant was involved in some criminal activity besides the traffic violation when the deputies called for the drug dog and continued to detain the defendant until the dog arrived and sniffed the car. Dominguez v. State, 310 Ga. App. 370, 714 S.E.2d 25 (2011).

Suppression motion properly denied. — Drugs were lawfully seized because the defendant's commission of a traffic offense pursuant to O.C.G.A. § 40-2-6.1 allowed an officer to make a valid traffic stop of the defendant's vehicle and thus allowed the officer to ask for consent to search and use a drug-sniffing dog to sniff the exterior of the vehicle. Thus, the defendant's motion to suppress was properly denied. Thomas v. State, 289 Ga. App. 161, 657 S.E.2d 247 (2008), cert. dismissed, No. S08C0959, 2008 Ga. LEXIS 491 (Ga. 2008).

Suppression motion erroneously granted on basis of venue. — Grant of defendant's motion to suppress on the basis of venue was reversed because the state did not need to establish venue at the pretrial hearing on the defendant's motion to suppress as it was not relevant to the issues raised in the motion, which challenged the reasonable basis for the traffic stop or whether the resulting search of the defendant and the defendant's vehicle were supported by probable cause. State v. Wallace, 338 Ga. App. 611, 791 S.E.2d 187 (2016).

6. Videotape

Identification by videotape. — Because a victim's identification of the defendant as the robber was corroborated by other witnesses, the evidence was sufficient to support the defendant's conviction for armed robbery as well as to provide probable cause for a search warrant; because it was proper for the witnesses to identify the defendant from a videotape, the trial court did not err by denying the defendant's motions to suppress and in limine. Bradford v. State, 274 Ga. App. 659, 618 S.E.2d 709 (2005).

Failure to proffer videotape evidence. — Order suppressing a videotape made by one of the officers involved in the stop of the defendant was upheld on appeal as the state failed to proffer the videotape for inclusion in the record; hence, nothing was presented for the appeals court to review. State v. Winther, 282 Ga. App. 289, 638 S.E.2d 428 (2006).

Suppression of videotape not required. — Trial court did not err by denying the motion to suppress because the proper implied consent warning, as enacted by the General Assembly, was read to the defendant without error, there was nothing in the record supporting the defendant's contention that the state suppressed the videotape of the stop in bad faith, and the stop was not pretextual as the corporal observed the defendant staggering, the defendant's car weaving, and erratic driving prior to stopping the defendant. Monas v. State, 270 Ga. App. 50, 606 S.E.2d 80 (2004).

It was not error for the trial court to refuse to suppress a portion of the defendant's videotaped interview with police on the basis that the statements about the defendant's alcohol consumption improperly placed the defendant's character at issue because generally an adult's consumption of alcohol was irrelevant to the issue of character. Sanford v. State, 284 Ga. 785, 671 S.E.2d 820 (2009).

7. Youthful Offenders

O.C.G.A. § 17-5-30 does not apply to searches by school officials. — Granting that public primary and secondary school students have minimal rights under U.S. Const., amend. 4 to be free from searches and seizures by school officials, nonetheless the exclusionary rule is not applicable to enforce those rights, and students aggrieved by the action of school officials must fall back upon such other legal remedies as applicable law may allow the students. State v. Young, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

Applicability to searches by school officials. — Trial court's denial of the defendant's motion to suppress evidence obtained from the defendant's classroom computer, pursuant to O.C.G.A. § 17-5-30, was proper when a school principal and school technical expert accessed the defendant's computer, and there was no indication that they were acting in the capacity of, or at the request of, law enforcement personnel; the exclusionary rule of U.S. Const., amend. 4 is only applicable to actions undertaken by law enforcement officers and does not apply to the actions of school officials. Joines v. State, 264 Ga. App. 558, 591 S.E.2d 454 (2003).

Applicability to searches by private individuals. — Upon a de novo review of the trial court's application of the law to the facts, because a warrantless search of the defendant's gym locker was conducted by private citizens and not by law enforcement, the search did not implicate the Fourth Amendment; hence, the trial court did not err in denying the defendant's motion to suppress the evidence seized as a result of the search. Hobbs v. State, 272 Ga. App. 148, 611 S.E.2d 775 (2005).

Search of juvenile at school not authorized. — Law enforcement officer, who was acting as an agent for a school principal in searching a juvenile, upon reports that the juvenile had been overheard making arrangements to sell drugs on school grounds, was not authorized to search the juvenile absent probable cause to do so; thus, when the juvenile was searched and drugs were found, the court properly granted the juvenile's motion to suppress. State v. K.L.M., 278 Ga. App. 219, 628 S.E.2d 651 (2006).

Juvenile defendant's statement not suppressed. — Given an analysis of the Riley factors, and the fact that the juvenile defendant knowingly and voluntarily waived any constitutional rights due under Miranda, suppression of a custodial statement to law enforcement was not required. Green v. State, 282 Ga. 672, 653 S.E.2d 23 (2007).

Warrants and Affidavits

Absence of warrant is not material either to guilt or punishment. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Arrest on valid warrant. — Defendant's motion to suppress was properly denied as to an arrest warrant that was supported by probable cause since a witness identified the defendant and stated that the defendant was present at the murder scene and another witness confirmed the identification through a photo lineup and testified to observing the defendant carry out the actual crime; even if the affidavit contained allegedly misleading information that one witness was the victim's cousin and that the defendant was identified by witnesses via a six-photo lineup, the remaining information was still sufficient to support the probable cause finding. Waters v. State, 281 Ga. 119, 636 S.E.2d 538 (2006).

Invalid arrest warrant. — Because a search yielding evidence used against the defendant was incident to the execution of an arrest warrant which was later invalidated, and no good faith exception existed, the evidence seized against the defendant should have been suppressed as the ar-

Warrants and Affidavits (Cont'd)

resting officer had no other basis to search the car in which the defendant was a passenger. Register v. State, 281 Ga. App. 822, 637 S.E.2d 761 (2006), cert. denied, 2007 Ga. LEXIS 216 (Ga. 2007).

Affidavit for search warrant insufficient. — Lack of information about informants and lack of corroboration to show reliability required the trial court to grant the defendant's motion to suppress. Elom v. State, 248 Ga. App. 273, 546 S.E.2d 50 (2001).

Defendant, who was charged with cocaine trafficking and possession of marijuana with intent to distribute, was entitled to suppression of evidence from the search of the defendant's residence because the search warrant was based on an officer's affidavit containing untrue information; the officer's interview with a person, who was arrested with the defendant, did not contain information, which was included in the officer's affidavit, that this person saw the defendant retrieve drugs from the home and hide the drugs in the woods or that this person saw drug paraphernalia in the defendant's residence. State v. Willis, 302 Ga. App. 355, 691 S.E.2d 261 (2010).

Denial of motion to suppress was reversed because the affidavit failed to provide any underlying details that would allow the magistrate to evaluate whether the conclusions were based on specific facts (derived, for example, from physical evidence or eyewitness testimony) rising to the level of probable cause or whether the conclusions were instead based on mere speculation or presumptions. Willoughby v. State, 315 Ga. App. 401, 727 S.E.2d 194 (2012).

Officer's affidavit insufficient. — Police officer's failure to independently corroborate any of the information provided by source A (an unidentified third party) to an anonymous tipster rendered the officer's affidavit insufficient to establish the reliability of either source. Absent a showing that the information in the affidavit was reliable, the trial court erred in denying the motion to suppress. Sutton v. State, 319 Ga. App. 597, 737 S.E.2d 706 (2013).

Affidavit for search warrant sufficient. — Even if a magistrate improperly relied upon a bloody sheet seen in plain view in a defendant's home as a basis for issuing a search warrant for the home, the arrest warrant still contained ample evidence from which to find probable cause that the defendant committed a battery on a victim inside the defendant's home; the evidence included the victim's physical injuries, the victim's statement that the defendant had shoved a curling iron down the victim's throat, and the presence of other blood observed inside the house after deputies entered in search of the assault victim. Lord v. State, 297 Ga. App. 88, 676 S.E.2d 404 (2009).

Once the trial court found that the detective's affidavit contained sufficient facts for the issuance of the search warrant, it was up to the defendant to produce evidence to support the defendant's motion to suppress. Defendant not only failed to do so but failed to insist on a full evidentiary hearing; thus, the state met the state's burden of proof as a matter of law and the denial of the defendant's motion to suppress was mandated. Adams v. State, 300 Ga. App. 294, 684 S.E.2d 404 (2009).

Based on the totality of the circumstances, an affidavit provided a magistrate with a substantial basis for concluding that probable cause existed to believe that contraband would be found in two vehicles because the affidavit in support of the warrant recited the positive alert by an officer's canine as well as the marijuana growing operation in the residence from which the vehicles drove away. Prado v. State, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence a detective found in the defendant's home because given the totality of the circumstances, the magistrate who issued the search warrant was authorized to conclude that there was a fair probability that contraband would be found at the defendant's home; the detective's affidavit in support of the warrant contained ample facts by which the magistrate could independently evaluate the veracity and reliability of anonymous informants and the

informants' information, and a confidential informant's controlled buy of marijuana from the defendant at the defendant's residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at the home. Taylor v. State, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Trial court did not err in denying the defendant's motion under O.C.G.A. § 17-5-30 to suppress evidence seized pursuant to search warrants because the reconstituted affidavit supported the issuance of the search warrant; an agent of the Georgia Bureau of Investigation testified that an antifreeze container smelling of gasoline was found in the warranted search of a car registered in the defendant's name and located in the yard of the home of the defendant's parents, and the affidavit executed as part of the application for a warrant to search the car set out the facts surrounding the crime, that the victim's body had been transported from the place where the victim was killed to the site where the victim's body was found, and that the object of the warrant was one of two vehicles registered to the defendant that the defendant likely used to move the body. Glenn v. State, 288 Ga. 462, 704 S.E.2d 794 (2010).

Trial court did not err in denying the defendant's motion under O.C.G.A. § 17-5-30 to suppress evidence seized pursuant to search warrants because the applications for search warrants to search the defendant's apartment and the car for which registration information was given in the detective's affidavit contained sufficient information from which a judicial officer could determine there was a fair probability that evidence of a crime would be found at those sites as the sites were likely methods of transporting the victim and the likely destination of appellant and the victim; in the detective's affidavit, the detective related the discovery of the victim's body and the statements of the victim's friend and roommate concerning the victim's relationship with the defendant, and the victim's pregnancy and identification of the defendant as the father, who was not pleased about the pregnancy. Glenn v. State, 288 Ga. 462, 704 S.E.2d 794 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence seized from a search warrant authorizing entry into the defendant's home because the affidavit submitted in support of the warrant provided a sufficient basis for the magistrate to make a practical, commonsense decision that there was a fair probability that evidence of sexual exploitation of children would be found at the defendant's residence; the National Center for Missing and Exploited Children forwarded the information it received from a security specialist employed by the host of the website to the Georgia Bureau of Investigation (GBI), and the affidavit of a special agent with the GBI set forth facts that showed both the reliability and basis of knowledge of the specialist. James v. State, 312 Ga. App. 130, 717 S.E.2d 713 (2011), cert. denied, No. S12C0347, 2012 Ga. LEXIS 227 (Ga. 2012).

Trial court erred by granting the defendant's motion to suppress all of the evidence seized at a residence because the affidavits underlying the warrants provided the magistrate with sufficient information to support probable cause as the evidence in the affidavits sufficiently corroborated the information received from the informant and established a nexus between the apartment and another address. Based on the suspect's vehicle, the investigators conducted surveillance on the apartment and the other address, a search of the other address uncovered large amounts of cocaine and methamphetamine, and a background check on the suspect connected the suspect to both the apartment and the other address. State v. Perez, 349 Ga. App. 707, 824 S.E.2d 804 (2019).

Evidence seized as result of warrant. — Because the magistrate was presented with a substantial basis for concluding that evidence of child molestation would be found in the cameras and film located in the defendant's car, and such enabled the magistrate to form probable cause to support the issuance of a search warrant, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of the warrant. Manders v. State, 281 Ga. App. 786, 637 S.E.2d 460 (2006).

Warrants and Affidavits (Cont'd)

Trial court properly denied the defendant's motion to suppress the evidence seized pursuant to a search warrant as: (1) there was a presumption of reliability as to the report of a police officer or undercover agent in the line of duty to a fellow officer in support of the warrant; (2) the affidavit attached to the warrant set forth sufficient facts to establish the reliability of the informant; and (3) a search warrant for the defendant's home was not even necessary because at the time of the search the defendant was on probation. McTaggart v. State, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

Because a search warrant affidavit provided the issuing magistrate with sufficient probable cause connecting the defendant to the residence of a female friend for the magistrate to logically conclude that there was a fair probability that evidence of a crime would be found therein, despite the omission of additional evidence by the affiant, an order granting suppression of the evidence seized therein was reversed; moreover, the police did not have to observe the defendant living with the female, based on the information provided to the police that the pair could still be living together. State v. Hunter, 282 Ga. 278, 646 S.E.2d 465 (2007).

Trial court did not err in denying the defendant's motion to suppress the DNA evidence obtained pursuant to a search warrant as the warrant, given the totality of the circumstances, was based upon sufficient fingerprint evidence which provided an accurate foundation for identifying the defendant as a suspect in all four crimes. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Trial court properly denied suppression of the defendant's blood sample for a DNA comparison pursuant to a particularized search warrant seeking the sample as the warrant and the attached affidavit when read together particularly described the evidence to be seized and gave the executing officers adequate notice of the search warrant's scope and command. Holloway v. State, 287 Ga. App. 655, 653 S.E.2d 95 (2007).

Because the application for a search warrant established that the victim lived in a residence at a specific address, that the defendant lived in the basement apartment located in the residence, that the defendant had severely beaten the victim, and that there was a fair probability that evidence of the crime could be found either in the defendant's apartment or in the victim's part of the residence, probable cause existed to search the defendant's basement apartment and the victim's part of the residence; accordingly, the trial court properly denied the defendant's motion to suppress the evidence found in the apartment. Fletcher v. State, 284 Ga. 653, 670 S.E.2d 411 (2008).

Trial court did not err in refusing to suppress the defendant's hospital records, which showed that the defendant used drugs on the day the defendant shot the victim, because on the evidence's face, the affidavit for the search warrant issued for the records demonstrated a fair probability that evidence of the defendant's drug use would be found in the hospital records; the alleged omissions in the affidavit, which was based on the statements of the defendant's spouse, had the potential to impeach the statements made by the spouse, but the omissions did not eliminate the existence of probable cause because if the omitted material were included in the warrant, probable cause would still exist. Herrera v. State, 288 Ga. 231, 702 S.E.2d 854 (2010).

Failure to leave a copy of the supporting affidavit at the searched premises did not render a warrant facially void for lack of particularity since the warrant referred to the attached affidavit, which specified the exact location of the property to be searched and the particular items to be seized and there was no dispute that the location, the scope of the search, and seizure conformed to the warrant; thus, denial of defendant's motion to suppress was not in error. Battle v. State, 266 Ga. App. 532, 597 S.E.2d 417 (2004).

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because the fact that the investigator who submitted the affidavit for the search warrant did not leave a copy of the affidavit with the warrant at the premises did not ren-

der the warrant invalid; the warrant satisfied the particularity requirement of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII on the warrant's face because the warrant listed the address of the place to be searched and contained a description of the home, and the warrant also listed items to be seized, including marijuana, weighing devices, and other paraphernalia used in the distribution of drugs. Pass v. State, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Failure to tender warrant or affidavit. — Trial court erred in denying the defendant's motion to suppress because the state did not carry the state's burden to prove the validity of the warrant in that the affidavit supporting the warrant was not tendered into evidence. Smith v. State, 324 Ga. App. 542, 751 S.E.2d 164 (2013).

Warrant for arrest of defendant's passenger justified search. — Trial court properly denied a defendant's motion to suppress the evidence of drugs and a handgun found during the warrantless search of the defendant's vehicle as the arrest of the defendant's passenger on an outstanding warrant authorized the stop of the defendant's vehicle and the mobility of the car, coupled with the existence of probable cause to believe the car contained marijuana, based on the officer smelling the marijuana upon approaching the vehicle, authorized the search. Somesso v. State, 288 Ga. App. 291, 653 S.E.2d 855 (2007), cert. denied, No. S08C0505, 2008 Ga. LEXIS 281 (Ga. 2008).

Affidavit containing false statements and omitting material information. — In reviewing the sufficiency of an affidavit containing false statements and omitting material information, the false statements must be deleted, the omitted truthful material must be included, and the affidavit must be reexamined to determine whether probable cause exists to issue a search warrant. Redding v. State, 192 Ga. App. 87, 383 S.E.2d 640 (1989).

Proof that facts in affidavit false may prove search illegal. — Proof that the facts sworn to in the supporting affidavit were actually false might well be proof of illegal execution of a search warrant. Wood v. State, 118 Ga. App. 477, 164 S.E.2d 233 (1968).

Search exceeded the warrant. — Because the scope of the search exceeded the warrant and the search was excessive, the court erred in denying the motion because of the difficulty in enumerating the items improperly seized; the remedy is the suppression and return of the unlawfully seized items. Grant v. State, 220 Ga. App. 604, 469 S.E.2d 826 (1996).

Search did not exceed warrant. — Because a search warrant referred to the crimes of possession of methamphetamines and theft by receiving stolen property, the warrant did not violate the particularity requirement; therefore, the trial court did not err in denying the defendant's motion to suppress. Allison v. State, 299 Ga. App. 542, 683 S.E.2d 104 (2009).

Insufficient evidence of existence of valid warrant. — State failed to meet the state's burden under O.C.G.A. § 17-5-30(b) of proving that a search of a defendant's hotel room was made pursuant to a valid warrant because the state failed to produce the warrant or supporting affidavit, and the sheriff's testimony concerning the warrant was hearsay because the sheriff had no personal knowledge of the warrant. Sosebee v. State, 303 Ga. App. 499, 693 S.E.2d 838 (2010).

Warrant and affidavit in record prior to suppression hearing. — Because the testifying officer had personal knowledge concerning the existence of a valid search warrant and the warrant and supporting affidavit were in the record prior to the suppression hearing, the state met the state's burden of producing evidence showing the validity of the warrant since the defendant offered nothing in opposition, the trial court properly denied the defendant's motion to suppress. Tyre v. State, 323 Ga. App. 37, 747 S.E.2d 106 (2013).

Evidence Acquired Unlawfully

Evidence seized as result of illegal police activity. — Law proscribes only unreasonable searches and seizures and prohibits the use of evidence seized as a result of lawless police activity. State v. Sanders, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Evidence Acquired Unlawfully (Cont'd)

Trial court did not err in granting the defendant's motion to suppress statements, drugs, paraphernalia, and cash the police found after searching the defendant's home as fruit of the poisonous tree because although the police had authority to enter the house for the purpose of apprehending the defendant, the subsequent reentry by the police was illegal since an officer reentered the house without a warrant, valid consent, or exigent circumstances; both before and at the time of the defendant's arrest, the defendant told the police not to enter the house, and it could not be assumed that the victim's need for assistance justified the officer's reentry because the exigent circumstances authorizing entry for the limited purpose of effecting the defendant's arrest had expired. State v. Driggers, 306 Ga. App. 849, 702 S.E.2d 925 (2010).

Deputy's discovery of the tailgate allegedly from the stolen truck was problematic because the deputy did not have a warrant or consent when the deputy went behind the house and, thus, the deputy's observation of the tailgate behind the house was illegal, and since the state did not show that the observation of the battery charger alone supported the issuance of the search warrant, the defendant's motion to suppress should have been granted. Bowman v. State, 332 Ga. App. 407, 773 S.E.2d 33 (2015).

No exigent circumstances justifying entry. — Because the state failed to carry the state's burden of establishing exigent circumstances justifying the entry of the police into defendants' trailer to arrest persons for underage drinking, the trial court properly granted the defendants' motion to suppress the evidence seized from the unlawful entry. State v. Ealum, 283 Ga. App. 799, 643 S.E.2d 262 (2007).

Suppression of marijuana and cocaine was proper after three uniformed officers stepped into the codefendant's hotel room without permission and asked about luggage and other bags in the room, because following the officers' entry to retrieve three zipped bags, which the codefendant's said were not theirs, the second defendant acquiesced in an officer's request to search the second defendant's bag and the state did not fulfill the state's burden to show that consent for the search was voluntary. State v. Hamby, 317 Ga. App. 480, 731 S.E.2d 374 (2012).

Exigent circumstances not found. — Defendant's suppression motion was properly granted when: (1) an officer executing an arrest warrant for a third person had unreasonably looked through the defendants' window, discovering the defendants using marijuana; (2) the officers did not identify themselves as police officers when the officers knocked at the defendants' door; (3) defendants hid the marijuana before opening the door; (4) the police confronted defendants about the marijuana after the police determined that the third person was not in the house; and (5) the appellate court could not conclude, as a matter of law, that there were exigent circumstances justifying the warrantless seizure of the drugs, in that the drugs were in danger of being destroyed, simply because the defendants hid the drugs before opening the door. State v. Schwartz, 261 Ga. App. 742, 583 S.E.2d 573 (2003).

Trial court erred in denying the defendant's motion to suppress evidence as the evidence that the police officer seized was obtained after the officer made a warrantless entry into the defendant's apartment without consent and without exigent circumstances to justify that entry; thus, the contraband that the officer observed or discovered as part of that entry was observed or discovered as a result of the officer being in a location where the officer did not have a lawful right to be. Leon-Velazquez v. State, 269 Ga. App. 760, 605 S.E.2d 400 (2004).

Although police officers had probable cause to investigate a crime, the Fourth Amendment prohibited the police from entering the defendant's home or the home's curtilage without a warrant absent consent or a showing of exigent circumstances; consequently, the trial court erred by denying defendant's motion to suppress evidence of a ten-foot high marijuana plant plainly growing in defendant's backyard. Kirsche v. State, 271 Ga. App. 729, 611 S.E.2d 64 (2005).

Trial court erred in denying the defendant's motion to suppress as the back yard and the back door of the defendant's home fell within the general definition of curtilage of the home and the state failed to show an exception, such as exigent circumstances, to the homeowners' Fourth Amendment right to protection of the back yard/door curtilage of the home. Arp v. State, 327 Ga. App. 340, 759 S.E.2d 57 (2014).

Evidence from exigent circumstances searches. — Given the existence of exigent circumstances, law enforcement officers were justified in searching the defendant's home without a warrant in order to determine if a child was present and in need of medical attention or in danger of imminent harm; as a result, the trial court properly denied the defendant's motion to suppress evidence seized as a result of that search. Richards v. State, 286 Ga. App. 580, 649 S.E.2d 747 (2007), cert. denied, No. S07C1766, 2007 Ga. LEXIS 702 (Ga. 2007).

Trial court did not err in admitting into evidence the murder weapon and photographs of the crime scene because the search of the defendant's residence was authorized due to the exigent circumstances; officers arrived at the residence to conduct a welfare check and knocked on the door, which caused the door to open slightly, allowing the officers to see the victim lying motionless on the couch, and after the victim failed to respond to the officers' calls, the officers were authorized to proceed into the residence immediately to come to the victim's aid. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447 (2011).

Trial court did not err in denying the defendant's motion to suppress photographs obtained subsequent to the police officers' entry into the defendant's home because the officers' entry was authorized by the exigent circumstances exception to the warrant requirement of the Fourth Amendment; the trial court was authorized to find that the age of the defendant's children, the children's undisputed inability to care for themselves, and the lack of adult supervision due to the defendant's absence and their father's arrest constituted an exigent circumstance that authorized the officers' entry into the residence for the purpose of temporarily supervising the children until a responsible adult arrived to relieve the officers, and once the officers were legally in the house pursuant to the exigent circumstances, the officers were authorized to photograph items of potential evidentiary significance that were in plain view, specifically, the family's living conditions. Staib v. State, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

If police know about crime, warrantless arrest legal. — If law enforcement officers have sufficient personal knowledge of the acceptance of a bribe to justify the officers' arrest of appellant without a warrant, the arrest is legal without a warrant and the exclusionary rule of Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) is not applicable to the evidence seized incident to that arrest. Humphrey v. State, 231 Ga. 855, 204 S.E.2d 603, cert. denied, 419 U.S. 839, 95 S. Ct. 68, 42 L. Ed. 2d 66 (1974).

Evidence and motion failing to prove alleged illegal warrantless search. — If a written motion to suppress evidence is based on allegations of an illegal search without a warrant, and a seizure with a warrant, but there is nothing in the written motion to support a contention that the search, if made with a warrant, was illegal for any of the reasons stated in the statute, and if the evidence adduced on the hearing authorized a determination that the search itself took place with a warrant, the motion to suppress is properly denied. Raines v. State, 123 Ga. App. 794, 182 S.E.2d 491 (1971).

Failure to file motion to suppress to challenge. — Because the defendant did not file a timely motion to suppress any physical evidence in the case, the defendant waived any right to claim that the underlying search which produced the physical evidence was unconstitutional; thus, the defendant was not entitled to exclusion of testimony describing the physical evidence on the basis that the testimony was the fruit of an unconstitutional search. Riley v. State, No. A20A1376, 2020 Ga. App. LEXIS 431 (July 21, 2020).

If illegal arrest, fruits not admissible. — If an arrest without a warrant is illegal, the search is unlawful and the

Evidence Acquired Unlawfully (Cont'd)

property seized as a result of the arrest should be suppressed as evidence by the trial court. Humphrey v. State, 231 Ga. 855, 204 S.E.2d 603, cert. denied, 419 U.S. 839, 95 S. Ct. 68, 42 L. Ed. 2d 66 (1974).

If there is no legal justification for the arrest, the unlawful fruits may not be introduced in evidence. Moore v. State, 155 Ga. App. 299, 270 S.E.2d 713 (1980).

Trial court erred in denying a defendant's motion to suppress because the state did not establish sufficient probable cause to arrest the defendant for driving under the influence since the state offered no evidence showing that the defendant's driving ability was impaired due to alcohol consumption; evidence that an officer smelled alcohol on the defendant's breath, that an alco-sensor test revealed the presence of alcohol, and that the defendant admitted that the defendant had been drinking "earlier in the day" was insufficient as a matter of law to constitute probable cause to arrest the defendant for driving under the influence. Handley v. State, 294 Ga. App. 236, 668 S.E.2d 855 (2008).

Fruits of pretextual arrest inadmissible. — When the state never physically produced at any point in the criminal proceedings and when the record did not otherwise confirm the existence of the alleged arrest warrant through which the state justified intruding into the defendant's home, resulting in the eventual search-warrant seizure of a controlled substance discovered pursuant to that arrest, a motion to suppress was improperly denied. Baez v. State, 206 Ga. App. 462, 425 S.E.2d 882 (1992).

Seizure for crime committed independent of warrant. — Results of a breath test obtained following the stop of the defendant pursuant to an arrest warrant on a family violence charge were untainted by any infirmity in the arrest warrant; the seizure of the breath test evidence resulted from a "second" arrest arising from the police officer's having witnessed the commission of an independent crime. King v. State, 211 Ga. App. 12, 438 S.E.2d 93 (1993).

Evidence obtained under a void warrant, is evidence illegally obtained and the taint of illegal procurement forbids its use as evidence. Anderson v. State, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Backpack too far from defendant to fall under search incident to arrest exception. — State failed to meet the state's burden to prove that the warrantless search of the defendant's backpack was lawful as the backpack was under the exclusive control of the officers and the defendant was handcuffed, leaving no danger that the defendant would gain access to the backpack to seize the weapon or destroy evidence. Huff v. State, 346 Ga. App. 120, 816 S.E.2d 304 (2018).

Requirements for Motion

1. In General

Motion must state facts showing search unlawful. — All motions to suppress, whether based on statutory or nonstatutory grounds, must state facts and not merely conclusions. Boatright v. State, 192 Ga. App. 112, 385 S.E.2d 298 (1989); Taylor v. State, 197 Ga. App. 678, 399 S.E.2d 213 (1990).

O.C.G.A. § 17-5-30(b) requires that a motion to suppress evidence "state facts showing that the search and seizure were unlawful." Unless the defendant has satisfied this requirement, the state is under no duty to present evidence in rebuttal. Wilson v. State, 197 Ga. App. 181, 397 S.E.2d 744 (1990).

O.C.G.A. § 17-5-30 required only that the motion to suppress state facts showing that the search and seizure was unlawful. Watts v. State, 274 Ga. 373, 552 S.E.2d 823 (2001).

Because the defendant never sought a ruling from the trial court on the defendant's motion to suppress evidence obtained during a roadblock, the appellate court had nothing to review because the appellate court could not find that the trial court erred by denying a motion that was never presented to the trial court; further, the motion would have been denied, even if a ruling was sought, because the motion never mentioned the roadblock and never stated any facts showing that a search and seizure were unlawful, as re-

quired by O.C.G.A. § 17-5-30(b), and a series of conclusions without support of stated facts did not meet the statutory requirements. Overton v. State, 270 Ga. App. 285, 606 S.E.2d 306 (2004).

Harm or prejudice must be demonstrated before a violation of O.C.G.A. § 17-5-30(b) can be held to give rise to reversible error. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981); Eidson v. State, 182 Ga. App. 321, 355 S.E.2d 691 (1987).

Defendant only required to state facts concerning illegal warrant. — O.C.G.A. § 17-5-30 requires the defendant only to "state facts" showing that warrant was unlawful. The statute does not require that those facts be proven or substantiated before the state satisfies the state's burden of proof. The possibility that the defendant may not have competent evidence to support the defendant's allegation is irrelevant until the state has entered evidence that specifically rebuts the defendant's charge. Slaughter v. State, 168 Ga. App. 58, 308 S.E.2d 6 (1983), rev'd in part on other grounds, 252 Ga. 435, 315 S.E.2d 865 (1984).

Contents of motion inadequate. — Objections to the legality of a search and seizure are not properly brought before the trial court when the motion to suppress evidence states no facts showing wherein the search and seizure were unlawful. Mosier v. State, 160 Ga. App. 415, 287 S.E.2d 357 (1981).

Trial court did not err in dismissing the motion to suppress since the defendants' motion to suppress failed to state any facts alleging why the search and seizure were illegal. Davis v. State, 203 Ga. App. 315, 416 S.E.2d 789, cert. denied, 203 Ga. App. 905, 416 S.E.2d 789 (1992).

Motion to suppress evidence found during a search was insufficient since the defendant stated in the defendant's motion that the warrant pursuant to which the search was conducted was invalid, but did not provide any facts to support such conclusion. Powles v. State, 248 Ga. App. 4, 545 S.E.2d 153 (2001).

Order suppressing evidence gathered at a traffic stop was reversed after the defendant's motion asked the trial court to suppress the fruits of a warrantless search of the defendant's home when there had been no search of the defendant's home, and the motion did not raise an issue of whether the officer had a valid basis to justify a traffic stop. The motion was so grossly inapplicable to the facts of the case that the motion did not give the state reasonable notice of the motion's nature and scope. The officer had a reasonable, articulable suspicion to justify an investigative traffic stop of the defendant solely on the basis of information from a dispatcher who reported that a citizen saw the defendant's vehicle, with the defendant's license number, being driven erratically, by a driver who appeared intoxicated. State v. Gomez, 266 Ga. App. 423, 597 S.E.2d 509 (2004).

Sufficient facts were contained in a motion which revealed the date of the stop, the identity of the person stopped, the identity of the officer who made the stop, the law enforcement organization with which the officer was affiliated, the nature of the stop, the offenses charged, and the conclusion that no violations occurred which would justify the stop. State v. Goodman, 220 Ga. App. 169, 469 S.E.2d 327 (1996).

Consideration of brief filed with motion. — O.C.G.A. § 17-5-30(b) does not preclude consideration of the defendant's brief, which was filed contemporaneously with the motion to suppress, as part of the motion. Stanley v. State, 206 Ga. App. 125, 424 S.E.2d 90 (1992).

Procedurally defective motion to suppress. — Motion to suppress which is procedurally defective is properly overruled, and a motion to suppress which is made orally is procedurally defective and a denial thereof is authorized. Graves v. State, 135 Ga. App. 921, 219 S.E.2d 633 (1975).

Must object to defective intoxication test. — If the defendant previously has not moved to suppress the evidence, results of a defectively administered intoxication test are inadmissible over objection. State v. Johnston, 160 Ga. App. 71, 286 S.E.2d 47 (1981), aff'd, 249 Ga. 413, 291 S.E.2d 543 (1982).

Objection by codefendant's counsel not a motion to suppress. — Objection to further testimony by a police officer on

Requirements for Motion (Cont'd)
1. In General (Cont'd)

the grounds that the officer unlawfully initiated a traffic stop was improper as a motion to suppress tangible evidence because the objection was not made in writing as required by O.C.G.A. § 17-5-30(b), and the objection was made by the codefendant's counsel rather than the defendant's counsel. Dunn v. State, 262 Ga. App. 643, 586 S.E.2d 352 (2003).

Claim of error in denying suppression motion waived. — Defendant waived the defendant's claim that the defendant's suppression motion was improperly denied by affirmatively stating at trial that the defendant had no objection to the admission of the evidence; when a prior motion to suppress has been filed, merely failing to object to the admission of the evidence during the subsequent trial does not constitute a waiver of the grounds asserted in the motion, but affirmatively stating there is no objection to admission of the evidence in effect concedes the point. Mew v. State, 267 Ga. App. 454, 600 S.E.2d 397 (2004).

Contents of motion adequate. — Motion containing facts showing the date of the search, the general location, the identity of the person searched, the organization with which the officer making the search was affiliated, that defendant did not consent to the search in fact, and the conclusion that the search was unsupported by probable cause or articulable suspicion was sufficient to require the state to meet the state's allegations with proof to the contrary. Hill v. State, 222 Ga. App. 839, 476 S.E.2d 634 (1996).

Motions to suppress that established the type of searches (Terry stops-and-frisks) and identified the legal issues raised (whether the stops-and-frisks were authorized by reasonable suspicion and whether the resulting arrests were supported by probable cause) put the state on notice as to the witnesses whose testimony was required; failure of the motions to identify the officers conducting the stops-and-frisks, and to more fully detail the attendant facts, was not fatal to the sufficiency of the motions. Dean v. State, 246 Ga. App. 263, 540 S.E.2d 246 (2000).

Defendant's motion to suppress met the requirements of O.C.G.A. § 17-5-30(b) because the motion was sufficient to put the state on notice that all of the searches the state conducted pursuant to a warrant were at issue, that it was necessary to have present at the hearing the affiant detective, and that the legal issue for resolution was the sufficiency of the affidavit. Glenn v. State, 288 Ga. 462, 704 S.E.2d 794 (2010).

Motion not applicable to questions on chain of custody. — Motion to suppress may properly be directed only to the issue of whether evidence has been illegally obtained or seized, not to the issue of chain of custody. Kelly v. State, 145 Ga. App. 780, 245 S.E.2d 20 (1978).

Issue of incorrect address not raised in motion to suppress. — Trial court erred in granting the motion to suppress when the defendant had ample opportunity to review the warrant in advance of the hearing and assert an incorrect address as a defect in the defendant's motion to suppress, and since the issue was not raised in the motion to suppress and the state was not properly placed on notice that this issue would be raised at the hearing on the motion, the objection must be deemed waived. State v. Armstrong, 203 Ga. App. 159, 416 S.E.2d 537 (1992).

2. Writing

Legislative intent to require motion in writing. — O.C.G.A. § 17-5-30 clearly evinces the legislative intent that suppression, or exclusion, of the evidence must be founded upon motion, or objection, in writing. Brannen v. State, 117 Ga. App. 69, 159 S.E.2d 476 (1967).

Written motion to suppress required. — Before a hearing is held on a motion to suppress, the motion must be in writing and state facts showing that the search and seizure were unlawful. Hayes v. State, 168 Ga. App. 94, 308 S.E.2d 227 (1983); Young v. State, 225 Ga. App. 208, 483 S.E.2d 636 (1997).

Appellate court declined to consider the defendant's challenge to the denial of a motion to suppress because the defendant failed to present the arguments to the trial court in the written motion to sup-

press. Wise v. State, 321 Ga. App. 39, 740 S.E.2d 850 (2013).

No objection required when motion in limine obtained. — As a preliminary matter, because the defendant obtained a ruling on a motion in limine, the defendant was not under an obligation to object when the state cross-examined the defendant concerning the defendant's sexual history and habits. Having obtained a ruling in limine, it was not necessary for the defendant to raise an objection at trial when the evidence was introduced in order to preserve this issue for appellate review. Herring v. State, 288 Ga. App. 169, 653 S.E.2d 494 (2007), cert. denied, No. S08C0448, 2008 Ga. LEXIS 205 (Ga. 2008).

Oral motion in limine. — O.C.G.A. § 17-5-30 applies only to motions to suppress evidence made by criminal defendants, and the state's oral motion in limine was therefore not required to be in writing. Brown v. State, 192 Ga. App. 864, 386 S.E.2d 734 (1989).

Trial court did not err in denying the defendant's oral motion made during a trial to suppress evidence obtained from a search of the defendant's person. Belcher v. State, 230 Ga. App. 235, 496 S.E.2d 306 (1998); Bellamy v. State, 243 Ga. App. 575, 530 S.E.2d 243 (2000).

Oral motion inadequate. — Because the defendant's oral motion to suppress was made on the first day of trial, the motion failed to satisfy the requirements of subsection (b) of O.C.G.A. § 17-5-30 and Uniform Superior Court Rule 31.1; therefore, the trial court did not err in denying the motion. Copeland v. State, 272 Ga. 816, 537 S.E.2d 78 (2000).

Defendant's oral objection at trial to the admission of alleged cocaine seized from the defendant's person based on Fourth Amendment grounds was not reviewable because the defendant failed to file a written motion to suppress the evidence as required by O.C.G.A. § 17-5-30. Nelson v. State, 305 Ga. App. 65, 699 S.E.2d 66 (2010).

Exception allowing oral motion. — Only when the movant becomes aware of the illegal seizure at such a late hour that a written motion to suppress is impossible should an oral motion to suppress and a hearing thereon be entertained. Rucker v. State, 250 Ga. 371, 297 S.E.2d 481 (1982).

Writing and timely filing required. — O.C.G.A. § 17-5-30 requires that a motion to suppress evidence be in writing and filed before arraignment. When the defendant's motion did neither, the defendant failed to preserve the right to challenge the validity of the search of the defendant's motel room. Jackson v. State, 252 Ga. App. 268, 555 S.E.2d 908 (2001).

When the defendant waited until trial to raise the argument that a shotgun was illegally seized from the defendant's house, the motion to suppress was not timely under the requirements of O.C.G.A. § 17-5-30 and Ga. Unif. Super. Ct. R. 31.1, so the issue was waived both for trial and on appeal. Cranford v. State, 275 Ga. App. 474, 621 S.E.2d 470 (2005).

In a prosecution for possession of cocaine with intent to distribute, because the defendant failed to voice an objection at trial regarding an inaccuracy in a search warrant affidavit as to the precise location of the alleged cocaine sale which served as the basis of the charge, but instead raised the issue for the first time in a motion for a new trial, the objection was late; thus, the appellate court's review of the issue was waived. Jackson v. State, 281 Ga. App. 368, 636 S.E.2d 34 (2006).

Defendant waived the issue of suppression of drug evidence because the defendant did not file a written motion to suppress under O.C.G.A. § 17-5-30(b) and neither objected to the admission of the drug evidence nor to the deputy's testimony regarding the search. Ferrell v. State, 312 Ga. App. 122, 717 S.E.2d 705 (2011).

Compelling trial court to put oral suppression motion in writing. — Because the state failed to request that the trial court put an oral order of suppression in writing, and show that the trial court refused to do so, the state did not have the right to appeal from that order; moreover, while the state could have filed a mandamus petition seeking to require the court to put the oral order in writing, the state did not seek that relief. State v. Morrell, 281 Ga. 152, 635 S.E.2d 716 (2006).

Writing held adequate. — See State v. Blosfield, 165 Ga. App. 111, 299 S.E.2d

Requirements for Motion (Cont'd)
2. Writing (Cont'd)

588 (1983); State v. Jones, 245 Ga. App. 763, 538 S.E.2d 819 (2000).

Under O.C.G.A. § 17-5-30(b), a defendant waived the right to challenge the lack of a search warrant because the issue had not been raised in the defendant's written motion to suppress, which was premised on the existence of a search warrant. The defendant could have ascertained prior to the motion hearing whether a warrant existed; moreover, even if the defendant was validly surprised at the motion hearing to learn for the first time that no search warrant was issued, the defendant did not request a continuance to amend the motion to suppress to be in accordance with § 17-5-30(b). Young v. State, 282 Ga. 735, 653 S.E.2d 725 (2007).

3. Timely Motion

Motion to suppress must be made at trial. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977), but see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998).

Motion to suppress must be filed prior to trial. — Although O.C.G.A. § 17-5-30 does not provide for a specific time when a motion to suppress must be filed, it is clear that the motion shall be filed before trial since the motion's purpose is to avoid the interruption of the trial for the purpose of investigating the collateral issue of the legality of the means by which the evidence was obtained. Stansifer v. State, 166 Ga. App. 785, 305 S.E.2d 481 (1983), but see Hatcher v. State, 224 Ga. App. 747, 482 S.E.2d 443 (1997), and Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998); Burch v. State, 213 Ga. App. 392, 444 S.E.2d 370 (1994); Tucker v. State, 222 Ga. App. 517, 474 S.E.2d 696 (1996).

Initial motion should be at trial, not on habeas corpus. — If the search warrants were illegal for any reason and the evidence obtained thereunder inadmissible on the prisoners' trials, this can be adjudicated upon such trial, rather than authorize the prisoner's discharge on habeas corpus in advance of the trial. Carlin v. Nevil, 227 Ga. 359, 180 S.E.2d 740 (1971).

Habeas corpus review test. — Habeas corpus review test on U.S. Const., amend. 4 claims is whether a defendant had a full and fair opportunity to litigate; not whether the claim was, in fact, litigated. Jacobs v. Hopper, 238 Ga. 461, 233 S.E.2d 169 (1977).

Habeas corpus review test for federal courts is adopted for state habeas corpus review: a court need not apply the exclusionary rule on habeas review of a claim under U.S. Const., amend. 4 absent a showing that the prisoner was denied a full and fair litigation of that claim at trial and on direct review. Jacobs v. Hopper, 238 Ga. 461, 233 S.E.2d 169 (1977).

Exclusionary rule does not affect evidence admitted without timely challenge. — Requirement that all evidence obtained by searches and seizures in violation of U.S. Const., amend. 4 is inadmissible in state courts and is only an exclusionary rule which does not affect the competence of evidence admitted without timely challenge. Graves v. State, 135 Ga. App. 921, 219 S.E.2d 633 (1975).

Untimely but properly challenged evidence competent if rules satisfied. — Evidence which is merely subject to exclusion but is not timely and properly challenged is competent evidence, provided, of course, that the applicable rules of evidence are satisfied. Touchstone v. State, 121 Ga. App. 602, 174 S.E.2d 450 (1970).

Defendant unaware of grounds for motion. — This law is similar to Fed. R. Crim. P. 41(e) which expressly provides that the motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. Thomas v. State, 118 Ga. App. 359, 163 S.E.2d 850 (1968), cert. denied, 394 U.S. 943, 89 S. Ct. 1273, 22 L. Ed. 2d 477 (1969).

Motion to suppress must be made prior to written plea. — Although there is no time limit set out in O.C.G.A. § 17-5-30 for the filing of a motion to suppress, the motion must be made before the defendant enters defendant's written plea. Waller v. State, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds,

467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Sartin v. State, 201 Ga. App. 612, 411 S.E.2d 582 (1991); Ellis v. State, 216 Ga. App. 232, 453 S.E.2d 810 (1995).

Motion to suppress prior to joining issues. — O.C.G.A. § 17-5-30 is limited in time only so far as the statute requires filing of a motion to suppress prior to joining of issues. State v. Shead, 160 Ga. App. 260, 286 S.E.2d 767 (1981).

Motion held untimely. — After the defendant learned of a pistol's seizure ten days before the defendant announced ready to proceed to trial at the call of the trial calendar but nevertheless did not file the defendant's motion to suppress the weapon until the day after the defendant announced ready, the motion was untimely. Highfield v. State, 198 Ga. App. 530, 402 S.E.2d 125 (1991).

Trial court properly denied the defendant's motion to suppress because the motion was untimely filed, only six days before trial in the matter. Baseler v. State, 213 Ga. App. 822, 446 S.E.2d 250 (1994).

Trial court did not abuse the court's discretion by failing to grant the defendant's request to present additional evidence in support of the defendant's motion to suppress which was made after the original hearing and ruling denying the motion. Pickens v. State, 225 Ga. App. 792, 484 S.E.2d 731 (1997).

Motion filed five weeks after arraignment was properly dismissed as untimely. Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998).

Failure to timely file results in waiver. — Trial court did not err in dismissing as untimely a defendant's motion in limine to suppress unlawfully obtained evidence with regard to a cocaine trafficking charge. The defendant waived formal arraignment and pled not guilty, and more than three months later the defendant filed a motion in limine to suppress evidence, arguing that both the cocaine and testimony regarding the cocaine should be excluded on the ground that both were products of an unlawful search; the defendant was unable to circumvent the requirements of Ga. Unif. Super. Ct. R. 31.1 by couching the defendant's motion to suppress as a motion in limine; and the defendant's failure to file a timely motion to suppress waived any right to claim that the search was unconstitutional. Fraser v. State, 283 Ga. App. 477, 642 S.E.2d 129 (2007), overruled in part by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Untimely objection amounts to waiver. — Failure to interpose a timely motion to suppress in compliance with Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) amounts to a waiver of the constitutional guaranty against illegal search and seizure in respect to the search and seizure in question. Brannen v. State, 117 Ga. App. 69, 159 S.E.2d 476 (1967); Watts v. State, 117 Ga. App. 558, 161 S.E.2d 516 (1968); Lane v. State, 118 Ga. App. 688, 165 S.E.2d 474 (1968); West v. State, 120 Ga. App. 390, 170 S.E.2d 698 (1969); Bissel v. State, 126 Ga. App. 61, 189 S.E.2d 701 (1972); Wilson v. State, 126 Ga. App. 145, 190 S.E.2d 128 (1972); Foskey v. State, 126 Ga. App. 268, 190 S.E.2d 556 (1972); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Wilcoxen v. State, 162 Ga. App. 800, 292 S.E.2d 905 (1982).

There is a waiver of defects in the affidavit upon which the search warrant was issued, or in the warrant itself, or in the absence of a warrant authorizing the search if no timely motion to suppress is filed. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973).

Oral objection to evidence obtained by unlawful search and seizure is not sufficient unless preceded by suppression of the evidence pursuant to a motion to suppress in compliance with Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30). Failure to interpose a timely motion to suppress in compliance with that section amounts to a waiver of the constitutional guaranty in respect to the search and seizure in question. Graves v. State, 135 Ga. App. 921, 219 S.E.2d 633 (1975).

Federal habeas petitioner did not offer any compelling reason to disturb the Georgia court's conclusion that the petitioner's suppression motion was untimely filed and, therefore, waived. Holton v. Newsome, 750 F.2d 1513 (11th Cir. 1985).

In a prosecution on four counts of child molestation, the defendant's failure to file a timely motion to suppress waived the right to claim that the seized items were

Requirements for Motion (Cont'd)
3. Timely Motion (Cont'd)

inadmissible as fruits of the poisonous tree. Walker v. State, 277 Ga. App. 485, 627 S.E.2d 54 (2006).

State's failure to object to timely filed motion. — State waived the state's claim that the defendant's motion to suppress, filed two months after arraignment, was untimely as the state failed to raise the issue or object to the motion on that basis before the trial court; moreover, the state's failure to object was particularly significant in light of the express provision in O.C.G.A. § 17-7-110 allowing the trial court to extend the time for filing. Hicks v. State, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Waiver of judge's error in denying hearing. — It is procedural error for the trial court to deny the appellant a hearing upon the appellant's motion to suppress outside the presence of the jury, but if no objection is made to its admission, the appellant waives any objection which might be urged, including those contained in the written motion to suppress. Yarbrough v. State, 151 Ga. App. 474, 260 S.E.2d 369 (1979).

Whether warrant void or otherwise defective. — Requirement for timely objection to introduction of illegally seized evidence applies with equal force to a warrant that is void as it does to a warrant that is defective for some other reason. Butler v. State, 134 Ga. App. 131, 213 S.E.2d 490 (1975).

Later objection barred. — Failure to comply with O.C.G.A. § 17-5-30(b) when evidence is first introduced bars a later objection to the admission of such evidence. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Failure to request permission to file late motion. — Trial court did not err by refusing to consider a defendant's motion to suppress which was untimely filed on the day of trial since no written extension for a late filing was requested prior to trial. Thompson v. State, 195 Ga. App. 18, 392 S.E.2d 732 (1990).

Discretion of trial court. — Defendants failed to show an abuse of the trial court's discretion in denying the request for leave to file the untimely motion to suppress. Davis v. State, 203 Ga. App. 315, 416 S.E.2d 789, cert. denied, 203 Ga. App. 905, 416 S.E.2d 789 (1992).

Objection must be raised when evidence offered. — To be valid, an objection to evidence based on grounds other than unlawful search and seizure must be voiced at the time the evidence is actually offered. Hawkins v. State, 117 Ga. App. 70, 159 S.E.2d 440 (1967).

Trial court did not err in denying the defendant's motion to suppress a written statement given to police during the course of a pretrial interview, despite that at the time the statement was given, the defendant invoked a right to counsel, as a defense objection to the admission of the statement on this ground came after the statement was already admitted, and was thus untimely. Copeland v. State, 281 Ga. App. 656, 637 S.E.2d 90 (2006).

Waiver results upon failure to make timely objection. — When testimony is tendered, an objection must be made affording the court the opportunity to rule upon the admissibility of the testimony upon the grounds then urged and in the context of the matter as the matter then appears, and failure to make a timely objection to testimony when the testimony is offered results in a waiver of any objection that might have been urged. Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Hearing Procedure

Requirement to hold hearing preserved by objection. — After a motion to suppress has been filed, failure to hold the mandatory hearing is error, and the error is preserved by objection to admission of the evidence sought to be suppressed. Gray v. State, 145 Ga. App. 293, 243 S.E.2d 687 (1978).

Trial court required to address tainted fruit rule. — Trial court erred by granting the defendant's motion to suppress after concluding that the state failed to prove the legality of the defendant's arrest for failing to tender the open container ordinance as the trial court was required to go on to address and rule on whether the drugs discovered during the

subsequent search of the backpack in the vehicle constituted tainted fruit of the arrest based on the officers' testimony regarding the smell of marijuana. State v. Alford, 347 Ga. App. 208, 818 S.E.2d 668 (2018).

Motion sufficient to put state on notice of grounds. — Defendant's motion to suppress was not insufficient to put the state on notice of the specific grounds of the motion; although the motion did not state the investigating officer's name, the motion stated the indictment number and alleged that a search was illegal and that probable cause was lacking. State v. Owens, 285 Ga. App. 370, 646 S.E.2d 340 (2007).

If state fails to show search validity at hearing, even imperfect motion granted. — If the state failed to produce any evidence proving the validity of a search and seizure at a hearing, a trial court should grant a motion to suppress, whether or not the sufficiency of the motion made complies with the law and amounts to a legal motion to suppress the evidence. State v. McNutt, 146 Ga. App. 369, 246 S.E.2d 402 (1978).

State need not prove lawful search if no valid attack. — Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) does not require that the state present evidence of the legality of a search in the absence of a valid attack thereon. Jacobs v. State, 133 Ga. App. 812, 212 S.E.2d 468 (1975).

State bears burden of proving warrantless search lawful. — Under a warrantless search and seizure, the burden of proving that the search and seizure was lawful is upon the state. Phillips v. State, 167 Ga. App. 260, 305 S.E.2d 918 (1983).

State's satisfaction of burden to show that search with warrant lawful. — When a motion to suppress is made on one of the three grounds of O.C.G.A. § 17-5-30(a)(2), challenging the validity of a search and seizure with a warrant, the burden of showing that the search and seizure was lawful is on the state; this burden is satisfied by production of the warrant and the warrant's supporting affidavit, and by showing that the warrant is not subject to the statutory challenge alleged. State v. Slaughter, 252 Ga. 435, 315 S.E.2d 865 (1984).

When a motion to suppress based on a challenge to the warrant is not based upon one of the three statutory grounds of O.C.G.A. § 17-5-30(a)(2), the state's burden is satisfied by production of the warrant and the warrant's supporting affidavit; the burden then shifts to the defendant to show the invalidity of the warrant on nonstatutory grounds. State v. Slaughter, 252 Ga. 435, 315 S.E.2d 865 (1984).

Error in placing burden of going forward on the defendant in a drug prosecution who challenged the validity of the search warrant under O.C.G.A. § 17-5-30 was harmless since the warrant and affidavit were attached to the order and the detective who requested issuance of the warrant was the only witness at the hearing. Bowman v. State, 205 Ga. App. 347, 422 S.E.2d 239 (1992).

State failed to prove lawfulness of encounter. — After defendant's O.C.G.A. § 17-5-30(b) motion to suppress put the state on notice of the defendant's contention that an initial police encounter was unlawful and the state did not prove the lawfulness, the trial court erred in denying the defendant's motion to suppress. Burrell v. State, 261 Ga. App. 677, 583 S.E.2d 521 (2003).

When state fails to prove municipal ordinance as basis for search. — If the state fails to prove the existence of a municipal ordinance by introduction of a certified copy of the ordinance, the ordinance, whose existence the court may not judicially recognize, cannot serve as a basis for upholding the arrest and incident search. Owens v. State, 153 Ga. App. 525, 265 S.E.2d 856 (1980), overruled on other grounds, State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Motion must indicate legal basis challenging traffic stop. — Trial court erred in granting the defendant's motion to suppress based on an improper traffic stop as nothing in the motion to suppress indicated that the defendant was challenging the legal basis for the traffic stop. State v. Conley, 273 Ga. App. 855, 616 S.E.2d 174 (2005).

Burden of persuasion remains. — Burden of proof referred to in Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) is a

Hearing Procedure (Cont'd)

burden of persuasion, and does not shift during the course of the motion hearing even though the burden of producing evidence may shift back and forth. Pope v. State, 134 Ga. App. 455, 214 S.E.2d 686 (1975).

Challenger of a search warrant does not have the burden of proving the warrant's invalidity; once a motion to suppress has been filed, the burden of proving the lawfulness of the warrant is on the state and that burden never shifts. Davis v. State, 266 Ga. 212, 465 S.E.2d 438 (1996).

Since the search warrant and affidavit at issue are not in the record nor before the trial court, the burden of production never shifts to the defendant to produce evidence regarding the allegedly false or omitted information and the trial court erred in denying the motion to suppress. Watts v. State, 274 Ga. 373, 552 S.E.2d 823 (2001).

When the defendant's conviction was reversed because the state did not meet the state's burden of production as to the defendant's suppression motion challenging the sufficiency of a search warrant affidavit when the state produced neither the affidavit nor the resulting search warrant, this was a ruling on the merits which was res judicata, and the defendant's plea in bar in the trial court, on remand, seeking to prevent the state from relitigating the issue, should have been granted. Watts v. State, 261 Ga. App. 230, 582 S.E.2d 186 (2003).

Trial judge is to resolve questions of fact pertaining to the admissibility of evidence subject to a motion to suppress. Gilliland v. State, 139 Ga. App. 399, 228 S.E.2d 314 (1976), vacated on other grounds, 238 Ga. 542, 233 S.E.2d 801 (1977).

Findings of fact not required. — There is no authority which requires a trial judge to make findings of fact after a hearing on a motion to suppress, if the hearing on the motion, including arguments of counsel, was recorded and transcribed verbatim and is included in the record and transcript accompanying the appeal. Shirley v. State, 166 Ga. App. 456, 304 S.E.2d 468 (1983).

Trial judge's decision on facts and credibility assumed correct. — Trial court's decision on questions of fact and credibility at a suppression hearing must be accepted unless clearly erroneous. Williams v. State, 151 Ga. App. 833, 261 S.E.2d 720 (1979); McShan v. State, 155 Ga. App. 518, 271 S.E.2d 659 (1980).

If there is a conflict in the evidence on the motion to suppress, the ruling of the trial court will be upheld if there is evidence to authorize a finding in support of the court's order. State v. Medders, 153 Ga. App. 680, 266 S.E.2d 331 (1980).

Judge hearing the motion to suppress is the trier of fact, and the judge's factual conclusion that there are no exigent circumstances, if supported by evidence, is controlling, even though the set of circumstances which ended with the search began with the stopping of a moving vehicle. State v. Watts, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

On appeal of the denial of a motion to suppress, the evidence is to be construed most favorably to the findings and judgment made and the trial court's findings must be adopted unless determined to be clearly erroneous. Thomas v. State, 203 Ga. App. 529, 417 S.E.2d 353, cert. denied, 203 Ga. App. 908, 417 S.E.2d 353 (1992).

Judge may admit hearsay to show how search conducted. — Judge may admit testimony on hearing of a motion to suppress, though hearsay, showing how or why the search was made. Jones v. State, 131 Ga. App. 699, 206 S.E.2d 601 (1974).

Judge may admit hearsay to show probable cause. — In a hearing on a motion to suppress, there is no inhibition against hearsay evidence in the showing of probable cause in an affidavit for obtaining a search warrant. Lloyd v. State, 139 Ga. App. 625, 229 S.E.2d 106 (1976).

Judge may consider matters not introduced. — Hearing is analogous to one on a motion for summary judgment in that the court may consider a wide variety of matters which need not be "introduced" to the judge. Merritt v. State, 121 Ga. App. 832, 175 S.E.2d 890 (1970).

Defendant requesting judge trial waives right to jury determination of search legality. — If appellant decides to have the appellant's case tried before a

judge alone, the appellant effectively waives the appellant's right to submit to a jury the question of the legality of a search. Aycock v. State, 142 Ga. App. 755, 236 S.E.2d 863 (1977).

Waiver of hearing before jury on motion means no harmful error. — If the defendant waived any objection regarding a hearing before a jury on the motion to suppress, there was no harmful error in having a judge decide the issue alone. Lloyd v. State, 139 Ga. App. 625, 229 S.E.2d 106 (1976).

Error if judge requires jury. — If the trial judge in effect compels that the hearing be held before a jury, then error results. Lloyd v. State, 139 Ga. App. 625, 229 S.E.2d 106 (1976).

Section provides way to record issues for appeal of trial judge's ruling. — Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30) provides the defendant a full and fair opportunity to have claims under U.S. Const., amend. 4 considered prior to the defendant's trial, and the law provides a method by which a defendant may secure a record on these issues that will enable a court, on direct appeal, to review the trial court's ruling. Jacobs v. Hopper, 238 Ga. 461, 233 S.E.2d 169 (1977).

Violation of motion to suppress in jury's presence. — Although receipt of evidence on a motion to suppress in the presence of jury constitutes a statutory violation, it does not rise to the level of denial of a constitutional right. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981).

Evidence in support of motion heard in jury's presence. — When there has been a waiver of the right to have the evidence heard outside of the presence of the jury and no harm or prejudice has occurred to the defendants because the evidence was heard in the jury's presence, reversal of the conviction is unwarranted. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981).

Motion to suppress outside jury's presence. — Failure to hear evidence on motion to suppress illegally obtained evidence outside of presence of jury is not per se reversible error. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981).

Right to have evidence on motion presented outside jury's presence may be waived. — After the trial judge announces at commencement of trial that the judge will receive evidence on the motion to suppress during the course of the trial and the defense attorneys raised no objections, the defense effectively waived the complaint that has been denied the right to have this evidence presented outside of the jury's presence. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981).

Commission of error by trial judge cannot be ignored by party. — Party cannot sit idly by, ignore the commission of error by the trial judge, take the party's chances on a favorable verdict, and then complain on appeal if the favorable verdict does not materialize. State v. Peabody, 247 Ga. 580, 277 S.E.2d 668 (1981).

Reintroduction of previously suppressed evidence in subsequent indictment. — If evidence has been suppressed as to another indictment, the evidence cannot be reintroduced as to a second indictment. Cook v. State, 141 Ga. App. 241, 233 S.E.2d 60 (1977).

Issues raised initially on appeal not considered. — Because the defendant on appeal abandoned the "second-tier" argument raised at the suppression hearing, and instead argued that the evidence should have been suppressed because the state failed to show that the officer was in the lawful discharge of any official duty during questioning, the latter argument was not addressed, as the argument was raised for the first time on appeal. Harper v. State, 285 Ga. App. 261, 645 S.E.2d 741 (2007).

Error to barring state to present evidence as sanction. — No constitutional provision or statute authorizes a trial court to bar the state from presenting evidence at a hearing on a motion to suppress as a sanction for prior prosecutorial conduct that the court deems to be dilatory in nature; because evidence exclusion is an extreme sanction and one not favored in the law, a trial court should exercise great caution before barring the state from showing why evidence the state seeks to admit at trial

Hearing Procedure (Cont'd)

should not be suppressed. State v. Smith, 308 Ga. App. 345, 707 S.E.2d 560 (2011).

Appeals

Standard of review. — Trial court's ruling on a motion to suppress will be upheld if it is right for any reason. Strickland v. State, 265 Ga. App. 533, 594 S.E.2d 711 (2004).

On review, the Court of Appeals of Georgia will uphold a trial court's findings as to disputed facts in a motion to suppress unless clearly erroneous, whereas the trial court's application of the law to undisputed facts is subject to de novo appellate review. State v. Harden, 267 Ga. App. 381, 599 S.E.2d 329 (2004).

Because a trial court credited a police officer's testimony and decided the defendant's suppression motion on an issue of law rather than on any issue of conflicting evidence, the Court of Appeals correctly used the de novo standard of review. Silva v. State, 278 Ga. 506, 604 S.E.2d 171 (2004).

Failure to file written motion as waiver of appeal. — By failing to file a written motion to suppress evidence alleged to have been obtained by an illegal search and seizure as required by Ga. L. 1966, p. 567, § 13 (see O.C.G.A. § 17-5-30), a defendant waives any objection to the evidence on that ground. Peppers v. State, 144 Ga. App. 662, 242 S.E.2d 330 (1978).

By failing to file a written motion to suppress, a defendant waives an appeal on that ground. Dennis v. State, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Trial court did not err by admitting the results of an intoximeter test even though the prosecution did not introduce evidence that the intoximeter had been calibrated since no objection was made at the time the evidence of the intoximeter results was offered. Although the defendant later attempted to exclude the evidence by an oral motion to suppress, such oral motions are not authorized. Jenkins v. State, 198 Ga. App. 843, 403 S.E.2d 859 (1991).

Trial court properly convicted a defendant of driving under the influence, less safe, in violation of O.C.G.A. § 40-6-391(a)(1), after a bench trial as the evidence showed that: (1) an officer saw the defendant drunk earlier in the evening while responding to a dispute between neighbors; (2) the defendant admitted to drinking; and (3) the defendant admitted to driving the defendant's vehicle while drunk from the defendant's home to a lake home. Any error in the charging instrument was deemed waived on appeal as the defendant should have addressed any purported error by a special demurrer and, likewise, the defendant failed to file a motion to suppress challenging the officers' entry into the defendant's dwelling without authority; thus, that issue was deemed waived. Pruitt v. State, 289 Ga. App. 307, 656 S.E.2d 920 (2008).

Although the defendant filed a motion to suppress evidence seized from the two search warrants executed on the defendant's home on October 20, because the defendant did not move to suppress the evidence seized the day before, which was based on the defendant's consent to search the defendant's person and home, the defendant did not preserve that issue for appeal. Evans v. State, 842 S.E.2d 837, No. S20A0007, 2020 Ga. LEXIS 339 (May 4, 2020).

Failure to request ruling meant waiver on appeal. — Defendant waived the right to argue that the trial court erred in failing to grant a motion to suppress a pistol because the trial court did not make a ruling regarding suppression of the pistol, and the defendant never requested such a ruling; when the pistol was tendered into evidence at trial the defendant expressly stated that the defendant had no objections. Rockholt v. State, 291 Ga. 85, 727 S.E.2d 492 (2012).

Since the defendant did not challenge evidence based on an improper inventory search in the defendant's motion to suppress, the state was not given notice of the issue and the issue was waived on appeal. McBurrows v. State, 325 Ga. App. 303, 750 S.E.2d 436 (2013).

Failure to include trial transcript in record on appeal. — Because the defendant failed to include the trial transcript in the record for the appellate court to review an order denying the defen-

dant's motion to suppress, the appellate court had to assume as a matter of law that the evidence presented supported the trial court's findings, and that the court properly exercised the court's judgment and discretion. Pittman v. State, 286 Ga. App. 415, 650 S.E.2d 302 (2007).

Failure to raise any issue in trial court challenging search warrant. — With regard to a defendant's convictions on multiple counts of rape and related crimes, because the defendant did not raise any issue in the trial court regarding either the existence of the warrant for the defendant's blood sample or the adequacy of the supporting affidavit, the appellate court found no merit to the defendant's contention on appeal that the denial of the defendant's motion to suppress evidence obtained from the warrant seeking a blood sample was in error. Baker v. State, 295 Ga. App. 162, 671 S.E.2d 206 (2008), cert. denied, No. S09C0571, 2009 Ga. LEXIS 183 (Ga. 2009).

Guilty plea waives suppression issue on appeal. — Because the defendant pled guilty to the charges of possession of a firearm by a convicted felon, the defendant waived any claim that the trial court erred in denying the defendant's motion to suppress evidence of the firearm found in the defendant's residence. Stuart v. State, 267 Ga. App. 463, 600 S.E.2d 629 (2004).

If objection overruled, ruling appealable. — If the motion to suppress is denied, an objection may nevertheless be lodged on the ground that the testimony relates to property which was illegally seized during an unlawful search, and if the objection is overruled the ruling may become a proper subject of an enumeration of error on appeal. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973), criticized, Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

Standard of review following grant of motion. — On appeal from a trial court's ruling on a motion to suppress, an appellate court construes the evidence most favorably to upholding the trial court's ruling, and the appellate court adopts the trial court's findings on disputed facts unless clearly erroneous. Since the trial court sits as the trier of fact, the court's findings are analogous to a jury verdict and will not be disturbed if there is any evidence to support the findings. Rucker v. State, 266 Ga. App. 293, 596 S.E.2d 639 (2004).

Standard of review of denial of a motion to suppress. — When reviewing a trial court's decision on a motion to suppress, an appellate court's responsibility is to ensure that there was a substantial basis for the decision; the evidence is construed most favorably to uphold the findings and judgment, and the trial court's findings on disputed facts and credibility are adopted unless the findings and judgment are clearly erroneous. Further, since the trial court sits as the trier of fact, its findings are analogous to a jury verdict and will not be disturbed if there is any evidence to support the findings. Williams v. State, 265 Ga. App. 489, 594 S.E.2d 704 (2004).

State's appeal. — State could not appeal from order compelling the return of seized property to the defendant after the state stipulated to not using the property at issue in the trial of the charges pending against the defendant, and the state did not challenge the trial court's ruling on defendant's motion to suppress. State v. McIntyre, 191 Ga. App. 565, 382 S.E.2d 669 (1989).

State's direct appeal of a judgment granting the defendant's motion to suppress evidence that the victims identified the defendant from photographic lineups was authorized by O.C.G.A. § 5-7-1(a)(4) because the state's direct appeal was from an order that: (1) was issued prior to the impaneling of a jury or the defendant being put in jeopardy; and (2) granted the defendant's motion to suppress evidence that was allegedly obtained in an illegal manner, and which the trial court deemed to be "meritorious" even apart from the prosecutor's supposed dilatory conduct; during the final hearing on the defendant's motion, the trial court refused to allow the state to present evidence to contest the motion as a means of sanctioning the state for prosecutorial conduct that the trial court deemed to be dilatory in nature, and the fact that the trial court was the direct cause of the state's inability to meet the state's burden of showing that the identifications were lawfully obtained

Appeals (Cont'd)

in no way divested the court of appeals of jurisdiction to hear the state's appeal pursuant to § 5-7-1(a)(4). State v. Smith, 308 Ga. App. 345, 707 S.E.2d 560 (2011).

Reconsideration of suppression order discussed. — See Chastain v. State, 158 Ga. App. 654, 281 S.E.2d 627 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 584, 598, 603, 604, 627, 633, 636, 640.

ALR. — Right to recover property held by public authorities as evidence for use in a criminal trial, 13 A.L.R. 1168.

Admissibility of evidence obtained by illegal search and seizure, 24 A.L.R. 1408; 32 A.L.R. 408; 41 A.L.R. 1145; 52 A.L.R. 477; 88 A.L.R. 348; 134 A.L.R. 819; 150 A.L.R. 566; 50 A.L.R.2d 531.

Right to enforce production of papers or documents by subpoena duces tecum or other process, as affected by unlawful means by which the knowledge of their existence was acquired, 24 A.L.R. 1429.

Jurisdiction to quash search warrant and order return of property seized in liquor cases under federal statutes, 65 A.L.R. 1246.

Right of employee having control of articles for employer to avail himself of rule which excludes evidence obtained by unlawful search and seizure, 86 A.L.R. 346.

Previous illegal search for or seizure of property as affecting validity of subsequent search warrant or seizure thereunder, 143 A.L.R. 135.

Authority to consent for another to search or seizure, 31 A.L.R.2d 1078.

Search warrant: sufficiency of showing as to time of occurrence of facts relied on, 100 A.L.R.2d 525.

Violation of federal constitutional rule (Mapp v. Ohio) excluding evidence obtained through unreasonable search or seizure, as constituting reversible or harmless error, 30 A.L.R.3d 128.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 A.L.R.3d 385.

Search and seizure: "furtive" movement or gesture as justifying police search, 45 A.L.R.3d 581.

Lawfulness of "inventory search" of motor vehicle impounded by police, 48 A.L.R.3d 537.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) — state cases, 1 A.L.R.4th 673; 65 A.L.R.5th 407.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 32 A.L.R.4th 378.

Officer's ruse to gain entry as affecting admissibility of plain-view evidence — modern cases, 47 A.L.R.4th 425.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 A.L.R.5th 229.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property — state cases, 61 A.L.R.5th 1.

Searches and seizures: Reasonable expectation of privacy in contents of garbage or trash receptacle, 62 A.L.R.5th 1.

Belief that burglary is in progress or has recently been committed as exigent circumstance justifying warrantless search of premises, 64 A.L.R.5th 637.

Search and seizure: reasonable expectation of privacy in tent or campsite, 66 A.L.R.5th 373.

Admissibility of evidence discovered in

search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant — state cases, 68 A.L.R.5th 343.

Civilian participation in execution of search warrant as affecting legality of search, 68 A.L.R.5th 549.

Effect of retroactive consent on legality of otherwise unlawful search and seizure, 76 A.L.R.5th 563.

Permissibility and sufficiency of warrantless use of thermal imager or Forward Looking Infra-Red Radar (F.L.I.R.), 78 A.L.R.5th 309.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where warrant was involved, 72 A.L.R.6th 1.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse, 160 A.L.R. Fed. 165.

17-5-31. Quashing warrant or suppressing evidence because of technical irregularity not affecting substantial rights of accused.

No search warrant shall be quashed or evidence suppressed because of a technical irregularity not affecting the substantial rights of the accused.

History. — Ga. L. 1966, p. 567, § 12; Ga. L. 1990, p. 8, § 17.

JUDICIAL DECISIONS

Law disapproves of raising untimely technicalities in search warrant. — Raising of technical irregularities in a search warrant is not favored by the law, especially when the defendant has not timely exercised the defendant's statutory right by a motion to suppress evidence allegedly illegally seized. Parker v. State, 118 Ga. App. 837, 166 S.E.2d 41 (1968).

Failure to swear to return before proper official. — Absent a showing of prejudicial error to the defendant, the failure to swear to the return before an officer authorized to administer oaths is not such a fatal defect as to vitiate the search warrant. Waters v. State, 122 Ga. App. 808, 178 S.E.2d 770 (1970).

Failure to swear when affidavit signed. — If the affiant was duly sworn, the failure to give a separate oath when the affidavit of probable cause was signed cannot be held to have undermined the warrant. State v. Penansky, 140 Ga. App. 405, 231 S.E.2d 152 (1976).

Omission of time of issuance. — When officers have a warrant and serve the warrant when the officers arrive to make the search, an omission on the warrant of the time of issuance is a technical irregularity not affecting the substantial rights of the accused which would not require suppression of the evidence seized. Merritt v. State, 121 Ga. App. 832, 175 S.E.2d 890 (1970).

Typographical errors. — Since the affidavit and warrant were all before the magistrate at the same time on the same date, the trial court correctly found that any errors as to the time the affidavit and warrant were signed were typographical and not so material as to destroy the integrity of the affidavit or the validity of the warrant. Carlton v. State, 251 Ga. App. 339, 554 S.E.2d 318 (2001).

Although a typographical error in the search warrant for the defendant's residence indicated the wrong street number of the home, when the defendant was named in the warrant and given the level of descriptive detail that matched the searched premises, as well as the officer's actions to verify that the defendant lived at the residence, the description of the

premises to be searched was sufficiently exact to pass muster; accordingly, denial of suppression pursuant to O.C.G.A. § 17-5-31 was not error. Lester v. State, 278 Ga. App. 247, 628 S.E.2d 674 (2006).

Affidavit in support of the search warrant was not legally insufficient to establish probable cause when the affidavit identified another individual as the suspected shooter in one paragraph of a six-page affidavit because the investigating officer testified that it was a typographical error and the defendant was correctly named on the warrant and identified as the suspect throughout the majority of the affidavit. Carson v. State, 314 Ga. App. 515, 724 S.E.2d 821 (2012).

Trial counsel was not ineffective for failing to file motions to suppress search warrants for the two recovered cell phones and the information obtained therefrom because, although the warrants erroneously stated the date of the murder as November 6, 2014 rather than November 6, 2013, mere typographical or clerical errors did not ordinarily provide a basis to suppress the evidence; and, even if the error in the warrants was deemed not to be purely typographical or clerical, and the extracted data outside the permissible scope of the warrants, the defendant did not claim, much less show, any specific resulting prejudice. Dent v. State, 303 Ga. 110, 810 S.E.2d 527 (2018).

Incorrect caption on search warrant. — Alleged "irregularities" as to time of issuance of the warrant and the incorrect caption on the search warrant all fall within the category of a technical irregularity not affecting the substantial rights of the accused. Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977).

Failure to put street address in clear warrant. — When a search warrant clearly authorized the search of the premises described in the caption, the failure to reflect the street address or description in the body of the warrant is a technical irregularity which did not affect the substantial rights of the defendants and did not authorize suppression of the evidence. Latimer v. State, 134 Ga. App. 372, 214 S.E.2d 390 (1975).

Incorrect street address invalidated warrant. — Search warrant containing the wrong street address was defective under both the federal and Georgia constitutions as the defect was not a mere technical irregularity under O.C.G.A. § 17-5-31 because it did not incorporate the affidavit and application and thus could not be construed with reference to them; furthermore, the warrant did not contain other descriptive elements that would allow an officer to locate the place with reasonable certainty. Thomas v. State, 287 Ga. App. 262, 651 S.E.2d 183 (2007).

Erroneous description of location technical irregularity because address and all other information correct. — When a search warrant affidavit incorrectly described the house to be searched as the second house on the right, when it was actually the third house on the right, this error was a technical irregularity which did not invalidate the affidavit or the warrant based on the affidavit because the warrant contained the house's complete and correct address, city, physical description, and the fact that the house did not face the street named in the address. Marshall v. State, 273 Ga. App. 17, 614 S.E.2d 169 (2005).

Because defendant's house trailer had no house number, description of trailer sufficient. — Trial court did not err in denying a defendant's motion to suppress evidence based on an allegedly insufficiently particular description of the property to be searched in the warrants. The warrants described the defendant's trailer home, which had no house number on the home, and the home's curtilage on the property where the home was located. Price v. State, 303 Ga. App. 859, 694 S.E.2d 712 (2010).

Inventory does not affect suspect's rights. — Making and filing of an inventory following execution of a search warrant is merely a ministerial act not affecting the substantive rights of the accused. Manemann v. State, 147 Ga. App. 747, 250 S.E.2d 164 (1978).

Introduction of uncertified copy of search warrant. — Introduction of an uncertified copy of the search warrant in lieu of the original established no basis for excluding contraband discovered pursuant to the warrant, since the officer upon

whose application the warrant had been issued testified at the trial, and there was no contention that the copy was not an exact duplicate of the original. Cayce v. State, 192 Ga. App. 97, 383 S.E.2d 648 (1989).

Execution of warrant after warrant's issuance but before police have physical possession of the warrant. — When (1) a search warrant, supported by probable cause, had properly issued before any search of the defendant's residence was conducted; (2) the police officers informed the resident of the premises of the existence of the warrant before the search; (3) the warrant arrived during the search and a copy was left with the resident at the conclusion of the search as required by O.C.G.A. § 17-5-25; and (4) there was no claim or indication that the officers exceeded the scope of the search authorized by the properly issued warrant, the trial court erred, pursuant to O.C.G.A. § 17-5-31, in suppressing the warrant based on the officers' commencement of the search before having physical possession of the warrant because no substantial right of the defendant was affected by the execution of the warrant after the warrant's issuance but prior to the warrant's arrival at the scene. State v. Rocco, 255 Ga. App. 565, 566 S.E.2d 365 (2002).

One copy of warrant unsigned after magistrate finding. — When one of three copies of a search warrant was not signed but at least one copy was signed at the time the warrant was issued, the warrant is not invalid if the magistrate made a judicial finding of the existence of probable cause prior to issuing the warrant. Braden v. State, 135 Ga. App. 827, 219 S.E.2d 479 (1975).

Officer's failure to sign return of things seized. — Defect in the search warrant procedure wherein the officer executing the warrant failed to sign the "return of things seized" is not a fatal defect because of the absence of a showing of prejudicial error to the defendant. Vaughn v. State, 126 Ga. App. 252, 190 S.E.2d 609 (1972).

Failure to file affidavit or prove docket record of warrant. — Search warrant is not inadmissible because the officers failed to file the affidavit with the issuing court after the warrant was executed or because there was no evidence indicating that a docket record of the warrant was made as these are technical irregularities not affecting the substantial rights of the accused. Sampson v. State, 165 Ga. App. 833, 303 S.E.2d 77 (1983).

Absence of attesting officer's signature fatal. — In that the attesting officer's signature determines the validity of the affidavit and the search warrant, the signature's absence cannot be considered a mere technical irregularity. State v. Barnett, 136 Ga. App. 122, 220 S.E.2d 730 (1975).

Untimely return of warrant not fatal when no showing of prejudice. — Trial court properly refused to suppress blood and urine test records under O.C.G.A. § 17-5-31, although a written return of the warrant was not made in a timely fashion, as provided in O.C.G.A. § 17-5-29, because a defendant received a copy of the inventory of the medical records seized, and made no showing of prejudice as a result of the delayed filing. Stubblefield v. State, 302 Ga. App. 499, 690 S.E.2d 892 (2010).

Magistrate's failure to determine probable cause. — Failure on the part of the magistrate to make a judicial determination of the existence of probable cause, which is a sine qua non to the issuance of the warrant, is not a mere technical irregularity within the meaning of this section. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973).

Fact that a taped "affidavit" was not in written form when the affidavit was presented to the magistrate was a technical defect; accordingly, the court properly denied the defendant's motion to suppress evidence. Williams v. State, 188 Ga. App. 334, 373 S.E.2d 42 (1988).

Technical violations of duplicate warrant requirement. — Fact that the copy of the search warrant received by the defendant after the defendant provided a DNA sample was lacking the issuing judge's signature as well as the date and time of the original warrant's execution did not warrant suppression of the DNA evidence pursuant to O.C.G.A. § 17-5-31, as any violations of the failure to comply with the duplicate warrant requirement of

O.C.G.A. § 17-5-25 were technical at best; further, the defendant made no showing of prejudice or that any substantial rights were affected by such omissions. State v. Stafford, 277 Ga. App. 852, 627 S.E.2d 802 (2006).

Lack of jurisdiction results in nullity. — Whether to require or suppress evidence in a given situation is a responsibility of the judicial, not the legislative, branch of the government under the Constitution. Lack of jurisdiction to issue the warrant is not a mere technicality, but results in a nullity. Pruitt v. State, 123 Ga. App. 659, 182 S.E.2d 142 (1971).

Cited in Steele v. State, 118 Ga. App. 433, 164 S.E.2d 255 (1968); Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975); State v. Blews, 148 Ga. App. 73, 251 S.E.2d 10 (1978); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); State v. Kirkland, 212 Ga. App. 672, 442 S.E.2d 491 (1994); Sprauve v. State, 229 Ga. App. 478, 494 S.E.2d 294 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 584.

ALR. — Admissibility of evidence obtained by illegal search and seizure, 24 A.L.R. 1408; 32 A.L.R. 408; 41 A.L.R. 1145; 52 A.L.R. 477; 88 A.L.R. 348; 134 A.L.R. 819; 150 A.L.R. 566; 50 A.L.R.2d 531.

Right to enforce production of papers or documents by subpoena duces tecum or other process, as affected by unlawful means by which the knowledge of their existence was acquired, 24 A.L.R. 1429.

Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure, 50 A.L.R.2d 531.

Propriety of execution of search warrant at nighttime, 26 A.L.R.3d 951; 41 A.L.R.5th 171.

17-5-32. Search and seizure of documentary evidence in possession of attorney; exclusion of illegally obtained evidence.

(a) As used in this Code section, the term "documentary evidence" includes but is not limited to writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, and papers of any type or description.

(b) Notwithstanding any other provision of law, no search and seizure without a warrant shall be conducted and no search warrant shall be issued for any documentary evidence in the possession of an attorney who is not a criminal suspect, unless the application for the search warrant specifies that the place to be searched is in the possession or custody of an attorney and also shows that there is probable cause to believe that the documentary evidence will be destroyed or secreted in the event a search warrant is not issued. This Code section shall not impair the ability to serve search warrants in cases in which the search is directed against an attorney if there is probable cause to suspect such attorney has committed a crime. This Code section shall not impair the ability to serve subpoenas on nonsuspect attorneys.

(c) In any case in which there is probable cause to believe that documentary evidence will be destroyed or secreted if a search warrant

is not issued, no search warrant shall be issued or be executed for any documentary evidence in the possession or custody of an attorney who is not a criminal suspect unless:

(1) At the time the warrant is issued the court shall appoint a special master to accompany the person who will serve the warrant. The special master shall be an attorney who is a member in good standing of the State Bar of Georgia and who has been selected from a list of qualified attorneys maintained by the State Bar of Georgia. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested. If the party, in the judgment of the special master, fails to provide the items requested, the special master shall conduct a search for the items in the areas indicated in the search warrant;

(2) If the party who has been served states that an item or items should not be disclosed, such item or items shall be sealed by the special master and taken to the superior court for a hearing. At the hearing the party whose premises has been searched shall be entitled to raise any issues which may be raised pursuant to Code Section 17-5-30 as well as claims that the item or items are privileged or claims that the item or items are inadmissible because they were obtained in violation of this Code section. Any such hearing shall be held in the superior court;

(3) Any such warrant must, whenever practicable, be served during normal business hours. The law enforcement officer or prosecutor serving the warrant shall not participate in the search but may accompany the special master when the special master is conducting the search;

(4) Any such warrant must be served upon a party who appears to have possession or control of the items sought. If, after reasonable efforts, the party serving the warrant is unable to locate any such person, the special master shall seal and return to the court for determination by the court any items which appear to be privileged;

(5) Any such warrant shall be issued only by the superior court. At the time of applying for such a warrant, the law enforcement officer or prosecutor shall submit a written search plan designed to minimize the intrusiveness of the search. When the warrant is executed, the special master carrying out the search shall have a duty to make reasonable efforts to minimize the intrusiveness of the search.

(d) Notwithstanding any provision of law to the contrary, evidence obtained in violation of this Code section shall be excluded and suppressed from the prosecution's case-in-chief or in rebuttal, and such evidence shall not be admissible either as substantive evidence or for impeachment purposes.

History. — Code 1981, § 17-5-32, enacted by Ga. L. 1989, p. 1687, § 1; Ga. L. 2014, p. 866, § 17/SB 340.

Law reviews. — For annual survey of criminal law and procedure, see 41 Mercer L. Rev. 115 (1989).

For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 221 (1989).

ARTICLE 3

DISPOSITION OF PROPERTY SEIZED

17-5-50. Property unlawfully obtained; rights of owner; hearing; admissibility of photographs in lieu of original property; representation of unknown or absent defendants; statements made by defendant or agent at trial.

(a) The clerk or person having charge of the property section for any police department, sheriff's office, or other law enforcement agency in this state shall enter in a suitable book a description of every article of property alleged to be stolen, embezzled, or otherwise unlawfully obtained and brought into the office or taken from the person of a prisoner and shall attach a number to each article and make a corresponding entry thereof.

(b)(1) Any person claiming ownership of such allegedly stolen, embezzled, or otherwise unlawfully obtained property may make application to the law enforcement agency for the return of such property. Upon such an application being filed, the clerk or person in charge of the property section shall serve upon the person from whom custody of the property was taken a copy of such application. Such person from whom custody of the property was taken shall have a reasonable opportunity to claim ownership of such property and to request a hearing on forms provided by the person in charge of the property section.

(2) If the person from whom custody of the property was taken fails to assert a claim to such property, upon any applicant furnishing satisfactory proof of ownership of such property and presentation of proper personal identification, the person in charge of the property section may deliver such property to the applicant. The person to whom property is delivered shall sign, under penalty of false swearing, a declaration of ownership, which shall be retained by the person in charge of the property section. Such declaration, absent any other proof of ownership, shall be deemed satisfactory proof of ownership for the purposes of this Code section; provided, however, that, in the case of motor vehicles, trailers, tractors, or motorcycles which are required to be registered with the state revenue commissioner, any such stolen vehicle shall be returned to the person evidencing ownership of such vehicle through a certificate of title, tag receipt, bill of sale, or other such evidence. The stolen vehicle shall be returned to

the person evidencing ownership within two days after such person makes application for the return of such vehicle unless a hearing on the ownership of such vehicle is required under this Code section or unless law enforcement needs the stolen vehicle for further criminal investigation purposes. Prior to such delivery, such person in charge of the property section shall make and retain a complete photographic record of such property. Such delivery shall be without prejudice to the state or to the person from whom custody of the property was taken or to any other person who may have a claim against the property.

(3) If the person from whom custody of the property was taken asserts a claim to such property and requests a hearing, the court which examines the charge against the person accused of stealing, embezzling, or otherwise unlawfully obtaining the property, or the court before whom the trial is had for stealing, embezzling, or otherwise unlawfully obtaining the property shall conduct the hearing to determine the ownership of such property.

(4) The provisions of this subsection shall not apply to any contraband or property subject to forfeiture under any provision of law.

(c) Photographs, video tapes, or other identification or analysis of the property involved, duly identified in writing by the law enforcement officer originally taking custody of the property as accurately representing such property, shall be admissible at trial in lieu of the original property.

(d) In the case of unknown or unapprehended defendants or defendants willfully absent from the jurisdiction, the court shall have discretion to appoint a guardian ad litem to represent the interest of the unknown or absent defendants.

(e) Statements made by the defendant or a person representing the defendant at a hearing provided for in subsection (b) of this Code section shall not be admissible for use against the defendant at trial.

History. — Orig. Code 1863, § 4637; Code 1868, § 4661; Code 1873, § 4759; Code 1882, § 4759; Penal Code 1895, § 1245; Penal Code 1910, § 1327; Code 1933, § 27-302; Ga. L. 1978, p. 2260, § 1; Ga. L. 1979, p. 761, § 1; Ga. L. 1982, p. 2336, § 1; Ga. L. 1986, p. 158, § 1; Ga. L. 2002, p. 415, § 17; Ga. L. 2005, p. 334, § 7-1/HB 501.

JUDICIAL DECISIONS

Section not restricted to claims between defendant and alleged owner. — Although O.C.G.A. § 17-5-50 would normally appear to be a procedure for the consideration of conflicting claims between a defendant in a criminal case and the person from whom property might have been stolen or illegally obtained, the statutory language does not restrict it solely to such use but provides a method by which the state and any civil claimants might resolve the claim between them and

the defendant. Thus, there is no reason that when a defendant makes a request for the return of the defendant's property that other claimants might not then be heard through the use of this procedure. Recoba v. State, 167 Ga. App. 447, 306 S.E.2d 713 (1983) (decided prior to 1982 amendment).

One week's prior notice of hearing sufficient. — Telephonic or personal notice to an interested party at least one week prior to a hearing to be held on the return of funds seized in connection with an arrest for violating the Controlled Substances Act, O.C.G.A. § 16-13-1 et seq., is sufficient as a matter of due process and incurs an obligation in the party to inquire further into the matter. Recoba v. State, 167 Ga. App. 447, 306 S.E.2d 713 (1983) (decided prior to 1982 amendment).

Sovereign immunity. — State may assert the state's immunity from suit in an action brought pursuant to O.C.G.A. § 17-5-50 to recover a sum which the state has improperly released to another party. State v. Collins, 171 Ga. App. 225, 319 S.E.2d 84 (1984).

Admission into evidence of photographs. — When the defendant charged with armed robbery asserts error in the admission of photographs allegedly depicting money taken during the robbery and either found on the defendant's person or under the seat in the police car in which the defendant was seated after the defendant's apprehension, the trial court properly permitted the entry of the photographs into evidence, since the provisions of O.C.G.A. § 17-5-50, on their face, do not establish any procedural prerequisites to the admission into evidence of photographs of any stolen, embezzled, or otherwise unlawfully obtained property that is or was in the custody of the police. McCoy v. State, 190 Ga. App. 258, 378 S.E.2d 888 (1989).

Fuel equipment used in theft of fuel was not contraband. — Because fuel equipment attached to the defendant's truck, and which had been used in the defendant's crime of theft of diesel fuel, did not constitute contraband per se and there was no statutory authority supporting retention by the sheriff of the equipment after the defendant was discharged under O.C.G.A. § 42-8-62(a); thus, the equipment was ordered returned to the defendant pursuant to O.C.G.A. § 17-5-54. Norman v. Yeager, 335 Ga. App. 470, 781 S.E.2d 580 (2016).

Cited in Day v. State, 242 Ga. App. 899, 531 S.E.2d 781 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 954, 956, 961, 981 et seq., 1035 et seq. 68 Am. Jur. 2d, Searches and Seizures, § 189 et seq.

ALR. — Admissibility of evidence obtained by illegal search and seizure, 24 A.L.R. 1408; 32 A.L.R. 408; 41 A.L.R. 1145; 52 A.L.R. 477; 88 A.L.R. 348; 134 A.L.R. 819; 150 A.L.R. 566; 50 A.L.R.2d 531.

Presence of liquor in vehicle at the time of search and seizure as condition of forfeiture for violating prohibition law, 71 A.L.R. 911.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Admissibility of photographs of stolen property, 94 A.L.R.3d 357.

17-5-51. Civil forfeiture of weapons used in commission of crime, possession of which constitutes crime or delinquent act, or illegal concealment generally.

Any device which is used as a weapon in the commission of any crime against any person or any attempt to commit any crime against any person, any weapon the possession or carrying of which constitutes a crime or delinquent act, and any weapon for which a person has been

convicted of violating Code Section 16-11-126 are declared to be contraband and shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9, notwithstanding the time frames set forth in Code Section 9-16-7.

History. — Ga. L. 1967, p. 749, § 1; Ga. L. 1977, p. 1131, § 1; Ga. L. 1994, p. 963, § 1; Ga. L. 2010, p. 963, § 2-10/SB 308; Ga. L. 2012, p. 1285, § 2/SB 350; Ga. L. 2015, p. 693, § 3-14/HB 233.

Editor's notes. — Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

For note on the 1994 amendment of this Code section and Code Section 17-5-52, see 11 Ga. St. U.L. Rev. 157 (1994).

JUDICIAL DECISIONS

Right of felon to dispose of gun collection. — Mere fact that the court could not return a seized gun collection to the defendant because the defendant had been convicted of a felony did not authorize the court to treat the gun collection as contraband subject to disposal as set forth in O.C.G.A. § 17-5-51. LoGiudice v. State, 164 Ga. App. 709, 297 S.E.2d 499 (1982), cert. denied, 466 U.S. 950, 104 S. Ct. 2152, 80 L. Ed. 2d 538 (1984).

Only one of six seized firearms subject to forfeiture. — When six firearms were seized from the defendant's home but only a reckless conduct charge against the defendant was due to the use of only one of the firearms seized, therefore, only this one firearm was contraband under O.C.G.A. § 17-5-51 and thus forfeited; the remaining guns were returned to the defendant. Holland v. State, 204 Ga. App. 22, 418 S.E.2d 400 (1992).

Sentence based on defendant's plea of nolo contendere constituted a conviction for carrying a concealed weapon within the meaning of O.C.G.A. § 17-5-51, requiring forfeiture of a weapon used in the commission of a crime. State v. Pitts, 199 Ga. App. 493, 405 S.E.2d 115 (1991).

Cited in Cannington v. State, 154 Ga. App. 557, 269 S.E.2d 62 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Forfeitures and Penalties, § 14 et seq. 79 Am. Jur. 2d, Weapons and Firearms, § 1 et seq.

C.J.S. — 37 C.J.S. (Rev), Forfeitures, § 1 et seq. 94 C.J.S., Weapons, § 72 et seq.

ALR. — Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Conviction or acquittal in criminal prosecution as bar to action for seizure, condemnation, or forfeiture of property, 27 A.L.R.2d 1137.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute, 89 A.L.R.3d 1026.

17-5-52. Disposition of weapons used in commission of crime or delinquent act involving possession; civil forfeiture.

When a final judgment is entered finding a defendant guilty of the commission or attempted commission of a crime against any person or guilty of the commission of a crime or delinquent act involving the illegal possession or carrying of a weapon, any device which was used as a weapon in the commission of the crime or delinquent act shall be turned over by the person having custody of the weapon or device to the sheriff, chief of police, or other executive officer of the law enforcement agency that originally confiscated the weapon or device when the weapon or device is no longer needed for evidentiary purposes. Within one year after receiving the weapon or device, the sheriff, chief of police, or other executive officer of the law enforcement agency shall return or sell the weapon as provided in Code Section 17-5-54, or if the weapon or device is subject to forfeiture, the procedures set forth in Chapter 16 of Title 9 shall be followed notwithstanding the time frames set forth in Code Section 9-16-7. A state attorney seeking forfeiture under this Code section shall commence civil forfeiture proceedings within 60 days of the entry of a final judgment as contemplated by this Code section; the remaining provisions of Chapter 16 of Title 9 shall be applicable.

History. — Ga. L. 1967, p. 749, § 3; Ga. L. 1976, p. 167, § 1; Ga. L. 1994, p. 963, § 2; Ga. L. 2008, p. 344, § 1/HB 333; Ga. L. 2012, p. 1285, § 3/SB 350; Ga. L. 2015, p. 693, § 3-15/HB 233.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

For note on the 1994 amendment of this Code section and Code Section 17-5-51, see 11 Ga. St. U.L. Rev. 157 (1994).

JUDICIAL DECISIONS

Cited in Cannington v. State, 154 Ga. App. 557, 269 S.E.2d 62 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Forfeitures and Penalties, § 14 et seq. 79 Am. Jur. 2d, Weapons and Firearms, § 1 et seq.

C.J.S. — 37 C.J.S. (Rev), Forfeitures, § 1 et seq. 94 C.J.S., Weapons, § 70 et seq.

ALR. — Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

17-5-52.1. Disposal of forfeited or abandoned firearms; innocent owners; auctions; record keeping; liability of government entities.

Repealed by Ga. L. 2015, p. 693, § 3-16/HB 233, effective July 1, 2015. See Editor's notes for applicability.

Code Commission notes. — Former Code Section 17-5-52.1 was repealed effective July 1, 2015, by Ga. L. 2015, p. 693, § 3-16/HB 233. However, Ga. L. 2015, p. 805, § 10/HB 492, effective July 1, 2015, purported to amend subsection (d) of the former Code section to read as follows:

"(d) If an innocent owner of a firearm cannot be located or after proper notification he or she fails to pay for the return of his or her firearm, if the political subdivision is:

"(1) A municipal corporation, it shall dispose of its firearms as provided for in Code Section 36 37 6; provided, however, that municipal corporations shall not have the right to reject any and all bids or to cancel any proposed sale of such firearms, and all sales shall be to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq. and who are authorized to receive such firearms under the terms of such license. Any political subdivision which disposes of firearms shall use proceeds from the sale of a firearm as are necessary to cover the costs of administering this Code section, with any surplus to be transferred to the general fund of the political subdivision; or

"(2) Not a municipal corporation, the state custodial agency or the political subdivision shall dispose of its firearms by sale at public auction to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq. and who are authorized to receive such firearms under the terms of such license. A state custodial agency shall retain only such proceeds as are necessary to cover the costs of administering this Code section, with any surplus to be transferred to the general fund of this state, provided that a state custodial agency may be reimbursed for any firearms formerly in use by the state custodial agency that are sold under this Code section." For effect of subsequent amendment of a repealed statute, see Lampkin v. Pike, 115 Ga. 827 (1902).

Editor's notes. — This Code section was based on Code 1981, § 17-5-52.1, enacted by Ga. L. 2012, p. 1285, § 4/SB 350; Ga. L. 2015, p. 5, § 17/HB 90; Ga. L. 2015, p. 805, § 10/HB 492.

Ga. L. 2015, p. 5, § 54(e)/HB 90, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2015 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to subsection (d) of this Code section by Ga. L. 2015, p. 5, § 17/HB 90, was not given effect.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 repeal of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

17-5-53. Disposition of devices with historical or instructional value.

(a) After a forfeiture of a device used in a crime, in the event the director of the Division of Archives and History or the commissioner of

public safety, in that order or priority, shall desire to receive and retain a device described in Code Section 17-5-51 for historical or instructional purposes of his or her division or department and gives written notice thereof to the sheriff, either prior to the sheriff's advertisement of the device for sale or within ten days thereafter, the sheriff shall forthwith deliver the device to the requesting division or department which shall retain the device for such purposes. A device delivered to either the division or the department in accordance with this Code section shall become the property of the state.

(b) This Code section shall prevail over Code Section 17-5-52.

History. — Ga. L. 1976, p. 749, § 4; Ga. L. 2002, p. 532, § 5.

Cross references. — Division of Archives and History generally, § 45-13-40 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Forfeitures and Penalties, § 14 et seq.

C.J.S. — 37 C.J.S. (Rev), Forfeitures, § 1 et seq.

17-5-54. Definitions; disposition of personal property in custody of law enforcement agency.

(a) As used in this Code section, the term:

(1) "Civil forfeiture proceeding" shall have the same meaning as set forth in Code Section 9-16-2.

(2) "Firearm" means any handgun, rifle, shotgun, or similar device or weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(3) "Law enforcement agency" means a law enforcement agency of this state or a political subdivision of this state, including the Department of Natural Resources.

(4) "Rightful owner" means a person claiming ownership of property which is the subject of a crime or has been abandoned.

(b) This Code section shall not apply to:

(1) Personal property which is the subject of any civil forfeiture proceeding;

(2) Any property which is the subject of a disposition pursuant to Code Sections 17-5-50 through 17-5-53; and

(3) Any abandoned motor vehicle for which the provisions of Chapter 11 of Title 40 are applicable.

(c)(1) Except as provided in Chapter 16 of Title 9, Code Sections 17-5-55 and 17-5-56, and subsection (b) of this Code section, when a

law enforcement agency assumes custody of any personal property which is the subject of a crime or has been abandoned, a disposition of such property shall be made in accordance with the provisions of this Code section.

(2) When a final verdict and judgment is entered finding a defendant guilty of the commission of a crime, any personal property used as evidence in the trial shall be returned to the rightful owner of the property within 30 days following the final judgment; provided, however, that if the judgment is appealed or if the defendant files a motion for a new trial and if photographs, videotapes, or other identification or analysis of the personal property will not be sufficient evidence for the appeal of the case or new trial of the case, such personal property shall be returned to the rightful owner within 30 days of the conclusion of the appeal or new trial, whichever occurs last.

(3) Any person claiming to be a rightful owner of property shall make an application to the entity holding his or her property and shall furnish satisfactory proof of ownership of such property and present personal identification. The person in charge of such property may return such property to the applicant. The person to whom property is delivered shall sign, under penalty of false swearing, a declaration of ownership, which shall be retained by the person in charge of the property. Such declaration, absent any other proof of ownership, shall be deemed satisfactory proof of ownership for the purposes of this Code section; provided, however, that with respect to motor vehicles, paragraph (3) of subsection (b) and subsection (f) of this Code section shall govern the return of motor vehicles.

(4) If more than one person claims ownership of property, a court with jurisdiction over the property shall conduct a hearing to determine the ownership of such property.

(d) After a period of 90 days following the final verdict and judgment, when personal property that is in the custody of a law enforcement agency was used as evidence in a criminal trial or was abandoned, it shall be subject to disposition as provided in subsection (e) of this Code section if the property is not a firearm and as provided in subsection (g) of this Code section if the property is a firearm if it is:

(1) No longer needed in a criminal investigation or for evidentiary purposes in accordance with Code Section 17-5-55 or 17-5-56;

(2) Not claimed pursuant to Code Section 17-5-50; and

(3) Not claimed pursuant to subsection (c) of this Code section.

(e) For any unclaimed personal property that is not a firearm, the sheriff, chief of police, or other executive officer of a law enforcement

agency shall make application to the superior court for an order to retain, sell, or discard such property. In the application the officer shall state each item of personal property to be retained, sold, or discarded. Upon the superior court's granting an order for the law enforcement agency to retain such property, the law enforcement agency shall retain such property for official use. Upon the superior court's granting an order which authorizes that the property be discarded, the law enforcement agency shall dispose of the property as other salvage or nonserviceable equipment. Upon the superior court's granting an order for the sale of personal property, the officer shall provide for a notice to be placed once a week for four weeks in the legal organ of the county specifically describing each item and advising possible owners of items of the method of contacting the law enforcement agency; provided, however, that miscellaneous items having an estimated fair market value of $75.00 or less may be advertised or sold, or both, in lots. Such notice shall also stipulate a date, time, and place said items will be placed for public sale if not claimed. Such notice shall also stipulate whether said items or groups of items are to be sold in blocks, by lot numbers, by entire list of items, or separately. Such unclaimed personal property shall be sold at a sale which shall be conducted not less than seven nor more than 15 days after the final advertised notice has been run. The sale shall be to the highest bidder. If such personal property has not been bid on in two successive sales, the law enforcement agency may retain the property for official use or the property will be considered as salvage and disposed of as other county or municipal salvage or nonserviceable equipment. With respect to unclaimed perishable personal property or animals or other wildlife, an officer may make application to the superior court for an order authorizing the disposition of such property prior to the expiration of 90 days.

(f) With respect to a motor vehicle which is the subject of a crime or has been abandoned but which is not the subject of any civil forfeiture proceeding, the law enforcement agency shall be required to contact the Georgia Crime Information Center to determine if such motor vehicle has been stolen and to follow generally the procedures of Code Section 40-11-2 to ascertain the registered owner of such vehicle.

(g)(1) With respect to unclaimed firearms, if the sheriff, chief of police, agency director, or designee of such official certifies that a firearm is unsafe because of wear, damage, age, or modification or because any federal or state law prohibits the sale or distribution of such firearm, at the discretion of such official, it shall be transferred to the Division of Forensic Sciences of the Georgia Bureau of Investigation, a municipal or county law enforcement forensic laboratory for training or experimental purposes, or be destroyed.

(2) Otherwise, an unclaimed firearm:

(A) Possessed by a municipal corporation shall be disposed of as provided for in Code Section 36-37-6; provided, however, that municipal corporations shall not have the right to reject any bids or to cancel any proposed sale of such firearms, and all sales shall be to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq., and who are authorized to receive such firearms under the terms of such license; or

(B) Possessed by the state or a political subdivision other than a municipal corporation, shall be disposed of by sale at public auction to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq., and who are authorized to receive such firearms under the terms of such license. Auctions required by this subparagraph may occur online on a rolling basis or at live events, but in no event shall such auctions occur less frequently than once every 12 months during any time in which the political subdivision or state custodial agency has an inventory of five or more saleable firearms.

(3) If no bids from eligible recipients are received within six months from when bidding opened on a firearm offered for sale pursuant to paragraph (2) of this subsection, the firearm shall be transferred to the Division of Forensic Sciences of the Georgia Bureau of Investigation, a municipal or county law enforcement forensic laboratory for training or experimental purposes, or be destroyed.

(h) Records shall be maintained showing the manner in which each personal property item came into possession of the law enforcement agency, a description of the property, all efforts to locate the owner, any case or docket number, the date of publication of any newspaper notices, and the date on which the property was retained by the law enforcement agency, sold, or discarded. All agencies subject to the provisions of this Code section shall keep records of the firearms acquired and disposed of as provided by this Code section as well as records of the proceeds of the sales thereof and the disbursement of such proceeds in accordance with records retention schedules adopted in accordance with Article 5 of Chapter 18 of Title 50, the "Georgia Records Act."

(i) The proceeds from the sale of personal property by the sheriff or other county law enforcement agency pursuant to this Code section shall be paid into the general fund of the county treasury. The proceeds from the sale of personal property by a municipal law enforcement agency pursuant to this Code section shall be paid into the general fund of the municipal treasury. The proceeds from the sale of personal property by a state agency pursuant to this Code section shall be paid into the general fund of the state.

(j) Neither the state nor any political subdivision of the state nor any of its officers, agents, or employees shall be liable to any person, including the purchaser of a firearm, for personal injuries or damage to property arising from the sale of a firearm under subsection (g) of this Code section unless the state or political subdivision acted with gross negligence or willful or wanton misconduct.

History. — Code 1981, § 17-5-54, enacted by Ga. L. 1991, p. 944, § 1; Ga. L. 1995, p. 909, § 1; Ga. L. 2004, p. 575, § 1; Ga. L. 2012, p. 1285, § 5/SB 350; Ga. L. 2015, p. 693, § 3-17/HB 233.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

JUDICIAL DECISIONS

Property subject to forfeiture proceeding. — Term "personal property" as used in O.C.G.A. § 17-5-54 is broad enough to include cash. Boone v. Sheriff of Lowndes County, 232 Ga. App. 601, 502 S.E.2d 535 (1998).

When the claimant asserted a right to property which was the subject of a forfeiture proceeding under O.C.G.A. § 16-13-49, the state's filing of a dismissal did not terminate the proceeding, and the sheriff was not authorized to apply for an order disposing of the property pursuant to O.C.G.A. § 17-5-54. Boone v. Sheriff of Lowndes County, 232 Ga. App. 601, 502 S.E.2d 535 (1998).

Motion for return of seized materials. — In a civil rights action by the plaintiff, an owner of a bookstore, involving the seizure of allegedly obscene materials, the plaintiff's motion under O.C.G.A. § 17-5-54 for return of the materials did not constitute a pending state proceeding for purposes of abstention under Younger v. Harris, 401 U.S. 37 (1972); the criminal action against the plaintiff was complete, constitutionally, and, the plaintiff had no burden to press for a hearing, and, even if the motion was a pending action, abstention was not available because the plaintiff's constitutional concerns would not be addressed in the proceeding; thus, return of the seized materials was required. Lee v. City of Rome, 866 F. Supp. 545 (N.D. Ga. 1994).

Fuel equipment used in theft of fuel was not contraband and not otherwise subject to forfeiture. — Because fuel equipment attached to the defendant's truck, and which had been used in the defendant's crime of theft of diesel fuel, did not constitute contraband per se, and there was no statutory authority supporting retention by the sheriff of the equipment after the defendant was discharged under O.C.G.A. § 42-8-62(a); thus, the equipment was ordered returned to the defendant pursuant to O.C.G.A. § 17-5-54. Norman v. Yeager, 335 Ga. App. 470, 781 S.E.2d 580 (2016).

Inconsistent claims of ownership. — Inconsistent claims of ownership are resolved against the defendant when the issue is disposition of personal property in accordance with O.C.G.A. § 17-5-54. Baez v. State, 231 Ga. App. 375, 500 S.E.2d 339 (1998).

Defendant entitled to personal items. — If defendant had personal items in the bag marked exhibit 1 at trial, and the items were not contraband or subject to forfeiture, defendant was entitled to return of the items. Baez v. State, 231 Ga. App. 375, 500 S.E.2d 339 (1998).

Destruction of cell phone did not violate due process rights. — Court of appeals erred in affirming an order dismissing an indictment against the defendant on the ground that the state destroyed the defendant's cell phone in

violation of O.C.G.A. § 17-5-54 because the defendant failed to show a violation of due process since there were no circumstances from which it could be concluded that the exculpatory value of the cell phone was obvious or evident to police or any other state actor before the phone was destroyed; the cell phone was initially seized because police believed that the phone was potentially inculpatory for possible use by the state at trial, and since the scenario did not permit the conclusion that it was apparent to police or anyone else involved in the seizure, custody, or disposition of the cell phone that the phone could possibly aid the defendant in the defense of any criminal charges, the evidence was not constitutionally material. State v. Miller, 287 Ga. 748, 699 S.E.2d 316 (2010).

OPINIONS OF THE ATTORNEY GENERAL

Stolen property from a pawn shop may be disposed of pursuant to the provisions of O.C.G.A. § 17-5-54. 1996 Op. Att'y Gen. No. 96-24.

17-5-55. Designation of custodian for introduced evidence; evidence log; storage, maintenance, and disposal of evidence.

(a) In all criminal cases, the court shall designate either the clerk of court, the court reporter, or any other officer of the court to be the custodian of any property that is introduced into evidence during the pendency of the case. Property introduced into evidence shall be identified or tagged with an exhibit number. After verdict and judgment has been entered in any criminal case, the person who has custody of the physical evidence introduced in the case shall inventory the evidence and create an evidence log within 30 days of the entry of the judgment. Within 30 days following the creation of the evidence log, physical evidence shall be returned to the rightful owner of the property unless the physical evidence itself is necessary for the appeal of the case, for a new trial, or for purposes of complying with this Code section or Code Section 17-5-56. The evidence log shall contain the case number, style of the case, description of the item, exhibit number, the name of the person creating the evidence log, and the location where the physical evidence is stored. After the evidence log is completed, the judge shall designate the clerk of court, the prosecuting attorney, or the law enforcement agency involved in prosecuting the case to obtain and store the evidence, and a notation shall appear in the evidence log indicating the transfer of evidence. If evidence is transferred to any other party, the evidence log shall be annotated to show the identity of the person or entity receiving the evidence, the date of the transfer, and the location of the evidence. The signature of any person or entity to which physical evidence is transferred shall be captured through electronic means that will be linked to the evidence log or the use of a property transfer form that will be filed with the evidence log. When physical evidence, other than audio or video recordings, is transferred to any person or entity, a photograph or other visual image of the evidence shall be made and placed in the case file.

(b) Physical evidence classified as dangerous or contraband by state or federal law, including, but not limited to, items described by state or federal law as controlled substances, dangerous drugs, explosives, weapons, ammunition, biomedical waste, hazardous substances, or hazardous waste shall be properly secured in a manner authorized by state or federal law. This evidence may be transferred to a government agency authorized to store or dispose of the material.

(c) Documents, photographs, and similar evidence shall be maintained and disposed of in accordance with records retention schedules adopted in accordance with Article 5 of Chapter 18 of Title 50, known as the "Georgia Records Act." Other physical evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime, shall be maintained in accordance with Code Section 17-5-56. A party to an extraordinary motion for new trial or a habeas corpus action in which DNA testing is sought that was filed prior to the expiration of the time prescribed for the preservation of evidence by this Code section may apply to the court in which the defendant was convicted for an order directing that the evidence be preserved beyond the time period prescribed by this Code section and until judgment in the action shall become final.

(d) Except as is otherwise provided in subsections (b) and (c) of this Code section or by law, following the expiration of the period of time set forth in subsections (b) and (c) of this Code section, physical evidence may be disposed of in accordance with the provisions of Article 5 of Chapter 12 of Title 44, known as the "Disposition of Unclaimed Property Act," or, in the case of property of historical or instructional value, as provided in Code Section 17-5-53.

History. — Code 1981, § 17-5-55, enacted by Ga. L. 2003, p. 247, § 3; Ga. L. 2004, p. 575, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, in subsection (c), a comma was deleted following "Code section" in the third sentence; and, in subsection (d), "Title 44" was substituted for "Title 50" and a comma was added following "Property Act".

Law reviews. — For note on the 2003 enactment of this Code section, see 20 Ga. St. U.L. Rev. 119 (2003).

JUDICIAL DECISIONS

Failure to comply with § 17-5-55. — No compliance with O.C.G.A. § 17-5-55 was indicated because neither the original nor a copy of a videotaped forensic interview of a child molestation victim was included in the record on appeal from the trial court, and the record did not reflect that the trial court designated a custodian of the evidence or that any evidence log was maintained; when it appears that photographs or audio or video recordings might be needed on appeal by a party, such party should move the trial court to allow duplicates to be admitted into the record in addition to the originals and be retained by the clerk of the court for inclusion in any appellate record, and the trial court should include in the court's

order, instructions that the clerk of court include such copies in the appellate record transmitted to the appellate court, when the appealing party either requests their inclusion or requests that nothing be omitted from the record on appeal because such a practice would ensure the completeness of the appellate record without delay. Lynn v. State, 300 Ga. App. 170, 684 S.E.2d 325 (2009).

Cited in State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

17-5-56. Maintenance of physical evidence containing biological material.

(a) Except as otherwise provided in Code Section 17-5-55, on or after May 27, 2003, governmental entities in possession of any physical evidence in a criminal case, including, but not limited to, a law enforcement agency or a prosecuting attorney, shall maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime as provided in this Code section. Biological samples collected directly from any person for use as reference materials for testing or collected for the purpose of drug or alcohol testing shall not be preserved.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained until the sentence in the case has been carried out. Evidence in all felony cases that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime shall be maintained for the period of time that the crime remains unsolved or until the sentence in the case is completed, whichever occurs last.

History. — Code 1981, § 17-5-56, enacted by Ga. L. 2003, p. 247, § 3; Ga. L. 2008, p. 486, § 2/HB 1297; Ga. L. 2011, p. 264, § 1-3/SB 80.

Editor's notes. — Ga. L. 2011, p. 264, § 1-1/SB 80, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Johnia Berry Act.'"

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

For note on the 2003 enactment of this Code section, see 20 Ga. St. U.L. Rev. 119 (2003).

JUDICIAL DECISIONS

Duty of state. — State did not violate O.C.G.A. § 17-5-56(a) by failing to preserve material evidence when, following a single-car accident involving the defendant's car, the state removed samples of biological evidence from the interior of the defendant's car and sold the defendant's car to a salvage wholesaler who then sold the car to a mechanic, who cleaned, repaired, repainted, and resold the vehicle. State v. Mussman, 289 Ga. 586, 713 S.E.2d 822 (2011).

State was not obligated under O.C.G.A. § 17-5-56(a) to preserve four vials of the defendant's blood that were drawn as reference samples for DNA analysis. Even assuming the defendant's motion challenging the admissibility of the defendant's statements put the state on notice that the defendant's level of intoxication

was an issue in determining whether the statements to law enforcement officers were voluntary, it did not indicate that the defendant was claiming that intoxication made the defendant physically incapable of committing the crimes and, thus, the defendant could not have been the perpetrator. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

Cigarette butts not constitutionally material. — Defendant did not show that the cigarette butts found in the dumpster were constitutionally material to the defendant's defense because although the butts were potentially useful to the defense the defendant raised in the custodial statement and at trial, that another person committed the crimes, that did not establish that the butts had an obvious or readily perceived exculpatory value, and the court's conclusion that the cigarette butts had apparent exculpatory value to that defense was not supported by the record because the DNA testing could have been exculpatory or inculpatory. Therefore, the lost cigarette butts were not constitutionally material and the trial court erred in granting the defendant's motion to dismiss the indictment based on the failure to preserve the cigarette butts found in the dumpster in violation of O.C.G.A. § 17-5-56(a). State v. Mizell, 288 Ga. 474, 705 S.E.2d 154 (2010).

Material collected from abortion. — When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, because O.C.G.A. § 17-5-56 applies to physical evidence containing biological material that could identify the perpetrator and is collected at the time of the crime, the statute did not apply to the biological material collected at the victim's abortion more than two months after the crime occurred; and the statute did not apply to the sample collected from the victim's abortion because the sample was contaminated due to the storage procedure used by the medical clinic, not the state, and there was no usable biological material that would relate to the identity of the perpetrator. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

Cited in State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Admissibility and Reliability of Hair Sample Testing to Prove Illegal Drug Use, 47 POF3d 203.

ARTICLE 4

INVESTIGATING SEXUAL ASSAULT

Cross references. — Establishment of sexual assault protocol and committee, § 15-24-2.

17-5-70. Definitions.

As used in this article, the term:

(1) "Forensic medical examination" means an examination by a health care provider of a person who is a victim of a sexual assault. Such examination shall include a physical examination, documentation of biological and physical findings, and collection of physical evidence from the victim.

(2) "Investigating law enforcement agency" means the law enforcement agency responsible for the investigation of the alleged sexual assault.

(3) "Sexual assault" means rape, sodomy, aggravated sodomy, statutory rape, child molestation, aggravated child molestation, sexual assault against a person in custody, sexual assault against a person detained in a hospital or other institution, sexual assault by a practitioner of psychotherapy against a patient, incest, bestiality, sexual battery, and aggravated sexual battery as those terms and offenses are set forth and defined in Chapter 6 of Title 16.

History. — Code 1981, § 17-5-70, enacted by Ga. L. 2008, p. 486, § 3/HB 1297.

17-5-71. Preservation of evidence.

(a) In cases in which the victim reports an alleged sexual assault to law enforcement, the investigating law enforcement agency shall maintain any physical evidence collected as a result of an alleged sexual assault that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of an alleged sexual assault, for 30 years from the date of arrest, or seven years from completion of sentence, whichever occurs last, and if no arrests, then for 50 years.

(b) If the victim does not cooperate with law enforcement in the investigation or prosecution of an alleged sexual assault, the investigating law enforcement agency shall maintain any physical evidence collected as a result of such alleged sexual assault that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the alleged sexual assault, for not less than 12 months from the date any such physical evidence is collected.

History. — Code 1981, § 17-5-71, enacted by Ga. L. 2008, p. 486, § 3/HB 1297; Ga. L. 2019, p. 721, § 1/HB 282.

The 2019 amendment, effective July 1, 2019, in subsection (a), substituted "In cases in which the victim reports an alleged sexual assault to law enforcement" for "Except as otherwise provided in subsection (b) of this Code section or Code Section 17-5-55 or 17-5-56, on or after May 12, 2008" at the beginning, and substituted "30 years from the date of arrest, or seven years from completion of sentence, whichever occurs last, and if no arrests, then for 50 years" for "ten years after the report of the alleged sexual assault" at the end.

Law reviews. — For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 51 (2019).

17-5-72. Right to free forensic medical examination.

A victim shall have the right to have a forensic medical examination regardless of whether the victim participates in the criminal justice

system or cooperates with law enforcement in pursuing prosecution of the underlying crime. A victim shall not be required to pay, directly or indirectly, for the cost of a forensic medical examination. The cost of a forensic medical examination shall be paid for by the Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of this title.

History. — Code 1981, § 17-5-72, enacted by Ga. L. 2008, p. 486, § 3/HB 1297; Ga. L. 2011, p. 214, § 3/HB 503.

17-5-73. Victim's right to refuse request for polygraph examinations or other truth-telling devices.

No prosecuting attorney, investigating law enforcement agency, or government official shall ask or require any victim of a sexual assault to submit to a polygraph examination or any other truth-telling device as a condition precedent to investigating such alleged crime. The refusal of a victim to submit to a polygraph examination or any other truth-telling device shall not prevent an investigation or prosecution of any sexual assault.

History. — Code 1981, § 17-5-73, enacted by Ga. L. 2008, p. 486, § 3/HB 1297.

Cross references. — Negligent or improper administration of polygraph examination, § 51-1-37.

ARTICLE 5

IMMIGRANTS

Cross references. — Offenses involving illegal aliens, § 16-11-200 et seq. Cooperation of Georgia law enforcement with federal immigration authorities, § 35-1-6. Secure and verifiable identity document act, § 50-36-2. Immigration enforcement review board, § 50-36-3.

Editor's notes. — Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not codified by the General Assembly, provides, in part, that this article shall apply to offenses and violations occurring on or after July 1, 2011.

Administrative rules and regulations. — The Immigration Enforcement Review Board, Official Compilation of the Rules and Regulations of the State of Georgia, Title 291.

Law reviews. — For article on the 2011 enactment of this article, 28 Ga. St.

U.L. Rev. 35 (2011). For article, "The Rise of Zero Tolerance and the Demise of Family," see 36 Ga. St. U.L. Rev. 287 (2020).

For comment, "Immigration Detention Reform: No Band Aid Desired," see 60 Emory L.J. 1211 (2011).

RESEARCH REFERENCES

C.J.S. — 3A Am. Jur.2d, Aliens and Citizens, § 284 et seq.
3A C.J.S., Aliens, § 672 et seq.

17-5-100. Investigation of illegal alien status.

(a) As used in this Code section, the term:

(1) "Criminal violation" means a violation of state or federal criminal law but shall not include a violation of a county or municipal law, regulation, or ordinance.

(2) "Illegal alien" means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(b) Except as provided in subsection (f) of this Code section, during any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect's immigration status when the suspect is unable to provide one of the following:

(1) A secure and verifiable document as defined in Code Section 50-36-2;

(2) A valid Georgia driver's license;

(3) A valid Georgia identification card issued by the Department of Driver Services;

(4) If the entity requires proof of legal presence in the United States before issuance, any valid driver's license from a state or district of the United States or any valid identification document issued by the United States federal government;

(5) A document used in compliance with paragraph (2) of subsection (a) of Code Section 40-5-21; or

(6) Other information as to the suspect's identity that is sufficient to allow the peace officer to independently identify the suspect.

(c) When attempting to determine the immigration status of a suspect pursuant to subsection (b) of this Code section, a peace officer shall be authorized to use any reasonable means available to determine the immigration status of the suspect, including:

(1) Use of any authorized federal identification data base;

(2) Identification methods authorized by federal law, including those authorized by 8 U.S.C.A. Section 1373(c) and 8 U.S.C.A. Section 1644;

(3) Use of electronic fingerprint readers or similar devices; or

(4) Contacting an appropriate federal agency.

(d) A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and of the United States.

(e) If during the course of the investigation into such suspect's identity, a peace officer receives verification that such suspect is an illegal alien, then such peace officer may take any action authorized by state and federal law, including, but not limited to, detaining such suspected illegal alien, securely transporting such suspect to any authorized federal or state detention facility, or notifying the United States Department of Homeland Security or successor agency. Nothing in this Code section shall be construed to hinder or prevent a peace officer or law enforcement agency from arresting or detaining any criminal suspect on other criminal charges.

(f) No person who in good faith contacts or has contact with a state or local peace officer or prosecuting attorney or member of the staff of a prosecuting attorney for the purpose of acting as a witness to a crime, to report criminal activity, or to seek assistance as a victim to a crime shall have his or her immigration status investigated based on such contact or based on information arising from such contact.

(g) A peace officer, prosecuting attorney, or government official or employee, acting in good faith to carry out any provision of this Code section, shall have immunity from damages or liability from such actions.

History. — Code 1981, § 17-5-100, enacted by Ga. L. 2011, p. 794, § 8/HB 87; Ga. L. 2012, p. 775, § 17/HB 942.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

For comment, "Aliens in a Foreign Field: Examining Whether States have the Authority to Pass Legislation in the Field of Immigration Law," see 63 Mercer L. Rev. 1077 (2012).

JUDICIAL DECISIONS

Standing. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, an undocumented immi-

grant currently classified under deferred action status had standing to challenge section 8. Such an alien remained permissibly in the United States but had not acquired the requisite documentation to stave off the investigatory detention permitted by section 8, and such an alien faced a credible threat of detention under section 8 as the alien possessed none of the listed documentation to prove that the alien had permission to remain temporarily in the United States. Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

CHAPTER 6

BONDS AND RECOGNIZANCES

Article 1

General Provisions

Sec.

17-6-1. (For effective date, see note.) When offenses bailable; procedure; schedule of bails; appeal bonds.
17-6-1.1. Electronic pretrial release and monitoring program for defendants; requirements; procedures; fees.
17-6-2. Acceptance of bail in misdemeanor cases; posting driver's license as collateral for bail.
17-6-3. Acceptance of recognizance bonds for military personnel.
17-6-4. (For effective date, see note.) Authorization of posting of cash bonds generally; furnishing of receipt to person posting bond; recordation of receipt of bond on docket; disposal of unclaimed bonds.
17-6-5. Acceptance of cash bonds for certain offenses; authorization.
17-6-6. Clerk of court or judge to provide cash receipt book; furnishing of copies of receipt; disposition of original receipt and bond.
17-6-7. Liability of arresting officer for failure to account for cash receipts and bonds.
17-6-8. Proceedings upon failure of person arrested to appear; forfeiture of bond not a bar to subsequent prosecution.
17-6-9. Acceptance of cash bonds in lieu of statutory bond or recognizance by officers or officials authorized to enforce "Comprehensive Litter Prevention and Abatement Act of 2006."
17-6-10. Acceptance of cash bonds for violations of ordinances or other offenses against municipalities; issuance of receipt; designated officials; effect of failure to appear in court; applicability to municipalities having similar provisions.
17-6-11. Display of driver's license for violation of certain traffic related laws; notice of failure to appear; suspension of license; arrest; seizure of license.
17-6-12. (For effective date, see note.) Unsecured judicial release; requirement; effect of failure of person charged to appear for trial.
17-6-13. First bail for offense permitted as matter of right; subsequent bails to be in discretion of court.
17-6-14. Use of bail bond posted for preliminary hearing for trial appearance; applicability to federal proceedings; proceedings in county other than where commitment hearing held; effect where bail bond required is less than bond originally posted.
17-6-15. Necessity for commitment where bail tendered and accepted; opportunity for bail; receipt of bail after commitment and imprisonment; imprisonment of person who offers bond for amount of bail set; effect upon common-law authority of court.
17-6-16. Entry of memorandum on warrant after waiver of commitment hearing and tender of bail.
17-6-17. Bond or recognizance to be conditioned on appearance of person accused of crime at arraignment; proceedings upon failure of accused to appear.
17-6-18. Amendment of bonds and giving of new security.

Article 2

Sureties

Part 1

General Provisions

Sec.
17-6-30. Fees of sureties.
17-6-31. Surrender of principal by surety; forfeiture of bond; death of principal.

Part 2

Professional Bondsmen

17-6-50. Persons deemed professional bondsmen; criminal background investigation information to be provided to clerk of court.
17-6-50.1. Continuing education programs for professional bondsmen; fee; annual requirement; certificate of completion.
17-6-51. Suggesting employment of attorneys during negotiations regarding signing of bond or any time subsequent thereto.
17-6-52. Soliciting business or loitering around jails or courts to solicit business; giving of advice by law enforcement officers as to services of professional bondsmen.
17-6-53. Giving advice or directions to defendants who are principals in bonds regarding defense or disposition of cases.
17-6-54. No further compensation after becoming surety; when sum received to be returned to defendant; right to surrender defendant and to keep sum paid when defendant forfeits.
17-6-55. Penalty for violation of part.
17-6-56. Bail recovery agents; requirements; registration.
17-6-56.1. Continuing education programs for bail recovery agents; fee; annual requirement; certificate of completion.
17-6-57. Bail recovery agents; notification to local police; out-of-state agents; identification card.
17-6-58. Penalty for violation; liability.

Article 3

Proceedings for Forfeiture of Bonds or Recognizances

Sec.
17-6-70. When forfeiture occurs.
17-6-70.1. Proceedings for forfeiture of bonds or recognizances generally [Repealed].
17-6-71. Execution hearing on failure of principal to appear.
17-6-72. Conditions not warranting forfeiture of bond for failure to appear; remission of forfeiture.
17-6-73. Address of principal and surety on bond or recognizance.

Article 4

Bonds for Good Behavior and to Keep the Peace

Part 1

Bonds for Good Behavior

17-6-90. Issuance of notice to appear for show cause hearing; requirement of bond; hearing; payment of court costs by affiant; issuance of order of arrest.
17-6-91. Extension of bond by court; right of sureties to surrender principal.
17-6-92. Violation of bond; contempt of court.
17-6-93. Redesignated.
17-6-94. Redesignated.

Part 2

Bonds to Keep the Peace

17-6-110. Issuance of warrant; requirement of bond; hearing; payment of costs by affiant.
17-6-111. Right of person to require bond against spouse.
17-6-112. Actions constituting violations of bond; right of action for breach of bond generally; imposition of additional penalty for contempt of court; finding of prosecuting witness in contempt.
17-6-113. Effect of provoking breach of bond.
17-6-114. Discharge or extension of bond by court.

Cross references. — Prohibition against excessive bail, U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Witness bonds in the event of commitment by court, §§ 17-7-26, 17-7-27. Bonds and first appearance, Uniform State Court Rules, Rule 26.1. Bond hearings in Juvenile Court, Uniform Rules for the Juvenile Courts of Georgia, Rules 9.1 and 9.2.

U.S. Code. — Release from custody, Federal Rules of Criminal Procedure, Rule 46.

Law reviews. — For article, "Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts," see 33 Ga. St. U.L. Rev. 695 (2017). For article, "Bail and Mass Incarceration," see 53 Ga. L. Rev. 238 (2018).

JUDICIAL DECISIONS

Cited in Sunrise Bonding Co. v. Busbee, 165 Ga. App. 83, 299 S.E.2d 153 (1983).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Excessive Bail, 18 POF2d 149

ALR. — Surrender of principal by sureties on bail bond, 3 A.L.R. 180; 73 A.L.R. 1369.

Bail: imposition of life sentence as affecting capital character of offense, 3 A.L.R. 970.

Induction of principal into military or naval service as exonerating his bail for nonappearance, 8 A.L.R. 371; 147 A.L.R. 1428; 148 A.L.R. 1400; 150 A.L.R. 1447; 151 A.L.R. 1462; 152 A.L.R. 1459; 153 A.L.R. 1431; 154 A.L.R. 1456; 156 A.L.R. 1457; 157 A.L.R. 1456.

Right to give bail in civil action or proceeding, 15 A.L.R. 1079.

Constitutional right to bail pending appeal from conviction, 19 A.L.R. 807; 77 A.L.R. 1235.

Disciplinary power of court in respect of suretyship in judicial proceedings, 91 A.L.R. 889.

Necessity of reference in bail bond to specific crime, 103 A.L.R. 535.

Rape as bailable offense, 118 A.L.R. 1115.

Right of surety on recognizance or bail bond to indemnity or contribution, 170 A.L.R. 1161.

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

Promise by one other than principal to indemnify on agreeing to become surety or guarantor as within statute of frauds, 13 A.L.R.4th 1153.

Liability of surety on bail bond taken without authority, 27 A.L.R.4th 246.

Right of defendant in state court to bail pending appeal from conviction — modern cases, 28 A.L.R.4th 227.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on post-trial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction, 33 A.L.R.4th 663.

State statutes making default on bail a separate offense, 63 A.L.R.4th 1064.

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

Failure of person, released pursuant to provisions of Federal Bail Reform Act of 1966 (18 USCS § 3141 et seq.), to make appearance as subjecting person to pen-

alty provided for by 18 USCS § 3150, 66 A.L.R. Fed. 668.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For note, "Pretrial Detention of Indigents: A Standard Analysis of Due Process and Equal Protection Claims," see 54 Ga. L. Rev. 707 (2020).

JUDICIAL DECISIONS

Applicability in federal proceeding. — Habeas corpus plaintiff, protesting conditions of the plaintiff's detention for a state criminal violation, had to look to state law for any rights the plaintiff might have regarding bond. Datz v. Hutson, 806 F. Supp. 982 (N.D. Ga. 1992), aff'd, 14 F.3d 58 (11th Cir. 1994).

RESEARCH REFERENCES

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 25 et seq., 34 et seq., 57 et seq., 66 et seq., 153 et seq.

17-6-1. (For effective date, see note.) When offenses bailable; procedure; schedule of bails; appeal bonds.

(a) The following offenses are bailable only before a judge of the superior court:

(1) Treason;

(2) Murder;

(3) Rape;

(4) Aggravated sodomy;

(5) Armed robbery;

(5.1) Home invasion in the first degree;

(6) Aircraft hijacking and hijacking a motor vehicle in the first degree;

(7) Aggravated child molestation;

(8) Aggravated sexual battery;

(9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(10) Violating Code Section 16-13-31 or Code Section 16-13-31.1;

(11) Kidnapping, arson, aggravated assault, or burglary in any degree if the person, at the time of the alleged kidnapping, arson,

aggravated assault, or burglary in any degree, had previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (10) of this subsection;

(12) Aggravated stalking; and

(13) Violations of Chapter 15 of Title 16.

(b)(1) All offenses not included in subsection (a) of this Code section, inclusive of offenses that are violations of local ordinances, are bailable by a court of inquiry. Except as provided in subsection (g) of this Code section, at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail. When determining bail for a person charged with a misdemeanor, courts shall not impose excessive bail and shall impose only the conditions reasonably necessary to ensure such person attends court appearances and to protect the safety of any person or the public given the circumstances of the alleged offense and the totality of circumstances.

(2) Except as otherwise provided in this chapter:

(A) A person charged with violating Code Section 40-6-391 whose alcohol concentration at the time of arrest, as determined by any method authorized by law, violates that provided in paragraph (5) of subsection (a) of Code Section 40-6-391 may be detained for a period of time up to six hours after booking and prior to being released on bail or on recognizance; and

(B) When an arrest is made by a law enforcement officer without a warrant upon an act of family violence or a violation of a criminal family violence order pursuant to Code Section 17-4-20, the person charged with the offense shall not be eligible for bail prior to the arresting officer or some other law enforcement officer taking the arrested person before a judicial officer pursuant to Code Section 17-4-21.

(3)(A) Notwithstanding any other provision of law, a judge of a court of inquiry may, as a condition of bail or other pretrial release of a person who is charged with violating Code Section 16-5-90 or 16-5-91, prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present or intentionally following such person.

(B) If the evidence shows that the defendant has previously violated the conditions of pretrial release or probation or parole

which arose out of a violation of Code Section 16-5-90 or 16-5-91, the judge of a court of inquiry may impose such restrictions on the defendant which may be necessary to deter further stalking of the victim, including but not limited to denying bail or pretrial release.

(c)(1) In the event a person is detained in a facility other than a municipal jail for an offense which is bailable only before a judge of the superior court, as provided in subsection (a) of this Code section, and a hearing is held pursuant to Code Section 17-4-26 or 17-4-62, the presiding judicial officer shall notify the superior court in writing within 48 hours that the arrested person is being held without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and shall set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(2) In the event a person is detained in a municipal jail for an offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section for a period of 30 days, the municipal court shall notify the superior court in writing within 48 hours that the arrested person has been held for such time without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(3) Notice sent to the superior court pursuant to paragraph (1) or (2) of this subsection shall include any incident reports and criminal history reports relevant to the detention of such person.

(d) A person charged with any offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section may petition the superior court requesting that such person be released on bail. The court shall notify the district attorney and set a date for a hearing within ten days after receipt of such petition.

(e)(1) A court shall be authorized to release a person on bail if the court finds that the person:

(A) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;

(B) Poses no significant threat or danger to any person, to the community, or to any property in the community;

(C) Poses no significant risk of committing any felony pending trial; and

(D) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

(2) When determining bail, as soon as possible, the court shall consider:

(A) The accused's financial resources and other assets, including whether any such assets are jointly controlled;

(B) The accused's earnings and other income;

(C) The accused's financial obligations, including obligations to dependents;

(D) The purpose of bail; and

(E) Any other factor the court deems appropriate.

(3) If the person is charged with a serious violent felony and has already been convicted of a serious violent felony, or of an offense under the laws of any other state or of the United States which offense if committed in this state would be a serious violent felony, there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required or assure the safety of any other person or the community. As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in Code Section 17-10-6.1.

(4) (For effective date, see note.) Any bond issued by an elected judge or judge sitting by designation that purports a dollar amount shall be executed in the full-face amount of such bond through secured means as provided for in Code Section 17-6-4 or 17-6-50 or shall be executed by use of property as approved by the sheriff in the county where the offense was committed.

(5) (For effective date, see note.) Notwithstanding any other provision of law, nothing in this Code section shall prohibit a duly sworn sheriff from releasing an inmate from custody in cases of medical emergency with the consent of the judge in the county in which he or she presides.

(f)(1) Except as provided in subsection (a) of this Code section or as otherwise provided in this subsection, the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, an accused shall be released from custody upon posting bail as fixed in the schedule.

(2) For offenses involving an act of family violence, as defined in Code Section 19-13-1, bail or other release from custody shall be set by a judge on an individual basis and a schedule of bails provided for in paragraph (1) of this subsection shall not be utilized; provided, however, that the judge shall include a listing of specific conditions which shall include, but not be limited to, having no contact of any

kind or character with the victim or any member of the victim's family or household, not physically abusing or threatening to physically abuse the victim, the immediate enrollment in and participation in domestic violence counseling, substance abuse therapy, or other therapeutic requirements.

(3) For offenses involving an act of family violence, the judge shall determine whether one or more specific conditions shall be used, except that any offense involving an act of family violence and serious injury to the victim shall be bailable only before a judge when the judge or the arresting officer is of the opinion that the danger of further violence to or harassment or intimidation of the victim is such as to make it desirable that the consideration of the imposition of additional conditions as authorized in this Code section should be made. Upon setting bail in any case involving family violence, the judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary. As used in this Code section, the term "serious injury" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, substantial bruises to body parts, fractured bones, or permanent disfigurements and wounds inflicted by deadly weapons or any other objects which, when used offensively against a person, are capable of causing serious bodily injury.

(4) For violations of Code Section 16-15-4, the court shall require increased bail and shall include as a condition of bail or pretrial release that the accused shall not have contact of any kind or character with any other member or associate of a criminal street gang and, in cases involving an alleged victim, that the accused shall not have contact of any kind or character with any such victim or any member of any such victim's family or household.

(5) For offenses involving violations of Code Section 40-6-393, bail or other release from custody shall be set by a judge on an individual basis and not a schedule of bails pursuant to this Code section.

(g) No appeal bond shall be granted to any person who has been convicted of murder, rape, aggravated sodomy, armed robbery, home invasion in any degree, aggravated child molestation, child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking, or aircraft hijacking and who has been sentenced to serve a period of incarceration of five years or more. The granting of an appeal bond to a person who has been convicted of any other felony offense or of any misdemeanor offense involving an act of family violence as defined in Code Section 19-13-1, or of any offense delineated as a high and aggravated misdemeanor or of any offense set forth in Code Section

40-6-391, shall be in the discretion of the convicting court. Appeal bonds shall terminate when the right of appeal terminates, and such bonds shall not be effective as to any petition or application for writ of certiorari unless the court in which the petition or application is filed so specifies.

(h) Except in cases in which life imprisonment or the death penalty may be imposed, a judge of the superior court by written order may delegate the authority provided for in this Code section to any judge of any court of inquiry within such superior court judge's circuit. However, such authority may not be exercised outside the county in which said judge of the court of inquiry was appointed or elected. The written order delegating such authority shall be valid for a period of one year, but may be revoked by the superior court judge issuing such order at any time prior to the end of that one-year period.

(i) (For effective date, see note.) As used in this Code section, the term "bail" shall include the release of a person on an unsecured judicial release, except as limited by Code Section 17-6-12.

(j) For all persons who have been authorized by law or the court to be released on bail, sheriffs and constables shall accept such bail; provided, however, that the sureties tendered and offered on the bond are approved by the sheriff of the county in which the offense was committed.

History. — Orig. Code 1863, § 4625; Code 1868, § 4649; Code 1873, § 4747; Code 1882, § 4747; Penal Code 1895, § 933; Penal Code 1910, § 958; Ga. L. 1922, p. 51, § 1; Code 1933, § 27-901; Ga. L. 1973, p. 454, § 1; Ga. L. 1980, p. 1359, § 1; Ga. L. 1982, p. 910, § 1; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 358, § 1; Ga. L. 1983, p. 452, § 1; Ga. L. 1984, p. 22, § 17; Ga. L. 1984, p. 679, § 1; Ga. L. 1984, p. 760, § 1; Ga. L. 1985, p. 416, § 1; Ga. L. 1986, p. 166, §§ 1, 2; Ga. L. 1988, p. 358, § 1; Ga. L. 1989, p. 1714, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 416, § 1; Ga. L. 1991, p. 1401, § 1; Ga. L. 1992, p. 1150, § 1; Ga. L. 1992, p. 2527, § 1; Ga. L. 1993, p. 91, § 17; Ga. L. 1993, p. 1534, § 2; Ga. L. 1994, p. 532, § 1; Ga. L. 1994, p. 1270, § .5; Ga. L. 1994, p. 1625, § 5; Ga. L. 1995, p. 379, §§ 1, 2; Ga. L. 1995, p. 989, §§ 1, 2; Ga. L. 1996, p. 1233, § 1; Ga. L. 1996, p. 1624, § 1; Ga. L. 1997, p. 143, § 17; Ga. L. 1998, p. 270, § 9; Ga. L. 1999, p. 391, § 3; Ga. L. 2000, p. 1171, § 1; Ga. L. 2006, p. 379, § 18/HB 1059; Ga. L. 2008, p. 817, § 1/HB 960; Ga. L. 2010, p. 226, § 1/HB 889; Ga. L. 2010, p. 230, §§ 8, 9/HB 1015; Ga. L. 2012, p. 899, § 8-8/HB 1176; Ga. L. 2013, p. 667, § 3/SB 86; Ga. L. 2014, p. 426, § 9/HB 770; Ga. L. 2017, p. 417, § 2-1/SB 104; Ga. L. 2018, p. 550, § 2-4/SB 407; Ga. L. 2020, p. 570, § 2-1/SB 402.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section in effect until January 1, 2021, see the 2020 amendment note.

The 2018 amendment, effective July 1, 2018, in paragraph (b)(1), inserted "inclusive of offenses that are violations of local ordinances," in the middle of the first sentence, and added the third sentence; designated the existing provisions of the introductory paragraph of subsection (e) as paragraph (e)(1); redesignated former paragraphs (e)(1) through (e)(4) as present subparagraphs (e)(1)(A) through (e)(1)(D), respectively; added paragraph (e)(2); designated the ending undesignated paragraph of subsection (e) as paragraph (e)(3); substituted "How-

ever, if" for "If" in present paragraph (e)(3); substituted "an accused" for "a person charged with committing any offense" in the middle of paragraph (f)(1); substituted "bail or other release from custody shall be set by a judge on an individual basis and a schedule of bails provided for in paragraph (1) of this subsection shall not be utilized; provided, however, that the judge" for "the schedule of bails provided for in paragraph (1) of this subsection shall require increased bail and" near the middle of paragraph (f)(2); in paragraph (f)(3), in the first sentence, deleted "the schedule of bails and" following "determine whether", and deleted "of its" preceding "specific conditions"; in paragraph (f)(4), substituted "accused" for "defendant" twice, and substituted "an alleged victim" for "a victim" in the middle; in subsection (i), deleted "the" following "shall include" in the middle, and deleted "the provisions of" preceding "Code Section 17-6-12".

The 2020 amendment, effective January 1, 2021, added paragraphs (e)(4) and (e)(5) and, in subsection (i), substituted "the release" for "releasing" and substituted "an unsecured judicial release" for "such person's own recognizance".

Cross references. — Bail in magistrate court criminal cases, Uniform Rules for the Magistrate Courts, Rule 23.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, "six" was substituted for "6" in paragraph (2) of subsection (b) (now subparagraph (b)(2)(A)).

Pursuant to Code Section 28-9-5, in 1995, paragraph (11) of subsection (a), as enacted by Ga. L. 1995, p. 989, § 1, was redesignated as paragraph (12) of subsection (a), owing to the use of a duplicate paragraph designation by Ga. L. 1995, p. 379, § 1.

Pursuant to Code Section 28-9-5, in 2010, "Chapter 15 of Title 16" was substituted for "the 'Georgia Street Gang Terrorism and Prevention Act'" in paragraph (a)(13).

Editor's notes. — Ga. L. 1986, p. 166, § 3, not codified by the General Assembly, provided that that Act would become effective July 1, 1986, and would apply to prosecutions commenced on or after that date.

Ga. L. 1994, p. 1625, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Anti-motor Vehicle Hijacking Act of 1994'".

Ga. L. 1995, p. 379, § 3, not codified by the General Assembly, provides that the amendment by that Act shall apply to all bail hearings held on or after July 1, 1995, without regard to whether the offense was committed prior to, on, or after July 1, 1995, and without regard to whether an underlying prior conviction occurred prior to, on, or after July 1, 1995.

Ga. L. 1995, p. 989, § 3, not codified by the General Assembly, provides that the amendment by that act shall apply to acts committed on or after July 1, 1995.

Ga. L. 1999, p. 391, §§ 1 and 2, not codified by the General Assembly, provides in part that the memory of all victims of drunken driving and Heidi Marie Flye, Cathryn Nicole Flye, and Audrey Marie Flye should be honored and that this Act shall be known and may be cited as "Heidi's Law".

Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c)/HB 1059, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For review of 1998 legislation relating to crimes and offenses, see 15 Ga. St. U.L. Rev. 80 (1998). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017). For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 45 (2018).

For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971). For note, "The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process," see 22 Ga. L. Rev. 805 (1988). For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 216 (1989). For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 43 (1992). For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 129 (1992). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 95 (1993). For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 99 (1994). For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 129 (1994). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 141 (1995). For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev.

200 (1999). For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017). For note, "Bailing on Bail: The Unconstitutionality of Fixed, Monetary Bail Systems and Their Continued Use Throughout the United States," see 52 Ga. L. Rev. 985 (2018). For note, "A 'Critical' Question of State Law: Georgia's Ambiguous Treatment of Initial Appearance Hearings and the Implications of Bail Reform," see 54 Ga. L. Rev. 363 (2019).

For comment on Ingram v. Grimes, 213 Ga. 652, 100 S.E.2d 914 (1957), holding that the granting of bail after conviction rests on the discretion of the trial court even when a motion for new trial is pending, see 21 Ga. B.J. 235 (1958).

JUDICIAL DECISIONS

Analysis

General Consideration
Discretion of Court
Practice and Procedure

General Consideration

For history of section, see Newsome v. Scott, 151 Ga. 639, 107 S.E. 854 (1921).

Constitutionality of subsection (g). — Provision in O.C.G.A. § 17-6-1(g) (former subsection (d)) denying appeal bonds to persons convicted of "murder, rape … and who have been sentenced to serve a period of seven years or more" does not violate either the due process or equal protection clause. Hall v. State, 254 Ga. 507, 330 S.E.2d 878 (1985).

O.C.G.A. § 17-6-1(g)'s (former subsection (d)) classification of persons ineligible for appeal bonds is rationally related to at least two legitimate state interests. First, it is rationally related to the promotion of public confidence in the judicial system by prohibiting persons given longer sentences for serious crimes from returning to the community pending appeal. Similarly, in providing that persons convicted of serious crimes who receive longer sentences are not entitled to an appeal bond, it is rationally related to the legitimate objective of assuring that such persons will not flee pending the outcome of their appeal. Browning v. State, 254 Ga. 478, 330 S.E.2d 879 (1985); Moran v. State, 268 Ga. 817, 493 S.E.2d 126 (1997).

Applicability to "capital offenses." — O.C.G.A. § 17-6-1, as amended, is applicable to capital "offenses," not convictions. Hardin v. State, 251 Ga. 533, 307 S.E.2d 669 (1983).

Former Code 1933, § 27-901 (see O.C.G.A. § 17-6-1) was applicable to the first 90 days of confinement, and Ga. L. 1973, p. 291, § 1 (see O.C.G.A. § 17-7-50) was applicable to all crimes after 90 days of confinement. After 90 days without bail and without indictment, the mandate of the preceding section was that bail must be set by the trial judge. Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975).

Duty of court. — Sole duty of the court hearing an application for bail is to determine whether or not the accused should be entitled to bail and, if so, the amount. At such hearing the court does not pass on the merits of the case and there is no determination of guilt or innocence, or even probable cause. Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490 (1980).

Bail considerations. — Many factors are to be considered in fixing bail, some of which are the ability of the defendant to give bail, the seriousness of the offense, penalty, character, and reputation of the accused, health, probability of the defendant appearing to serve sentence, forfeiture of other bonds, and whether a fugitive. Jones v. Grimes, 219 Ga. 585, 134 S.E.2d 790 (1964).

Considerations to be employed by the superior court in granting or denying pre-trial bonds are the same as the considerations to be employed in granting or denying appeal bonds. Hardy v. State, 192 Ga. App. 860, 386 S.E.2d 731 (1989).

Principal factor in fixing bail is probability of appearance of the accused. — In setting the amount of bail,

General Consideration (Cont'd)

the principal factor considered, to the determination of which most other factors are directed, is the probability of the appearance of the accused, or of the accused's flight to avoid punishment. Jones v. Grimes, 219 Ga. 585, 134 S.E.2d 790 (1964); Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970).

When fixing the amount of bail, the judge is to consider chiefly the probability that the accused, if freed, will appear at trial; other factors to be considered include the accused's ability to pay, the seriousness of the offense, and the accused's character and reputation. Spence v. State, 252 Ga. 338, 313 S.E.2d 475 (1984); Howard v. State, 197 Ga. App. 693, 399 S.E.2d 283 (1990).

Trial court erred in admitting, at trial, a pretrial statement made by the defendant's parent to an investigator as the defendant was not afforded a meaningful opportunity to cross-examine the parent regarding the statement during a bond hearing, and the reasonable doubt standard and the significant risk standard could not be equated, given that determining whether a specific crime was committed reached different issues than determining the possibility of future bad conduct by the defendant. Dickson v. State, 281 Ga. App. 539, 636 S.E.2d 721 (2006).

Question is whether appearance for trial may be reasonably assured. — In passing on an application for bond, the question before the judge is whether the appearance of the accused for trial may be reasonably assured. Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490 (1980).

Factors considered in felony cases. — Grant or refusal of bail in felony cases pending appeal lies within the sound discretion of the trial court. Release should not be granted unless, after hearing, the court affirmatively determines that there is no substantial risk of the defendant absconding, that the defendant is unlikely to commit a serious crime or intimidate witnesses, and that the appeal is not frivolous and not taken for delay. Sapp v. State, 147 Ga. App. 690, 250 S.E.2d 23 (1978).

Authority of arresting officer to accept bond from felon. — Arresting officer has no authority to accept bond from one arrested under warrant for felony, but should return the party arrested to the county in which the crime was alleged to have been committed, for examination before a judicial officer of that county and the fixing of bail by such officer in case of commitment. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

Who is a person "charged with a misdemeanor." — Defendant is not a person "charged with a misdemeanor" after conviction and a review of the judgment of conviction by every court of the land to which the defendant could apply, which judgment of conviction has become final. Hodges v. Balkcom, 209 Ga. 856, 76 S.E.2d 798 (1953).

Bail in misdemeanor cases. — When one has been convicted of a misdemeanor and there was no motion for new trial pending, former Code 1933, § 27-901 (see O.C.G.A. § 17-6-1) had no application. Johnson v. Aldredge, 192 Ga. 209, 14 S.E.2d 757 (1941).

Only persons convicted in misdemeanor cases are entitled to bail as a matter of law. Sellers v. State, 112 Ga. App. 607, 145 S.E.2d 827 (1965).

Trial court has authority to place conditions on bail in misdemeanor cases. Clarke v. State, 228 Ga. App. 219, 491 S.E.2d 450 (1997).

Review of revocation of probation. — Defendants, who are confined upon revocation of probationary sentences and who seek review by certiorari of order of revocation are not entitled to be released on bond, since the defendants are not seeking to review a "judgment of conviction" within the provisions of former Code 1933. Foster v. Jenkins, 210 Ga. 383, 80 S.E.2d 277 (1954).

Excessive bail is the equivalent of a refusal to grant bail, and in such cases habeas corpus is an available and appropriate remedy for relief. Jones v. Grimes, 219 Ga. 585, 134 S.E.2d 790 (1964).

No contact order against defendant. — For offenses involving an act of family violence, O.C.G.A. § 17-6-1(f)(2) expressly authorized the trial court to impose special bond conditions that the

accused have no contact of any kind or character with the victim; moreover, even without this express statutory authorization, the trial court had the inherent authority to impose such conditions when the defendant was charged with a violent crime against a specific victim. Patel v. State, 283 Ga. App. 181, 641 S.E.2d 184 (2006).

Admissibility at trial of defendant's testimony at bail hearing. — Absent objections grounded on the Fifth Amendment at the bail hearing, the decision of defense counsel to bring the extraneous issue of guilt or innocence into the bail proceeding did not preclude, on Fifth Amendment grounds, the use at trial of incriminating testimony given at such hearing. Cowards v. State, 266 Ga. 191, 465 S.E.2d 677 (1996).

Rights not violated. — State did not violate O.C.G.A. § 17-6-1(d), despite the defendants' contrary claim, as the superior court was not required to act on a bail motion within ten days of receiving a petition for release, nor did the statute provide for a release if such action was not undertaken. Capestany v. State, 289 Ga. App. 47, 656 S.E.2d 196 (2007).

Cited in Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822, 9 Ann. Cas. 617, aff'd, 126 Ga. 753, 55 S.E. 1025 (1906); Padgett v. Grimes, 198 Ga. 566, 32 S.E.2d 302 (1944); Washburn v. Foster, 87 Ga. App. 132, 73 S.E.2d 240 (1952); Pennaman v. Walton, 220 Ga. 295, 138 S.E.2d 571 (1964); Watts v. Grimes, 224 Ga. 227, 161 S.E.2d 286 (1968); Boatner v. State, 122 Ga. App. 736, 178 S.E.2d 699 (1970); Holland v. State, 127 Ga. App. 145, 193 S.E.2d 56 (1972); Fowler v. State, 229 Ga. 884, 194 S.E.2d 923 (1972); Holcomb v. State, 129 Ga. App. 86, 198 S.E.2d 876 (1973); Gill v. Decatur County, 129 Ga. App. 697, 201 S.E.2d 21 (1973); Goodman v. Ault, 358 F. Supp. 743 (N.D. Ga. 1973); Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974); Harris v. Hopper, 236 Ga. 389, 224 S.E.2d 1 (1976).

Discretion of Court

Discretion as to amount of bail. — Amount of bail to be assessed in each criminal case is left to the sound discretion of the trial judge and in the absence of clear abuse of such discretionary power, the judge's action will not be controlled. Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970).

Granting or refusal of bail in capital cases is a matter peculiarly within the discretion of the judge of the superior court, and will not be controlled, unless it has been manifestly and flagrantly abused. To assist an appellate court in determining whether there has been an abuse of discretion, the trial court must make an affirmative finding that the defendant is likely to commit a serious crime, intimidate witnesses, or will flee if released. Merritt v. State, 169 Ga. App. 523, 313 S.E.2d 780 (1984).

Trial court did not abuse the court's discretion in denying the defendant's motion for pretrial bond after stating in the court's written order that the defendant posed a significant risk of committing further felonies pending trial of this matter and poses a significant risk to persons in the community, including the defendant personally. Prigmore v. State, 327 Ga. App. 368, 759 S.E.2d 249 (2014).

On remand, the habeas court was directed to hold a hearing on the petitioner's habeas petition because the record showed that the petitioner exhausted efforts to seek an interlocutory review of the trial court's order denying bond and the petitioner had no other adequate remedy for meaningful review of the lawfulness of continued detention. Tumlinson v. Dix, 844 S.E.2d 765, No. S20A1277, 2020 Ga. LEXIS 456 (2020).

Discretion as to grant of appeal bond. — Under the 1996 amendment to O.C.G.A. § 17-6-1, the trial court is required to exercise discretion in determining whether to grant an appeal bond, and the court must hold an evidentiary hearing at which the court may consider evidence presented during the trial as well as additional oral or documentary evidence. Knapp v. State, 223 Ga. App. 267, 477 S.E.2d 621 (1996).

Despite the fact that the defendant was not convicted of the listed felonies outlined in O.C.G.A. § 17-6-1(g), the trial court did not abuse the court's discretion in denying the defendant an appeal bond as the defendant was found guilty of two

Discretion of Court (Cont'd)

violent sex crimes, had a prior aggravated assault conviction, and the likelihood of a successful appeal was minimal. Luke v. State, 282 Ga. App. 749, 639 S.E.2d 645 (2006).

Georgia Supreme Court recognizes that the Georgia General Assembly has chosen to treat murder cases differently in O.C.G.A. § 5-7-5, and trial courts must be allowed some level of discretion to deny requests for bail pending appeals by the state in such cases; that discretion of trial courts in these cases should be governed by the standards for deciding whether to grant pretrial bail. Johnson v. State, 304 Ga. 369, 818 S.E.2d 601 (2018).

Trial court did not abuse the court's discretion by denying the defendant's motion for appeal bond because the defendant's case was currently at an appellate stage until the Georgia Supreme Court considered the state's appeal; thus, it was appropriate for the trial court to have evaluated the defendant's request for an appeal bond by the standards for pretrial bail in O.C.G.A. § 17-6-1(e). Johnson v. State, 304 Ga. 369, 818 S.E.2d 601 (2018).

Discretion of court in noncapital felony cases. — After conviction, the decision of whether or not to grant bail in a noncapital felony rests in the sound discretion of the trial court, and should that court determine that bail should not be granted, the offense, as to that defendant, is nonbailable. Finley v. Thompson, 100 Ga. App. 508, 112 S.E.2d 166 (1959).

Abuse of discretion in felony cases. — Granting or refusing of bail in felony cases after indictment and conviction is a matter within the sound discretion of the court below, and the Supreme Court will not control that discretion unless that discretion has been flagrantly abused. Smith v. State, 203 Ga. 636, 47 S.E.2d 866 (1948).

Granting or refusing of bail in felony cases after indictment and conviction is a matter within the sound discretion of the trial court, and the appellate court will not control that discretion unless that discretion has been flagrantly abused. Hardwick v. State, 131 Ga. App. 721, 206 S.E.2d 727 (1974).

If there is some evidence to support at least part of the underlying basis for the trial court's conclusion, there is no flagrant abuse of the trial court's discretion in denying bail. Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

Abuse of discretion in narcotics and perjury cases. — Since the General Assembly has placed the noncapital offense of sale of narcotics as well as perjury into the same category as the capital offenses of rape, armed robbery, aircraft hijacking, treason, and murder insofar as bail is concerned, the old rule applied in capital cases, the granting or refusal of bail in capital cases is a matter peculiarly within the discretion of the judge of the superior court, and will not be controlled, unless that discretion has been manifestly and flagrantly abused, must be applied to narcotics and perjury cases. Reed v. State, 134 Ga. App. 47, 213 S.E.2d 147 (1975).

No abuse of discretion. — Trial court did not abuse the court's discretion in denying a motion for bail by the defendant charged with aggravated assault, since the defendant had no significant ties to the community, had previously failed to appear when ordered, and had to be extradited from California after the defendant's last failure to appear in court. Stirling v. State, 189 Ga. App. 283, 375 S.E.2d 302 (1988), aff'd, 192 Ga. App. 39, 383 S.E.2d 595 (1989).

Trial court did not abuse the court's discretion in denying an appeal bond based on evidence that the defendant showed a violent character which, coupled with the defendant's violent temper, lack of remorse, and belief that the defendant had committed no wrong in shooting a fleeing teenager who appeared to be stealing defendant's truck, indicated that the defendant would be a danger to others. Prayor v. State, 214 Ga. App. 132, 447 S.E.2d 155 (1994).

Evidence of the guilt or innocence of the person detained does not figure prominently in the judge's determination over whether to deny bail and therefore the delay in receiving an exculpatory statement of a witness did not infringe upon the defendant's constitutional rights when the justice denied bail. Rock v. Lowe, 893 F. Supp. 1573 (S.D. Ga. 1995), aff'd without op., 79 F.3d 1161 (11th Cir. 1996).

Trial court did not err in denying the defendant's motions for bond because, as to the defendant's initial request for bond, the defendant had a bond hearing in another case denied and the defendant did not state any additional facts that were not presented at the first hearing; as to the two subsequent motions for bond, the trial court held that the court could not make a finding that the defendant posed no significant risk of intimidating witnesses or otherwise obstructing the administration of justice; and, as to the additional motions for bond, the defendant presented no new information, testimony, or evidence that indicated a change in circumstances. Wimbush v. State, 345 Ga. App. 54, 812 S.E.2d 489 (2018).

Bail condition prohibiting harassing victim. — If the defendant was charged with battery against a specific female victim, it was not an abuse of discretion for the court to forbid the defendant to threaten, harass, stalk, or abuse the victim as conditions of bail. Clarke v. State, 228 Ga. App. 219, 491 S.E.2d 450 (1997).

Trial court abused the court's discretion. — Trial court abused the court's discretion in setting conditions of a bond that were totally unrelated to the defendant's offense and were, therefore, unreasonable as a matter of law. Dudley v. State, 230 Ga. App. 339, 496 S.E.2d 341 (1998).

Denial of a supersedeas bond following defendant's conviction of child molestation was not an abuse of discretion since there was evidence that during the time the case was pending trial, the defendant and the defendant's spouse would drive by the victim's house and "make faces at the children" playing in the yard and that the people involved lived fairly closely together. Ferry v. State, 210 Ga. App. 321, 436 S.E.2d 59 (1993).

Murder is bailable only within sound discretion of trial judge. Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1025, 71 L. Ed. 2d 310 (1982).

Denial of bail not an abuse of discretion. — Petitioner charged with 16 counts of violating the Georgia RICO Act, O.C.G.A. § 16-14-1, securities fraud, and theft, who owned no assets in the United States and had allegedly funneled significant assets to Belize, where petitioner traveled frequently, was not entitled to bail as of right under O.C.G.A. § 17-6-1(a), Ga. Const. 1983, Art. I, Sec. I, Para. XVII, or U.S. Const., amend. VIII. Constantino v. Warren, 285 Ga. 851, 684 S.E.2d 601 (2009).

Practice and Procedure

Bail refused because of prior conviction. — Fact that the magistrate could not grant bail to the defendant, who had a prior conviction for burglary, was a result of the defendant's prior conviction and was not due to a "statutorily" deficient hearing. Burson v. State, 183 Ga. App. 647, 359 S.E.2d 731, cert. denied, 183 Ga. App. 905, 359 S.E.2d 731 (1987).

Effect of refusal to accept money. — Upon learning that the arrestee wanted to post bail and had the money to do so, a sheriff's sergeant was told by a sheriff's captain that because the arrestee was arrested by the City of Midville, the arrestee had to pay the fine at Midville. Although the sergeant made several calls to the City of Midville in an unsuccessful attempt to inform Midville that the arrestee had enough money to post bail, Burke County refused to accept the money, and this refusal amounted to a constitutional violation. Bunyon v. Burke County, 306 F. Supp. 2d 1240 (S.D. Ga. 2004).

Failure of the magistrate to initially set a bond did not require that the indictment against the defendant be quashed since when the error was brought to the magistrate's attention by the defendant's parole officer the magistrate immediately held a hearing and set bail. Nixon v. State, 256 Ga. 261, 347 S.E.2d 592 (1986).

Use of bond determination to compel urine test. — Consent for a urine test was not voluntary since the consent was premised on incomplete and thus deceptively misleading information received from a police officer that the test results would be used only "for determination of bond." Had the defendant been cautioned that the results of the search and seizure of the defendant's urine would be used to

Practice and Procedure (Cont'd)

supply evidence against the defendant in an independent criminal prosecution, no consent might have been given. Beasley v. State, 204 Ga. App. 214, 419 S.E.2d 92 (1992).

Bond conditions did not constitute criminal punishment for double jeopardy purposes. — Defendant did not suffer multiple criminal punishment on account of the harassing phone call charge, under O.C.G.A. § 16-11-39.1(a), and the trial court did not err by refusing to bar the prosecution on grounds of double jeopardy as the defendant's bond conditions did not constitute criminal punishment; given the nature of the underlying charge and the abusive content of the letter defendant sent to the victim's workplace, the bond conditions were intended to further the interests of public safety, under O.C.G.A. § 17-6-1(e), and not to act as a punishment for the harassing phone call charge and, even if the defendant was not validly incarcerated for violating the bond, the defendant was not incarcerated in order to punish the defendant for the harassing phone calls charge. Bozzuto v. State, 276 Ga. App. 614, 624 S.E.2d 166 (2005); Edvalson v. State, 339 Ga. App. 348, 793 S.E.2d 545 (2016).

Conducting a hearing to modify the bond conditions of a third-time DUI offender and placing limitations upon the offender's driving privileges, predicated upon the necessity to protect the welfare and safety of the citizens of Georgia from a recidivist offender, was not punishment, nor was the hearing prosecution, for the purposes of double jeopardy. Strickland v. State, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

Considering the nature of the defendant's arrest and charges, the amount and conditions of the defendant's bond, which included home confinement, drug and alcohol evaluation and counseling, installation of an ignition interlock device on the defendant's vehicle, and a SCRAM bracelet, were not punishment for purposes of double jeopardy; instead, the conditions were rationally related to an alternative purpose as the conditions were designed to prevent the defendant from being a danger to the community by committing future acts of driving under the influence while awaiting trial and to assure defendant's presence at court proceedings. Alden v. State, 314 Ga. App. 439, 724 S.E.2d 451 (2012), cert. denied, No. S12C1277, 2012 Ga. LEXIS 1011 (Ga. 2012). See also Edvalson v. State, 339 Ga. App. 348, 793 S.E.2d 545 (2016).

Denial of pretrial bail is interlocutory matter. — Denial of a motion for pretrial bail is an interlocutory matter requiring a defendant to follow the interlocutory procedure set forth in O.C.G.A. § 5-6-34(b). Howard v. State, 194 Ga. App. 857, 392 S.E.2d 562 (1990).

Only appealable issue from the denial of bail is the abuse vel non of the trial judge's discretion. Fields v. Tankersley, 487 F. Supp. 1389 (S.D. Ga. 1980).

When denial of bail not grounds for reversal. — If the record discloses that appellant has been tried, adjudicated a delinquent, sentenced, and detained because of that conviction, any possible error in denial of bail as ground for reversal has been removed. R.T.M. v. State, 138 Ga. App. 92, 225 S.E.2d 510 (1976).

Revocation of the bond. — Bond for a person charged with stalking lies within the discretion of the trial judge; however, because a bond revocation involves the deprivation of one's liberty the decision must comport with at least minimal state and federal due process requirements. Hood v. Carsten, 267 Ga. 579, 481 S.E.2d 525 (1997).

Appeal bond for rapist. — Granting of an appeal bond to a defendant convicted of statutory rape is discretionary with the convicting court. Grayer v. State, 176 Ga. App. 248, 335 S.E.2d 483 (1985).

Burden on appellant for appeal bond. — Burden of seeking a stay of execution and a release on bond is upon the appellant. Shaw v. State, 178 Ga. App. 67, 341 S.E.2d 919 (1986).

Trial court should not grant bond pending appeal unless the appellant presents sufficient information, evidence, or argument to convince the court that there is no substantial risk appellant will not appear to answer judgment, is not likely to commit a serious crime, intimidate witnesses,

or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for the purpose of delay. If the appellant does not carry this burden of convincing the court to reach a negative answer to all of these criteria, release should not be granted. Shaw v. State, 178 Ga. App. 67, 341 S.E.2d 919 (1986).

Applicability in federal proceeding. — Habeas corpus plaintiff, protesting conditions of plaintiff's detention for a state criminal violation, had to look to state law for any rights plaintiff might have regarding bond. Datz v. Hutson, 806 F. Supp. 982 (N.D. Ga. 1992), aff'd, 14 F.3d 58 (11th Cir. 1994).

Burden of proof. — Defendant has the burden of producing evidence on community ties, but the state has the burden of persuading by a preponderance of the evidence that a defendant is not entitled to release on bail. Ayala v. State, 262 Ga. 704, 425 S.E.2d 282 (1993).

Application for appeal bond remanded. — Defendant's case was remanded to allow the trial court to revisit the defendant's bond application as the defendant's ineffective assistance of counsel claims had not been finally resolved and had been remanded, and as the questions surrounding the bond application were not moot; if the trial court denied the bond application, it was directed to specify the basis for the application's denial. Carter v. State, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Authority of superior court judge over order of designated judge. — Superior court judge had the authority to reconsider and revoke a pretrial bond that was set by another judge who was presiding in the judge's place by designation; the designated judge should not have granted the bond to the defendant after expressly finding that the defendant was likely to intimidate witnesses or otherwise interfere with the administration of justice. Rooney v. State, 217 Ga. App. 850, 459 S.E.2d 601 (1995).

Appeal bond prohibited. — O.C.G.A. § 17-6-1(g), precluding a trial court from granting an appeal bond to the defendant, who had been convicted of child molestation and aggravated child molestation, did not violate the separation of powers provision of Ga. Const. 1983, Art. I, Sec. II, Para. III because there was no constitutional right to an appeal bond, so the system under which prisoners were allowed to be released on bond pending an appeal was a legislative function, and the legislature's establishment of the parameters of such bonds did not invade the province of the judiciary. Getkate v. State, 278 Ga. 585, 604 S.E.2d 838 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Approval of sureties. — Former Code 1933, §§ 27-901, 27-902, 27-801 (see O.C.G.A. §§ 17-6-1, 17-6-2 and 17-7-90) provide for the approval of sureties by sheriffs or judicial officers. Qualifications, such as solvency and reliability, may be inquired into before approval. 1970 Op. Att'y Gen. No. U70-83.

Responsibility for approving or rejecting the surety on a criminal bail bond in a felony offense remains in the court having jurisdiction over the offense but, since it is a ministerial function, it may be delegated to a nonjudicial officer such as a sheriff. The authority to approve or reject the surety in misdemeanor cases is given by statute to the sheriff. 1976 Op. Att'y Gen. No. U76-39.

Residence of surety. — When a sheriff is authorized to accept bail and when the sureties have been approved by the sheriff of any county of this state, the detaining sheriff must accept bail in reasonable amounts without regard to the residence of the approved sureties. 1970 Op. Att'y Gen. No. U70-168.

Real estate as appearance bond when not completely paid for. — Justice of the peace may use discretion in accepting real estate which is not completely paid for as an appearance bond in a criminal proceeding. 1969 Op. Att'y Gen. No. 69-180.

Arbitrary detention period unlawful. — Arbitrary period of detention or until the accused has sobered is unlawful, unless the defendant is unable or unwilling to post bond, and if there is no respon-

sible person available to take custody of the defendant. Therefore, an intoxicated person is entitled to be released into the custody of a responsible person as soon as bail is allowable and paid. If a police officer is acting reasonably, in good faith, and within the procedures prescribed by law, the officer cannot be held liable for any subsequent acts of the accused once the person is released from custody. 1967 Op. Att'y Gen. No. 67-214.

Prosecuting one for possessing one ounce or less of marijuana in a superior court makes the crime a felony punishable as a misdemeanor and would not invoke former Code 1933, § 27-901 (see O.C.G.A. § 17-6-1). 1974 Op. Att'y Gen. No. U74-79.

Release of one accused of escape. — Assuming that release of one accused of escape does not interrupt the service of an existing sentence, the accused is entitled to be released on bail if the offense is a misdemeanor and, if a felony, the accused is entitled to bail either before or after indictment. 1970 Op. Att'y Gen. No. U70-136.

Probate court jurisdiction to set bail. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, it may also set bail for any criminal offense not included in O.C.G.A. § 17-6-1(a). 1995 Op. Att'y Gen. No. U95-1.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 4 Am. Jur. Pleading and Practice Forms, Bail and Recognizance, § 2 et seq.

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq.

ALR. — Abolition of death penalty as affecting right to bail of one charged with murder in first degree, 8 A.L.R. 1352.

Power to admit to bail in deportation case, 36 A.L.R. 887.

Amount of bail required in criminal action, 53 A.L.R. 399.

Factors in fixing amount of bail in criminal cases, 72 A.L.R. 801.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petitioner to bail, 56 A.L.R.2d 668.

Upon whom rests burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption is great, 89 A.L.R.2d 355.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

17-6-1.1. Electronic pretrial release and monitoring program for defendants; requirements; procedures; fees.

(a) In addition to other methods of posting bail or as special condition of bond, a defendant may be released from custody pending the trial of his or her case on the condition that the defendant comply with the terms and conditions of an electronic pretrial release and monitoring program which is approved pursuant to subsection (j) of this Code section. The sheriff of a county may enter into agreements with such approved providers. A bonding company, bonding agent, or probation service provider may be a provider of such services.

(b) If it appears to the court that a defendant subject to its jurisdiction is a suitable candidate for electronic pretrial release and monitor-

ing, the court may, in its sole discretion and subject to the eligibility requirements of this Code section, authorize the defendant to be released under the provisions of an electronic pretrial release and monitoring program. A judge may only authorize electronic pretrial release and monitoring if that judge has jurisdiction to set a bond for the offense charged and the defendant is otherwise eligible for bond under subsection (e) of Code Section 17-6-1. When a court of competent jurisdiction has already set bond for a defendant indicating that the defendant is otherwise eligible for release on bail pursuant to subsection (e) of Code Section 17-6-1, in addition to accepting cash in satisfaction of the bond set by a court, the court may instruct the sheriff that the defendant is to be released to an electronic pretrial release and monitoring program.

(c) The court, in its sole discretion, may revoke at any time the eligibility of any defendant to participate in the electronic pretrial release and monitoring program in which event the defendant shall be immediately returned to custody. If the defendant's case has not been assigned to a particular division of the court, the chief judge shall have such authority.

(d) A defendant may not be released to, or remain in, an electronic pretrial release and monitoring program if such defendant has any other outstanding warrants, accusations, indictments, holds, or incarceration orders from any other court, law enforcement agency, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42 that require the posting of bond or further adjudication.

(e) A defendant released pursuant to an electronic pretrial release and monitoring program shall abide by such conditions as the court may impose relating to such program, including, but not limited to, the following:

(1) Periods of home confinement;

(2) Compliance with all requirements and conditions of the electronic pretrial release and monitoring program provider;

(3) Compliance with any court orders or special conditions of bond which may include an order directing that no contact, direct or indirect, be made with the victim or forbidding entry upon, about, or near certain premises;

(4) An order directing that the accused provide support and maintenance for the person's dependents to the best of his or her ability;

(5) Restrictions on the use of alcoholic beverages and controlled substances;

(6) Curfews;

(7) Limitations on work hours and employment;

(8) An order directing the accused to submit to test of breath, blood, or urine from time to time;

(9) Travel restrictions;

(10) An order directing that electronic pretrial release and monitoring equipment be kept in good working condition;

(11) An order directing that the person refrain from violating the criminal laws of any state, county, or municipality;

(12) An order directing timely payment of all fees connected with the electronic pretrial release and monitoring program;

(13) Payroll deductions to fund electronic pretrial release and monitoring fees;

(14) Provisions to permit reasonable medical treatment;

(15) Provisions for procuring reasonable necessities, such as grocery shopping;

(16) Provisions for attendance in educational, rehabilitative, and treatment programs; and

(17) Such other terms and conditions as the court may deem just and proper.

(f) Under no circumstances shall electronic pretrial release and monitoring equipment be introduced internally or beneath the skin of any person.

(g) In the event that a court of competent jurisdiction finds probable cause, upon oath, affirmation, or sworn affidavit, that a defendant has violated the terms or conditions of his or her electronic pretrial release and monitoring program, other than terms regarding home confinement set forth in paragraph (1) of subsection (e) of this Code section, or finds that the defendant provided false or misleading information concerning his or her qualifications to participate in the electronic pretrial release and monitoring program, including, but not limited to, name, date of birth, address, or other personal identification information, then the defendant's ongoing participation in such program shall be terminated immediately and, upon arrest of the defendant for such violation by any law enforcement officer, the defendant shall be returned to confinement at the county jail or other facility from which the defendant was released.

(h)(1) As an additional condition of electronic pretrial release and monitoring, a defendant authorized to participate in such program by

the court shall pay a reasonable, nonrefundable fee for program enrollment, equipment use, and monitoring to the provider of such program. If a bonding company, bonding agent, or probation service provider is the provider, the fees earned in the capacity of being such a provider shall be in addition to the fees allowed in Code Sections 17-6-30, 42-8-34, and 42-8-102.

(2) The fees connected with the electronic pretrial release and monitoring program shall be timely paid by a defendant as a condition of his or her ongoing participation in the electronic pretrial release and monitoring program in accordance with the terms for such programs as approved by the court. Failure to make timely payments shall constitute a violation of the terms of the electronic pretrial release and monitoring program and shall result in the defendant's immediate return to custody.

(3) Defendants who have an extraordinary medical condition requiring ongoing medical treatment or indigent persons, as defined by the court, and who are selected by the court following the indigency standards established by the court may have such electronic pretrial release and monitoring fees paid by the sheriff with the consent of the governing authority.

(i) No defendant released under an electronic pretrial release and monitoring program under this Code section shall be deemed to be an agent, employee, or involuntary servant of the county or the electronic pretrial release and monitoring provider while so released, working, or participating in training or going to and from the defendant's place of employment or training. Neither the electronic pretrial release and monitoring provider nor the sheriff shall be civilly liable for the criminal acts of a defendant released pursuant to this Code section.

(j) Any person or corporation approved by the chief judge of the court and the sheriff in their discretion who meets the following minimum requirements may be approved to provide electronic pretrial release and monitoring services:

(1) The provider shall comply with all applicable federal, state, and local laws and all rules and regulations established by the chief judge and the sheriff in counties where the provider provides electronic pretrial release and monitoring services;

(2) The provider shall provide the chief judge and the sheriff with the name of the provider, the name of an individual who shall serve as the contact person for the provider, and the telephone number of such contact person;

(3) The provider shall promptly, not later than three business days after such change, notify the chief judge and sheriff of any changes in its address, ownership, or qualifications under this Code section;

(4) The provider shall provide simultaneous access to all records regarding all monitoring information, GPS tracking, home confinement, and victim protection regarding each person placed on electronic pretrial release and monitoring; and

(5) The provider shall act as surety for the bond.

(k) The sheriff shall maintain a list of approved providers of electronic pretrial release and monitoring services. The sheriff, in his or her discretion, may temporarily or permanently remove any provider from the list of approved providers should the provider:

(1) Fail to comply with the requirements of this Code section;

(2) Fail to monitor properly any defendant that the provider was required to monitor;

(3) Charge an excessive fee for use and monitoring of electronic monitoring equipment; or

(4) Act or fail to act in such a manner that, in the discretion of the sheriff, constitutes good cause for removal.

History. — Code 1981, § 17-6-1.1, enacted by Ga. L. 2009, p. 691, § 2/HB 306; Ga. L. 2015, p. 422, § 5-29/HB 310.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, "condition" was substituted for "conditions" in paragraph (h)(3).

Editor's notes. — Ga. L. 2009, p. 691, § 1/HB 306, not codified by the General Assembly, provides that: "The General Assembly finds that a program of electronic pretrial release, monitoring, and home confinement incorporates modern technology to accomplish the following purposes, including, but not limited to:

"(1) Ensuring proper prioritization of local incarceration resources;

"(2) Improving child support collections by giving nonpayors an opportunity to maintain employment while under electronic surveillance;

"(3) Better protecting crime victims by global positioning satellite (GPS) tracking and monitoring of pretrial release offenders to better ensure ongoing protection of crime victims;

"(4) Permitting defendants with extraordinary health problems to seek appropriate medical care;

"(5) Assisting sheriffs in alleviating jail overcrowding by creating alternative methods of pretrial release and monitoring and home confinement;

"(6) Reducing the costs of pretrial detention to governing authorities of counties as the costs of self-paid, electronic pretrial release and monitoring are substantially less than pretrial incarceration; and

"(7) Creating instant alert capabilities to law enforcement in the event terms of pretrial release are violated."

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2015, and shall apply to sentences entered on or after such date."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Providers shielded from civil liability for criminal acts of those being monitored. — In a wrongful death and personal injury action after two alleged criminals left their home in violation of a court order and the electronic monitoring providers failed to notify law enforcement, the trial court erred in denying the pro-

viders' motion to dismiss because O.C.G.A. § 17-6-1.1(i) shielded the providers from civil liability for the criminal acts of the alleged criminals the providers were monitoring. SecureAlert, Inc. v. Boggs, 345 Ga. App. 812, 815 S.E.2d 156 (2018).

17-6-2. Acceptance of bail in misdemeanor cases; posting driver's license as collateral for bail.

(a)(1) In all cases wherein a licensed driver of this state has been arrested, incarcerated, and charged with a violation of state law and where said violation is a misdemeanor, the sheriff of the county wherein the violation occurred shall be authorized, unless otherwise ordered by a judicial officer, after the individual has been incarcerated for not less than five days, to accept that individual's driver's license as collateral for any bail which has been set in the case, up to and including the amount of $1,000.00, provided such license is not under suspension or has not expired or been revoked.

(2) The individual posting a license as collateral pursuant to this subsection shall execute an acknowledgment and agreement between the individual and the State of Georgia as bond wherein the individual agrees to appear in court to answer the charges made against the individual and acknowledges that failure to appear in court when the case is scheduled for hearing, trial, or plea shall result in a forfeiture of the individual's license through suspension by operation of law effective upon the date of the individual's scheduled appearance. The individual shall also be notified that failure to appear in court as required may result in criminal prosecution for bail jumping as provided in Code Section 16-10-51. After execution of the agreement, except as otherwise provided by law, the license shall be returned to the individual and the original agreement shall be delivered to the prosecuting attorney for filing with the accusation, citation, or dismissal. Whenever an individual has been charged with a violation of Code Section 40-6-391, relating to driving under the influence of alcohol or drugs, then the provisions of Code Section 40-5-67 shall apply.

(3) A failure to appear by the individual who has been charged with a misdemeanor offense and who posted that individual's license as bail pursuant to this subsection shall, by operation of law, cause that individual's license to be suspended by the Department of Driver Services effective immediately, and the clerk of the court within five days after that failure to appear shall forward a copy of the agreement to the Department of Driver Services which shall enter the suspension upon the individual's driver history record. The posting of a license as provided in this subsection shall also be considered as bail for the purposes of Code Section 16-10-51. Where the original court date has been continued by the judge, clerk, or other officer of

the court and there has been actual notice given to the defendant in open court or in writing by a court official or officer of the court or by mailing such notice to the defendant's last known address, then the provisions of this paragraph shall apply to the new court appearance date.

(4) A license suspended pursuant to this subsection shall only be reinstated when the individual shall pay to the Department of Driver Services a restoration fee of $25.00 together with a certified notice from the clerk of the originating court that the case has either been disposed of or has been rescheduled and a deposit of sufficient collateral approved by the sheriff of the county wherein the charges were made in an amount to satisfy the original bail amount has been paid. The court wherein the charges are pending shall be authorized to require payment of costs by the defendant in an amount not to exceed $100.00 to reschedule the case.

(5) Upon the trial of any individual charged with the offense of driving with a suspended license where such license was suspended as provided in this subsection, a copy of the acknowledgment and agreement executed by the individual together with certification by the clerk of the court of the individual's failure to appear shall be prima-facie evidence of actual notice to the individual that the individual's license was suspended.

(b) In all other misdemeanor cases, sheriffs and constables shall accept bail in such reasonable amount as may be just and fair for any person or persons charged with a misdemeanor, provided that the sureties tendered and offered on the bond are approved by the sheriff in the county where the offense was committed.

History. — Ga. L. 1921, p. 241, § 1; Code 1933, § 27-902; Ga. L. 1966, p. 428, § 1; Ga. L. 1989, p. 448, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 94, § 17; Ga. L. 2002, p. 415, § 17; Ga. L. 2005, p. 334, § 7-2/HB 501.

Cross references. — Bail in magistrate court criminal cases, Uniform Rules for the Magistrate Courts, Rule 11.

Law reviews. — For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Approval of surety in misdemeanor cases. — This section placed the approval of sureties on misdemeanor bonds in the sheriff's discretion. Jarvis v. J & J Bonding Co., 239 Ga. 213, 236 S.E.2d 370 (1977).

Liability of municipality for bail policy. — In Georgia, a municipality had power under O.C.G.A. § 36-35-3(a) and Ga. Unif. Mun. Ct. R. 18.1 and under the municipality's charter to set a bail policy for its municipal court, and its police also had authority under O.C.G.A. §§ 17-6-2(b) and 42-4-1(b); therefore, the municipality could be held liable under 42 U.S.C. § 1983 for constitutional violations relating to the municipality's bail policy. Walker v. City of Calhoun, 901 F.3d

1245 (11th Cir. 2018), cert. denied, 139 S. Ct. 1446, 2019 U.S. LEXIS 2446, 203 L. Ed. 2d 681 (U.S. 2019).

Mere failure or refusal of an officer to accept bail under this section did not authorize release without bail, when the detention was otherwise lawful. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

Sheriffs not authorized to demand additional cash of sureties. — If one is charged with a misdemeanor, that person is entitled as a matter of law to furnish bail in a reasonable amount, with the sureties on the bond to be approved by a sheriff, and there is no provision of law whereby a sheriff can require such sureties to deposit with the sheriff a cash bond or a deposit of money in addition to the bail required by law before the sheriff will accept the bail tendered. Money so deposited remains the property of the person depositing the money, and the sheriff holds the money as trustee for the depositor. Washburn v. Foster, 87 Ga. App. 132, 73 S.E.2d 240 (1952).

Sheriffs not authorized to accept cash in lieu of bail. — There is no authority of law for a sheriff or arresting officer to accept a cash bond or a deposit of money in lieu of bail from one charged with a criminal offense. When an arresting officer requires or accepts a cash bond or a deposit of money in lieu of bail, the money remains the property of the person depositing the money with such officer, and the officer holds the money in trust for the depositor. Washburn v. Foster, 87 Ga. App. 132, 73 S.E.2d 240 (1952) (decided before enactment of O.C.G.A. § 17-6-4).

Authority of arresting officer to accept bond from felon. — Arresting officer has no authority to accept bond from one arrested under warrant for felony, but should return the party arrested to the county in which the crime was alleged to have been committed, for examination before a judicial officer of that county and fixing of bail by such officer in case of commitment. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

Deputy sheriff had authority to issue cash bond for drunk driving arrestee. — When a person was arrested by a state patrol officer inside a municipality for driving under the influence, a deputy sheriff, even without authorization from the court, could accept a cash bond; the trial court, as a result, had the authority to order the cash bond forfeited. Wilson v. State, 167 Ga. App. 421, 306 S.E.2d 704 (1983).

Cited in Johnson v. Aldredge, 192 Ga. 209, 14 S.E.2d 757 (1941); Gill v. Decatur County, 129 Ga. App. 697, 201 S.E.2d 21 (1973).

OPINIONS OF THE ATTORNEY GENERAL

Approval of sureties generally. — Former Code 1933, §§ 27-801, 27-901 and 27-902 (see O.C.G.A. §§ 17-6-1, 17-6-2, and 17-7-90) provide for the approval of sureties by sheriffs or judicial officers. Qualifications, such as solvency and reliability, may be inquired into before approval. 1970 Op. Att'y Gen. No. U70-83.

Scope of sheriff's discretion. — Language "provided that the sureties tendered and offered on the bond are approved by a sheriff of any county" vests in the sheriff the discretion to accept or reject any surety offered on bail bond in misdemeanor cases and, if in the sheriff's judgment the surety does not own sufficient property or if the property is otherwise encumbered by reason of the execution of other bail bonds, the sheriff is not required to accept the surety tendered, whether it be an individual or a limited partnership. 1957 Op. Att'y Gen. p. 197.

Residence of surety. — In those cases in which a sheriff is authorized to accept bail, and in which the sureties have been approved by the sheriff, the detaining sheriff must accept bail in reasonable amounts without regard to the residence of the approved sureties. 1970 Op. Att'y Gen. No. U70-168.

Construction with O.C.G.A. § 17-6-5, dealing with cash bonds. — While it was true that Ga. L. 1953, Jan. - Feb. Sess., p. 331, § 1 (see O.C.G.A. § 17-6-5) authorized the taking of cash bonds under certain circumstances, it was quite obvious that the preceding provision was in addition to and not in place of former Code 1933, § 27-902 (see O.C.G.A. § 17-6-2). 1957 Op. Att'y Gen. p. 65.

Authority to accept or reject sureties in felony cases. — Responsibility for approving or rejecting the surety on a criminal bail bond in a felony offense remains in the court having jurisdiction over the offense but, since it is a ministerial function, the responsibility may be delegated to a nonjudicial officer such as a sheriff. 1976 Op. Att'y Gen. No. U76-39, but see O.C.G.A. § 17-6-15 and 1977 Op. Att'y Gen. No. U77-29.

No authority to set bail in felony cases. — Sheriffs and constables may accept bail in misdemeanor cases, but there is no authority for such officers to set bail in felony cases. 1970 Op. Att'y Gen. No. U70-152.

Court to which appearance bond made. — Appearance bond received for a person charged with a misdemeanor should be made to a court that has jurisdiction to try the offense. 1969 Op. Att'y Gen. No. 69-79.

Authority of constable to accept bond. — Constable is authorized to accept bond in a reasonable amount in a misdemeanor case, provided it was approved by the sheriff. 1962 Op. Att'y Gen. p. 111.

County police officer has the same authority as the sheriff in those cases when the defendant is arrested under a warrant charging a misdemeanor, so long as the prisoner is in the officer's custody. If the county police officer turns the prisoner over to the sheriff without bail, it would thereafter be the responsibility of the sheriff to accept bail. 1962 Op. Att'y Gen. p. 63.

Bail in traffic cases. — While it was true that Ga. L. 1937-38, Ex. Sess., p. 558, § 10 (see O.C.G.A. § 40-13-28) does not specifically provide for the taking of an appearance bond, but merely for the taking of a bond in cases which are to be appealed, acting under former Code 1933, § 27-902 (see O.C.G.A. § 17-6-2) the sheriff or constable could accept bail in cases involving traffic violations which are made returnable to the court of ordinary (now probate court). 1948-49 Op. Att'y Gen. p. 393.

Bonds for traffic violations. — O.C.G.A. § 17-6-2 gives the sheriff complete authority to approve or reject bail bonds written by a bonding company for traffic citations. 1993 Op. Att'y Gen. No. U93-6.

Disposition of interest accrued on cash bond. — County may not pay to a bondsman the interest accrued on a cash bond during the time it is held as assurance of a defendant's appearance at trial; upon timely appearance by the defendant, the bondsman is entitled to no more than the amount of the bond. 1986 Op. Att'y Gen. No. U86-39.

No modification of judicial order specifying cash bond. — Sheriff does not have the authority to modify a judicial order and accept a property or surety bond after a magistrate has specified a cash bond. 1987 Op. Att'y Gen. No. U87-22.

RESEARCH REFERENCES

ALR. — Power to admit to bail in deportation case, 36 A.L.R. 887.

Amount of bail required in criminal action, 53 A.L.R. 399.

Factors in fixing amount of bail in criminal cases, 72 A.L.R. 801.

Reasonableness of amount required for bond to keep peace, 93 A.L.R. 304.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

17-6-3. Acceptance of recognizance bonds for military personnel.

(a) In the case of any person engaged in military service who is charged with a misdemeanor and whose bond has been fixed at not more than $400.00 plus costs, any sheriff shall be allowed to accept, in lieu of bail, a recognizance bond executed and signed by the command-

ing officer of the person or the officer's lawfully delegated subordinates. Any person so charged may be taken into custody on behalf of the military installation by his commanding officer or by persons designated by the commanding officer of the military installation under the following terms and conditions:

(1) Immediately following his release he will be returned by the military police or other designated authority directly to the military installation and delivered to the duty officer of the command to which he is attached;

(2) He then will be restrained as appropriate in each case. The restraint will be for a minimum of 12 hours in all cases involving consumption of alcoholic beverages. He normally will be restricted to the limits of the military installation until such time as the charges are dismissed or his case has been adjudicated;

(3) He will not be transferred, granted leave, or discharged from the military service without 36 hours' notice to the sheriff or his deputy sheriff;

(4) He will be delivered to the sheriff or his deputy on demand; and

(5) These terms or conditions will be withdrawn only upon his posting the required bond or otherwise being released by the sheriff, his deputy, or the appropriate court.

(b) The recognizance bond shall be of the following type:

In consideration of the release of _____ (name of person charged) charged with _____ (name or description of offense) it is agreed that the aforementioned prisoner will be restrained at the _____ (appropriate military installation) in whatever degree considered to be appropriate by his commanding officer. This restraint will be for a minimum of 12 hours in all cases involving consumption of alcoholic beverages. It is further agreed that he will not be transferred, granted leave, or discharged from the _____ (appropriate service) without notice to the sheriff or his deputy and will be delivered to the sheriff or his deputy upon demand. These terms and conditions will be withdrawn only upon his posting of the required personal bond or upon the release by the sheriff, his deputy, or the appropriate court.

Signed _____

Official title _____

History. — Ga. L. 1921, p. 241, § 1; Code 1933, § 27-902; Ga. L. 1966, p. 428, § 1; Ga. L. 1982, p. 3, § 17; Ga. L. 1983, p. 884, § 3-18; Ga. L. 1984, p. 22, § 17.

17-6-4. (For effective date, see note.) Authorization of posting of cash bonds generally; furnishing of receipt to person posting bond; recordation of receipt of bond on docket; disposal of unclaimed bonds.

(a) Any party, defendant, accused, or other person required or permitted by law to give or post bond (or bail) as surety or security for the happening of any event or act in criminal matters may discharge the requirement by depositing cash in the amount of the bond so required with the appropriate person, official, or other depository.

(b) Any official or other person receiving any such bond shall give a receipt therefor and shall cause the fact of the receipt to be entered and recorded on the docket of the case in which it was given. If bond is given in a matter not appearing as a separate court case on a docket, a docket shall be prepared, maintained, and kept of all such transactions and the name and address of the person giving or making the bond, the date of the receipt of the bond, the name of the person receiving the bond, the amount of the bond, and a description of the cause for giving the bond, together with any and all other information desirable concerning the bond, shall be a part of the record in that separate docket.

(c) (For effective date, see note.) In the event that any cash bail posted pursuant to this Code section or Code Section 17-6-5 is not later claimed by the surety on such bond after a period of two years from the earlier of either the date of the surety being released from liability pursuant to Code Section 17-6-31 or the date of disposition of the case by the prosecutor or the court, including any appeal of a verdict or sentence, then the cash shall be paid into the general fund of the county having trial venue of the case, as in the case of forfeited cash bonds, provided that the officer who is in possession of such cash bail shall first have notified the surety, by mailing notice to such surety at the last address given by such surety, that such funds shall be forfeited if they are not claimed within 90 days following the date of mailing of such notice. Any claim by a surety for refund of a cash bail shall include acceptable documentary proof of disposition of the case from the prosecuting official or appropriate court records or such other documentation as may be acceptable to the official holding such cash bail as proof that the case has been settled.

History. — Ga. L. 1969, p. 41, §§ 1, 2; Ga. L. 1991, p. 749, § 1; Ga. L. 2020, p. 492, § 1/SB 446.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section in effect until January 1, 2021, see the 2020 amendment note.

The 2020 amendment, effective January 1, 2021, in the middle of the first sentence of subsection (c), substituted "two years from the earlier of either the date of the surety being released from liability pursuant to Code Section 17-6-31" for "seven years from the later of either the date on which the defendant was required to appear in court" and "is in possession of" for "accepted."

Cross references. — Corresponding provision relating to civil procedure, § 9-10-10.

JUDICIAL DECISIONS

Cited in Wilson v. State, 167 Ga. App. 421, 306 S.E.2d 704 (1983); Roscoe v. State, 286 Ga. 325, 687 S.E.2d 455 (2009).

OPINIONS OF THE ATTORNEY GENERAL

This section does not vary the previous law or procedure for recording bonds. It only provides that as an alternative to giving a bond, the person may satisfy the requirement by depositing cash. 1969 Op. Att'y Gen. No. 69-265.

No modification of judicial order specifying cash bond. — Sheriff does not have the authority to modify a judicial order and accept a property or surety bond after a magistrate has specified a cash bond. 1987 Op. Att'y Gen. No. U87-22.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bonds, §§ 6, 7, 21, 22.

C.J.S. — 11 C.J.S., Bonds, § 19 et seq.

ALR. — Check or money as meeting requirement of appeal bond, 65 A.L.R.2d 1134.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

17-6-5. Acceptance of cash bonds for certain offenses; authorization.

Any sheriff, deputy sheriff, county peace officer, or other county officer charged with the duty of enforcing the laws of this state relating to:

(1) Traffic or the operation or licensing of motor vehicles or operators;

(2) The width, height, or length of vehicles and loads;

(3) Motor common carriers and motor contract carriers;

(4) Commercial vehicle or driver safety;

(5) Hazardous materials transportation;

(6) Motor carrier insurance or registration;

(7) Road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48;

(8) Game and fish;

(9) Boating; or

(10) Litter control

who makes an arrest outside the corporate limits of any municipality of this state for a violation of said laws and who is authorized, as provided

herein by a court of record having jurisdiction over such offenses, to accept cash bonds may accept a cash bond from the person arrested in lieu of a statutory bond or recognizance. No such officer shall accept a cash bond unless he or she is authorized to receive cash bonds in such cases by an order of the court having jurisdiction over such offenses and unless such order has been entered on the minutes of the court. Any such order may be granted, revoked, or modified by the court at any time.

History. — Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 1; Ga. L. 1962, p. 530, § 1; Ga. L. 1975, p. 845, § 1; Ga. L. 1982, p. 1136, §§ 1, 4; Ga. L. 2011, p. 479, § 2/HB 112.

Cross references. — Acceptance of cash bonds from persons cited for traffic offenses under jurisdiction of traffic violations bureau of court, § 40-13-55 et seq.

Law reviews. — For comment on Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961), see 14 Mercer L. Rev. 452 (1963).

JUDICIAL DECISIONS

Cash bond authorized for drunk driving arrestee. — If a person was arrested by a state patrol officer inside a municipality for driving under the influence, a deputy sheriff, even without authorization from the court, could accept a cash bond; the trial court, as a result, had the authority to order the cash bond forfeited. Wilson v. State, 167 Ga. App. 421, 306 S.E.2d 704 (1983).

Cited in Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961); Perry v. State, 118 Ga. App. 22, 162 S.E.2d 466 (1968).

OPINIONS OF THE ATTORNEY GENERAL

Construction with O.C.G.A. § 17-6-2 as to misdemeanors generally. — While it was true that Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 1 (see O.C.G.A. § 17-6-5) authorized the taking of cash bonds under certain circumstances, it was quite obvious that this provision was in addition to and not in place of former Code 1933, § 27-902 (see O.C.G.A. § 17-6-2). 1957 Op. Att'y Gen. p. 65.

RESEARCH REFERENCES

ALR. — Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

17-6-6. Clerk of court or judge to provide cash receipt book; furnishing of copies of receipt; disposition of original receipt and bond.

Other laws to the contrary notwithstanding, when an order is passed as provided for in Code Section 17-6-5 authorizing an officer to accept cash bonds, it shall be the duty of the clerk of the court, if there is one, or, if there is no clerk, the judge passing the order to furnish the officer or officers authorized under the order with a book of blank receipts, consecutively numbered in triplicate and readily distinguishable and identifiable. The receipts shall be completed by the officers when making an arrest and accepting a cash bond so as to show the name of

the person arrested, date of arrest, nature of the offense, amount of the cash bond given, and the name of the arresting officer. The arresting officer or the person receiving the cash bond shall deliver a copy of the receipt to the person arrested at the time the cash bond is given and shall file the original receipt together with the cash bond with the clerk, or judge, as the case may be, of the court having jurisdiction of the offense not later than the next succeeding business day of such clerk or judge following the date of issuance of the receipt. The remaining copy of the receipt shall be mailed to the commissioner of public safety.

History. — Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 2; Ga. L. 1978, p. 1493, § 1.

Law reviews. — For comment on Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961), see 14 Mercer L. Rev. 452 (1963).

JUDICIAL DECISIONS

Discretion is not unlimited. — Trial court's discretion under O.C.G.A. § 17-6-6 is not unlimited, particularly when its exercise affronts the goals of deterring the state from violating the state's discovery obligations and correcting the prejudice to the defendants caused by such violations. Marshall v. State, 230 Ga. App. 116, 495 S.E.2d 585 (1998).

Defendant failed to raise noncompliance at trial. — Although O.C.G.A. § 17-6-6 provides remedies for failure to comply with any of the discovery provisions, since the defendant did not raise the state's noncompliance at trial, the defendant did not give the trial court the opportunity to exercise the court's discretion in formulating an appropriate remedy and could not complain for the first time on appeal. Cox v. State, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

Cited in Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961).

17-6-7. Liability of arresting officer for failure to account for cash receipts and bonds.

All receipts issued to arresting officers and all cash bonds received under Code Sections 17-6-5 and 17-6-6 shall be accounted for by the receiving officers to the court from which the receipts were issued and, in the event that any such officer fails to account for same, he shall be personally liable for any default and may be punished as for contempt by the court, in addition to any other penalties which are provided for by law in such cases.

History. — Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 3.

Law reviews. — For comment on Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961), see 14 Mercer L. Rev. 452 (1963).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 56 et seq.

17-6-8. Proceedings upon failure of person arrested to appear; forfeiture of bond not a bar to subsequent prosecution.

If any person arrested for a misdemeanor arising out of a violation of the laws of this state relating to:

(1) Traffic or the operation or licensing of motor vehicles or operators;

(2) The width, height, or length of vehicles and loads;

(3) Motor common carriers and motor contract carriers;

(4) Commercial vehicle or driver safety;

(5) Hazardous materials transportation;

(6) Motor carrier insurance or registration;

(7) Road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48;

(8) Game and fish;

(9) Boating; or

(10) Litter control

gives a cash bond for his or her appearance as provided in Code Section 17-6-5 and fails to appear on the date, time, and place specified in the citation or summons without legal excuse, the court may order said cash bond forfeited without the necessity of complying with the statutory procedure provided for in the forfeiture of statutory bail bonds. A judgment ordering the case disposed of and settled may be entered by the court and the proceeds shall be applied in the same manner as fines. If the court does not enter a judgment ordering the case disposed of and settled, the forfeiture of the cash bond shall not be a bar to subsequent prosecution of the person charged with the violation of such laws.

History. — Ga. L. 1953, Jan.-Feb. Sess., p. 331, § 4; Ga. L. 1962, p. 530, § 2; Ga. L. 1975, p. 845, § 2; Ga. L. 1982, p. 1136, §§ 2, 5; Ga. L. 2011, p. 479, § 3/HB 112.

Law reviews. — For comment on Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961), see 14 Mercer L. Rev. 452 (1963).

JUDICIAL DECISIONS

Forfeiture of cash bond not a bar to subsequent prosecution. — As the forfeiture of a cash bond for any person arrested for violation of the traffic laws of this state does not bar a subsequent prosecution for such violation, such forfeiture does not constitute a prior disposition so as to bar prosecution by reason of double jeopardy. Benton v. State, 150 Ga. App. 647, 258 S.E.2d 298 (1979).

Cited in Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961); Perry v. State, 118 Ga. App. 22, 162 S.E.2d 466 (1968); Parker v. Turk, 169 Ga. App. 188, 311

S.E.2d 844 (1983); Thompson v. State, 237 Ga. App. 466, 517 S.E.2d 339 (1999); Fairbanks v. State, 242 Ga. App. 830, 531 S.E.2d 381 (2000); Brown v. State, 251 Ga. App. 569, 554 S.E.2d 760 (2001).

OPINIONS OF THE ATTORNEY GENERAL

Appearance pursuant to this section is controlled by notice. 1963-65 Op. Att'y Gen. p. 723.

Notice of arraignment. — In view of this section, a notice of arraignment is necessary only if the court decides to require the defendant to face trial. 1965-66 Op. Att'y Gen. No. 66-216.

Forfeiture of traffic appearance bonds by superior court. — Superior court can forfeit traffic appearance bonds without district attorney first preparing accusations on such offenses. 1980 Op. Att'y Gen. No. U80-2.

Waiver of jury trial not necessary as prerequisite to forfeiture. — Probate court has authority to order forfeiture of the defendant's bond and order that the case be disposed of on the case's merits, without first obtaining a written waiver of jury trial from the absent defendant. 1980 Op. Att'y Gen. No. 80-135.

RESEARCH REFERENCES

ALR. — Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

17-6-9. Acceptance of cash bonds in lieu of statutory bond or recognizance by officers or officials authorized to enforce "Comprehensive Litter Prevention and Abatement Act of 2006."

Any law enforcement officer or official of a political subdivision of this state who is authorized to enforce Part 2 of Article 2 of Chapter 7 of Title 16 and who is authorized by the judge having jurisdiction of the offense to accept cash bonds may accept a cash bond for the personal appearance at trial of the person arrested in lieu of a statutory bond or recognizance. The procedures connected with such cash bonds, including, but not limited to, duties of the arresting officer, forfeiture, distribution of proceeds, and discretion of court as to disposal of the cash bond, shall be the same procedures applicable to arrest by a sheriff for a violation of any litter law.

History. — Ga. L. 1975, p. 845, § 3; Ga. L. 2006, p. 275, § 3-7/HB 1320.

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006 for purposes of adopting local ordinances to become effective on or after July 1, 2006.

17-6-10. Acceptance of cash bonds for violations of ordinances or other offenses against municipalities; issuance of receipt; designated officials; effect of failure to appear in court; applicability to municipalities having similar provisions.

(a) All mayors or chief governing officers or their designated official or officials of municipalities are authorized to accept a cash bond for the personal appearance in court of any person charged with a violation of an ordinance or other offense against the municipality. The officer assessing and accepting a cash bond shall issue a receipt for the bond to the person charged with the violation.

(b) When any mayor or chief governing officer of any municipality of this state designates any municipal official to accept cash bonds under subsection (a) of this Code section, the delegation of authority shall be in writing and filed in the records of the municipality.

(c) Any person charged with a violation of an ordinance or other offense against a municipality who gives a cash bond for his personal appearance in court at a designated time and place and who fails to appear at said time and place shall forfeit the cash bond upon the call of the case for trial. It shall not be necessary for the municipality to take any further action to forfeit the cash bond. Forfeiture of a cash bond shall not be a bar to a subsequent prosecution of the accused for the violation.

(d) This Code section shall not apply to municipalities having provisions in their charters with reference to the subject matter of this Code section.

History. — Ga. L. 1952, p. 182, §§ 1-4, 4A.

JUDICIAL DECISIONS

Effect of clerical error in docket entry. — Clerical error in making a docket entry showing that the defendant's cash bond was forfeited did not bar a subsequent prosecution of the defendant for the offense for which the bond was issued. Smith v. State, 174 Ga. App. 647, 331 S.E.2d 14 (1985).

RESEARCH REFERENCES

ALR. — Insanity of principal as relieving bail for his nonappearance, 7 A.L.R. 394.

Right to recover cash bail or securities taken without authority, 44 A.L.R. 1499; 48 A.L.R. 1430.

Failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite arraignment and plea, 90 A.L.R. 298.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

17-6-11. Display of driver's license for violation of certain traffic related laws; notice of failure to appear; suspension of license; arrest; seizure of license.

(a)(1) When an individual is apprehended by an officer for the violation of the laws of this state or ordinances relating to the offenses listed in paragraph (2) of this subsection, he or she may display his or her driver's license and be issued a uniform traffic citation in lieu of being:

(A) Brought before the proper magistrate or other judicial officer;

(B) Incarcerated;

(C) Ordered to post a bond; or

(D) Ordered a recognizance for his or her appearance for trial.

(2) This subsection shall apply to any violation:

(A) Of Title 40 except any offense:

(i) For which a driver's license may be suspended for a first offense by the commissioner of driver services;

(ii) Covered under Code Section 40-5-54; or

(iii) Covered under Article 15 of Chapter 6 of Title 40;

(B) Involving the width, height, and length of vehicles and loads;

(C) Involving motor common carriers and motor contract carriers;

(D) Involving hazardous materials transportation; or

(E) Involving road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48.

(3) The apprehending officer shall include the individual's driver's license number on the uniform traffic citation. The uniform traffic citation, duly served as provided in this Code section, shall give the judicial officer jurisdiction to dispose of the matter.

(4) Upon display of the driver's license, the apprehending officer shall release the individual so charged for his or her further appearance before the proper judicial officer as required by the uniform traffic citation.

(b)(1) When a uniform traffic citation is issued and if the accused fails to appear for court or otherwise dispose of his or her charges before his or her scheduled court appearance as stated on the uniform traffic citation, prior to the court issuing a bench warrant, the clerk of

court shall notify the accused by first-class mail or by postcard at the address listed on the uniform traffic citation of his or her failure to appear. Such notice shall be dated and allow the accused 30 days from such date to dispose of his or her charges or waive arraignment and plead not guilty. If after the expiration of such 30 day period the accused fails to dispose of his or her charges or waive arraignment and plead not guilty, the clerk of court in which the charges are lodged shall, within five days of such date, forward to the Department of Driver Services the accused's driver's license number. The commissioner of driver services shall, upon receipt of such driver's license number, suspend such accused's driver's license and driving privilege until notified by the clerk of court that the charge against the accused has been finally adjudicated. Such accused's driver's license shall be reinstated when he or she submits proof of the final adjudication and pays to the Department of Driver Services a restoration fee of $50.00 or $25.00 when such reinstatement is processed by mail.

(2) This subsection shall not apply to any violation of Title 40:

(A) For which a driver's license may be suspended for a first offense by the commissioner of driver services;

(B) Covered under Code Section 40-5-54; or

(C) Covered under Article 15 of Chapter 6 of Title 40.

(b.1) It shall be the duty of a law enforcement officer or emergency medical technician responding to the scene of any motor vehicle accident or other accident involving a fatal injury to examine immediately the driver's license of the victim to determine the victim's wishes concerning organ donation. If the victim has indicated that he or she wishes to be an organ donor, it shall be the duty of such law enforcement officer or emergency medical technician to take appropriate action to ensure, if possible, that the victim's organs shall not be imperiled by delay in verification by the donor's next of kin.

(c) Nothing in this Code section bars any law enforcement officer from arresting or from seizing the driver's license of any individual possessing a fraudulent license or a suspended license or operating a motor vehicle while his or her license is suspended, outside the scope of a driving permit, or without a license.

(d) The commissioner of driver services shall be authorized to promulgate reasonable rules and regulations to carry out the purposes of this Code section and to establish agreements with other states whereby a valid license from that state may be accepted for purposes of this Code section.

History. — Ga. L. 1973, p. 435, §§ 1, 2; Ga. L. 1976, p. 213, § 1; Ga. L. 1979, p. 759, § 1; Ga. L. 1982, p. 1136, §§ 3, 6; Ga. L. 1986, p. 1607, § 1; Ga. L. 1987, p. 542,

§ 3; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 94, § 17; Ga. L. 1991, p. 1776, § 1; Ga. L. 1996, p. 1624, §§ 2, 3; Ga. L. 2000, p. 951, § 12-1; Ga. L. 2005, p. 334, § 7-3/HB 501; Ga. L. 2011, p. 479, § 4/HB 112; Ga. L. 2017, p. 608, § 1/SB 176.

Cross references. — Transportation of hazardous materials, § 40-1-20. Prosecution of traffic offenses generally, T. 40, C. 13. Search and notification for information identifying donor status, § 44-5-150.

JUDICIAL DECISIONS

Notice provisions comport with due process. — This section is not violative of the due process clause of either the federal or state Constitutions for failure to provide a second notice when the license is forwarded to the Department of Public Safety for suspension. Jones v. State, 241 Ga. 178, 243 S.E.2d 872 (1978).

Judge and court administrator protected from suit by judicial and quasi-judicial immunity. — When the appellee sued the appellants, a judge of the former recorder's court and the court administrator, the appellate court's opinion was reversed to the extent the opinion allowed the appellee's suit to move forward against the appellants as the appellants were protected from suit by judicial and quasi-judicial immunity because, at the time, traffic offenses were adjudicated in the recorder's court; the appellee was dealing with the recorder's court as part of the court's official function of adjudicating traffic offenses; the court was obligated to report to the Georgia Department of Driver Services the status of the traffic case; and the act of making the report was a function that was judicial in nature and was protected by judicial immunity. Withers v. Schroeder, 304 Ga. 394, 819 S.E.2d 49 (2018).

Court clerks protected from suit by judicial and quasi-judicial immunity. — Appellant's suit against clerks of a city municipal court was properly dismissed because the clerks' failure to perform their duties to withdraw a canceled arrest warrant from the state's criminal database, which led to the appellant's arrest and detention, were actions protected by quasi-judicial immunity as to the appellant's claims of wrongful arrest. Spann v. Davis, No. A20A0202, 2020 Ga. App. LEXIS 368 (June 22, 2020).

Suspended Florida license could not be surrendered in lieu of bail. — Defendant, who was arrested for driving with a suspended Florida driver's license, was not entitled to surrender that license in lieu of bail and thereby avoid impoundment of the defendant's vehicle. Pierce v. State, 194 Ga. App. 481, 391 S.E.2d 3 (1990).

Cited in Thomason v. Harper, 162 Ga. App. 441, 289 S.E.2d 773 (1982); Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986).

OPINIONS OF THE ATTORNEY GENERAL

Duties to facilitate organ donations under O.C.G.A. § 17-6-12(b.1) must be performed harmoniously with the coroner's duty to take charge of the body of a fatally injured individual under O.C.G.A. § 45-16-24. 1996 Op. Att'y Gen. No. 96-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 81 et seq.

17-6-12. (For effective date, see note.) Unsecured judicial release; requirement; effect of failure of person charged to appear for trial.

(a) As used in this Code section, the term:

(1) "Bail restricted offense" means the person is charged with:

(A) An offense of:

(i) Murder or felony murder, as defined in Code Section 16-5-1;

(ii) Armed robbery, as defined in Code Section 16-8-41;

(iii) Kidnapping, as defined in Code Section 16-5-40;

(iv) Rape, as defined in Code Section 16-6-1;

(v) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(vi) Aggravated sodomy, as defined in Code Section 16-6-2; or

(vii) Aggravated sexual battery, as defined in Code Section 16-6-22.2; or

(B) A felony offense of:

(i) Aggravated assault;

(ii) Aggravated battery;

(iii) Hijacking a motor vehicle in the first degree;

(iv) Aggravated stalking;

(v) Child molestation;

(vi) Enticing a child for indecent purposes;

(vii) Pimping;

(viii) Robbery;

(ix) Bail jumping;

(x) Escape;

(xi) Possession of a firearm or knife during the commission of or attempt to commit certain crimes;

(xii) Possession of firearms by convicted felons and first offender probationers;

(xiii) Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine;

(xiv) Participating in criminal street gang activity;

(xv) Habitual violator; or

(xvi) Driving under the influence of alcohol, drugs, or other intoxicating substances.

(2) "Unsecured judicial release" means any release on a person's own recognizance that does not purport a dollar amount through secured means as provided for in Code Section 17-6-4 or 17-6-50 or property as approved by the sheriff in the county where the offense was committed.

(b) An elected judge or judge sitting by designation as provided for in subsection (c) or (d) of this Code section may issue an unsecured judicial release if:

(1) Such unsecured judicial release is noted on the release order; and

(2) Except as provided for in subsection (c) of this Code section, the person is not charged with a bail restricted offense.

(c) A person charged with a bail restricted offense shall not be released on bail on an unsecured judicial release for the purpose of entering a pretrial release program, a pretrial release and diversion program as provided for in Article 4 of Chapter 3 of Title 42, or a pretrial intervention and diversion program as provided for in Article 4 of Chapter 18 of Title 15, or pursuant to Uniform Superior Court Rule 27.

(d) Except as provided in subsection (c) of this Code section and in addition to other laws regarding the release of an accused person, the judge of any court having jurisdiction over a person charged with committing an offense against the criminal laws of this state shall have authority, in his or her sound discretion and in appropriate cases, to authorize the release of the person on an unsecured judicial release only.

(e) Upon the failure of a person released on an unsecured judicial release to appear for trial, if the release is not otherwise conditioned by the court, absent a finding of sufficient excuse to appear, the court shall summarily issue an order for his or her arrest which shall be enforced as in cases of forfeited bonds.

History. — Ga. L. 1969, p. 72, §§ 1, 2; Ga. L. 2010, p. 226, § 2/HB 889; Ga. L. 2011, p. 752, § 17/HB 142; Ga. L. 2017, p. 417, § 2-1/SB 104; Ga. L. 2018, p. 550, § 2-5/SB 407; Ga. L. 2018, p. 1112, § 17/SB 365; Ga. L. 2020, p. 570, § 1-1/SB 402.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section in effect until January 1, 2021, see the 2020 amendment note.

The 2018 amendments. — The first 2018 amendment, effective July 1, 2018, in subsection (b), inserted "as provided for in Article 4 of Chapter 3 of Title 42" near

the middle, deleted "or Article 5 of Chapter 8 of Title 42," following "Title 15,", and inserted ", or other judge sitting by designation under the express written authority of such elected judge," near the end; and, in subsection (d), deleted "only" following "recognizance", inserted "absent a finding of sufficient excuse to appear,", and substituted "shall" for "may" near the middle. The second 2018 amendment, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, substituted "Article 4 of Chapter 3 of Title 42" for "Article 5 of Chapter 8 of Title 42" in the middle of subsection (b).

The 2020 amendment, effective January 1, 2021, added a colon to the end of the introductory clause in subsection (a); in paragraph (a)(1), substituted "(1) 'Bail'" for "'bail'"; rewrote subparagraph (a)(1)(A), which read: "Aggravated assault"; redesignated former paragraph (a)(2) as present subparagraph (a)(1)(B) and former subparagraphs (a)(2)(A) through (a)(2)(P) as present subdivisions (a)(1)(B)(i) through (a)(1)(B)(xvi), respectively; added paragraph (a)(2); added subsection (b); redesignated former subsections (b) through (d) as present subsections (c) through (e), respectively; in subsection (c), substituted "an unsecured judicial release" for "his or her own recognizance" and deleted ", unless an elected magistrate, elected state or superior court judge, or other judge sitting by designation under the express written authority of such elected judge, enters a written order to the contrary specifying the reasons why such person should be released upon his or her own recognizance." following "Rule 27" at the end; in subsection (d), substituted "subsection (c)" for "subsection (b)" and substituted "on an unsecured judicial release" for "upon his or her own recognizance"; and substituted "an unsecured judicial release" for "upon his or her own recognizance" in subsection (e).

Code Commission notes. — Ga. L. 2018, p. 1112, § 54(e)/SB 365, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2018 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to this Code section by Ga. L. 2018, p. 1112, § 17/SB 365, was not given effect.

Editor's notes. — Ga. L. 2011, p. 752, § 17(1)/HB 142, which amended this Code section, purported to amend subparagraph (a)(1)(C) but actually amended subparagraph (a)(2)(C).

Law reviews. — For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017). For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 45 (2018).

JUDICIAL DECISIONS

Cited in Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97 (1971).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — O.C.G.A. § 17-6-12 is one for which those charged with a violation are to be fingerprinted. 1996 Op. Att'y Gen. No. 96-17; 1997 Op. Att'y Gen. No. 97-33.

An offense under O.C.G.A. § 17-6-12 requires fingerprinting only in those instances involving "failure to appear" for an offense which is itself a fingerprintable offense. 1998 Op. Att'y Gen. No. 98-20.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 11 et seq., 26 et seq., 37 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 12, 13, 153 et seq.

ALR. — Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

17-6-13. First bail for offense permitted as matter of right; subsequent bails to be in discretion of court.

Except as otherwise provided in this chapter, each person who is entitled to bail under this article shall be permitted one bail for the same offense as a matter of right. Subsequent bails shall be in the discretion of the court.

History. — Laws 1832, Cobb's 1851 Digest, p. 862; Code 1863, § 4625; Code 1868, § 4649; Code 1873, § 4747; Ga. L. 1878-79, p. 55, § 1; Code 1882, § 4747; Penal Code 1895, § 934; Penal Code 1910, § 959; Code 1933, § 27-903; Ga. L. 1971, p. 408, § 1; Ga. L. 1983, p. 452, § 2.

History of Code section. — The language in this Code section is derived in part from the decision in Newsome v. Scott, 151 Ga. 639, 107 S.E. 854 (1921).

JUDICIAL DECISIONS

Bail after conviction not covered by former Penal Code 1895, § 934 (see O.C.G.A. § 17-6-15). Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822, 9 Ann. Cas. 617 (1906).

Failure to appear in accordance with terms of bond will not authorize court to punish for contempt. Collins v. State, 32 Ga. App. 450, 123 S.E. 723 (1924).

Cited in Fleming v. Smith, 10 Ga. App. 701, 73 S.E. 1074 (1912); Knowles v. State, 166 Ga. 182, 142 S.E. 676 (1928).

RESEARCH REFERENCES

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 25 et seq., 34 et seq.

ALR. — Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case, 29 A.L.R.2d 945.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petition to bail, 56 A.L.R.2d 668.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

17-6-14. Use of bail bond posted for preliminary hearing for trial appearance; applicability to federal proceedings; proceedings in county other than where commitment hearing held; effect where bail bond required is less than bond originally posted.

(a) When a person posts bail bond prior to a preliminary or commitment hearing and is later bound over to another court for trial, the original bail bond shall not terminate but shall be valid to provide for the person's appearance at the trial of the case unless the amount of the bail is set higher by lawful authority, in which case new bail bond shall be posted.

(b) Nothing contained in subsection (a) of this Code section shall apply to any proceedings in which any federal court or United States commissioner is involved. Subsection (a) of this Code section shall apply only to those instances wherein the person required to post a bail bond shall be bound over to a court or grand jury of the same county wherein the committing court exercised its jurisdiction. Subsection (a) of this Code section shall not apply to those instances where a person is bound over to two or more courts or grand juries.

(c) Nothing contained in subsection (a) of this Code section shall be construed to require an additional bail bond in the event the court to which the person has been committed requires a lesser bail bond than the bond originally posted.

History. — Ga. L. 1971, p. 407, §§ 1, 2.

Law reviews. — For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Habeas corpus relief. — Although pretrial habeas corpus was a proper remedy after the defendant challenged a failure to set bail, pursuant to O.C.G.A. § 17-6-14(a), the defendant's initial bond sufficed to provide for the defendant's appearance upon the trial of the original charges; however, because the defendant was indicted within 90 days of the defendant's re-arrest on new charges, the defendant was not entitled to habeas corpus relief under O.C.G.A. § 17-7-50. Rainwater v. Langley, 277 Ga. 127, 587 S.E.2d 18 (2003).

Cited in AAA Bonding Co. v. State, 192 Ga. App. 684, 386 S.E.2d 50 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 1 et seq., 9 et seq., 48 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, § 11 et seq.

ALR. — Dismissal or vacation of indictment as terminating liability or obligation of surety or bail bond, 18 A.L.R.3d 1354.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond

surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

17-6-15. Necessity for commitment where bail tendered and accepted; opportunity for bail; receipt of bail after commitment and imprisonment; imprisonment of person who offers bond for amount of bail set; effect upon common-law authority of court.

(a) After arrest, if bail is tendered and accepted, no regular commitment need be entered, but a simple memorandum of the fact of bail being taken shall be sufficient.

(b)(1) A reasonable opportunity shall be allowed the accused person to give bail; and, even after commitment and imprisonment, the committing court may order the accused person brought before it to receive bail. No person shall be imprisoned under a felony commitment when bail has been fixed, if the person tenders and offers to give bond in the amount fixed, with sureties acceptable to the sheriff of the county in which the alleged offense occurred; provided, however, the sheriff shall publish and make available written rules and regulations defining acceptable sureties and prescribing under what conditions sureties may be accepted. If the sheriff determines that a professional bonding company is an acceptable surety, the rules and regulations shall require, but shall not be limited to, the following:

(A) Complete documentation showing the composition of the company to be an individual, a trust, or a group of individuals, whether or not formed as a partnership or other legal entity, or a corporation or a combination of individuals, trusts, and corporations;

(B) Complete documentation for all employees, agents, or individuals authorized to sign or act on behalf of the bonding company;

(C) Complete documentation showing that the company holds a valid business license in the jurisdiction where bonds will be written;

(D) Fingerprints and background checks of every individual who acts as a professional bondsperson as defined in Code Section 17-6-50 for the professional bonding company seeking approval;

(E) Establishment of a cash escrow account or other form of collateral as follows:

(i) For any professional bonding company that is new to the county or that has operated continuously in the county for less than 18 months, in an amount and upon terms and conditions as determined and approved by the sheriff;

(ii) Once a professional bonding company has operated continuously for 18 months or longer in the county, then any such cash escrow account or other form of collateral shall not exceed 10 percent of the current outstanding bail bond liability of the professional bonding company; and

(iii) No professional bonding company shall purchase an insurance policy in lieu of establishing a cash escrow account or posting other collateral; provided, however, that any professional bonding company which was using an insurance policy as collateral as of December 31, 2013, may continue to do so at the discretion of the sheriff.

(F) Establishment of application, approval, and reporting procedures for the professional bonding company deemed appropriate by the sheriff which satisfy all rules and regulations required by the laws of this state and the rules and regulations established by the sheriff;

(G) Applicable fees to be paid by the applicant to cover the cost of copying the rules and regulations and processing and investigating all applications and all other costs relating thereto; or

(H) Additional criteria and requirements for approving and regulating bonding companies to be determined at the discretion of the sheriff.

(2) This Code section shall not be construed to require a sheriff to accept a professional bonding company or bondsperson as a surety.

(3) This Code section shall not be construed to prevent the posting of real property bonds and the sheriff may not prohibit the posting of property bonds. Additional requirements for the use of real property may be determined at the discretion of the sheriff. The sheriff shall not prohibit a nonresident of the county from posting a real property bond if such real property is located in the county in which it is offered as bond and if such property has sufficient unencumbered equity to satisfy the sheriff's posted rules and regulations as to acceptable sureties.

(c) This Code section shall not abrogate or repeal the common-law authority of the judge having jurisdiction.

History. — Orig. Code 1863, § 4620; Code 1868, § 4644; Code 1873, § 4742; Code 1882, § 4742; Penal Code 1895, § 922; Penal Code 1910, § 947; Code 1933, § 27-418; Ga. L. 1977, p. 346, § 1; Ga. L. 1994, p. 532, § 2; Ga. L. 2014, p. 444, § 3-1/HB 271.

JUDICIAL DECISIONS

Factors considered in setting bail. — Many factors are to be considered in fixing bail, some of which are the ability of the defendant to give bail, the seriousness of the offense, penalty, character and reputation of the accused, health, probability of the defendant appearing to serve sentence, forfeiture of other bonds, and whether a fugitive. Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970).

Principal factor is probability that accused will appear. — In setting the amount of bail, the principal factor considered, to the determination of which most other factors are directed, is the probability of the appearance of the accused, or of the accused's flight to avoid punishment. Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970).

Authority to accept sureties in felony cases. — This section placed the authority to accept sureties in felony cases in the office of the sheriff and not in the superior court. Jarvis v. J & J Bonding Co., 239 Ga. 213, 236 S.E.2d 370 (1977).

Sovereign immunity. — Use of O.C.G.A. § 17-6-15 to determine the acceptability of a surety involves discretionary function and is therefore protected by sovereign immunity. Washington v. Jefferson County, 221 Ga. App. 81, 470 S.E.2d 714 (1996).

Discretion of sheriff in approval of sureties. — This section placed the approval of sureties on misdemeanor bonds in the sheriff's discretion. Jarvis v. J & J Bonding Co., 239 Ga. 213, 236 S.E.2d 370 (1977).

Applicants for a certificate to operate as a bail bond company failed to state a procedural due process violation under O.C.G.A. §§ 17-6-15 and 17-6-50 because Georgia law gave the sheriffs broad discretion to determine who was an acceptable surety to write bonds in the sheriffs' respective counties and the provisions did not require a sheriff to accept any specific applicant. A.A.A. Always Open Bail Bonds, Inc. v. Dekalb County, 129 Fed. Appx. 522 (11th Cir. 2005) (Unpublished).

Discretion of trial judge. — Amount of bail to be assessed in each criminal case is left to the sound discretion of the trial judge and in the absence of clear abuse of such discretionary power, the judge's action will not be controlled. Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970).

Acceptance of bond by sheriff. — While the face of the bond bore the signature of the sheriff of Clayton County rather than that of the sheriff of Floyd County, the sheriff of Floyd County testified at the forfeiture hearing that the sheriff relied upon the bond to release the defendant from custody and that a second bond was just "extra security." The sheriff's testimony made it clear that the sheriff did accept and approve the first bond. Osborne Bonding Co. v. Harris, 183 Ga. App. 764, 360 S.E.2d 32, cert. denied, 183 Ga. App. 906, 360 S.E.2d 32 (1987).

Accepting bond on Sunday. — To take a bond on Sunday, admitting a prisoner to bail is lawful. Weldon v. Colquitt, 62 Ga. 449, 35 Am. R. 128 (1879).

Authority of arresting officer to accept bond from felon. — Arresting officer has no authority to accept bond from one arrested under a warrant for a felony, but should return the party arrested to the county in which the crime was alleged to have been committed for examination before a judicial officer of that county and the fixing of bail by such officer in case of commitment. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

Cited in Fox v. State, 34 Ga. App. 74, 128 S.E. 222 (1924); Johnson v. Aldredge, 192 Ga. 209, 14 S.E.2d 757 (1941); Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

OPINIONS OF THE ATTORNEY GENERAL

Authority of sheriff to approve sureties. — Effect of this section was to provide the sheriff with the statutory authority to approve or reject the surety on a criminal bail bond in a felony case. That section eliminates the need for that authority to be judicially delegated. 1977 Op. Att'y Gen. No. U77-29.

Disposition of interest accrued on cash bond. — County may not pay to a bondsman the interest accrued on a cash bond during the time the bond is held as assurance of a defendant's appearance at trial; upon timely appearance by the defendant, the bondsman is entitled to no more than the amount of the bond. 1986 Op. Att'y Gen. No. U86-39.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 1 et seq., 95 et seq.
C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 25 et seq., 41 et seq.

ALR. — Necessity of reference in bail bond to specific crime, 103 A.L.R. 535.

17-6-16. Entry of memorandum on warrant after waiver of commitment hearing and tender of bail.

If the accused person waives a commitment hearing and tenders bail, a memorandum of these facts shall be entered on the warrant by the person authorized to accept bail; and this waiver may be done by the person charged before arrest and, when done, shall operate as a supersedeas.

History. — Orig. Code 1863, § 4621; Code 1868, § 4645; Code 1873, § 4743; Code 1882, § 4743; Penal Code 1895, § 923; Penal Code 1910, § 948; Code 1933, § 27-419.

Law reviews. — For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Failure to insist upon a commitment hearing until after arraignment waives any requirement for such hearing. Johnson v. Caldwell, 232 Ga. 200, 205 S.E.2d 857 (1974).

Cited in Newsome v. Scott, 151 Ga. 639, 107 S.E. 854 (1921); Fox v. State, 34 Ga. App. 74, 128 S.E. 222 (1924); Johnson v. Plunkett, 215 Ga. 353, 110 S.E.2d 745 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq. 21 Am. Jur. 2d, Criminal Law, § 548 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 159, 161.

17-6-17. Bond or recognizance to be conditioned on appearance of person accused of crime at arraignment; proceedings upon failure of accused to appear.

In addition to all other requirements prescribed for appearance bonds or recognizances, the appearance bond or recognizance given by a person accused of the commission of a crime shall be conditioned upon the person presenting himself before the court at the time fixed for his

arraignment. Upon failure of a person charged with a penal offense to appear before the court at the time fixed for his arraignment, the prosecuting attorney may proceed to forfeit the bond or recognizance.

History. — Code 1933, § 27-1402, enacted by Ga. L. 1966, p. 430, § 2; Ga. L. 1977, p. 179, § 1.

Cross references. — Limitation on power of General Assembly to relieve principals or securities upon forfeited recognizances, Ga. Const. 1983, Art. III, Sec. VI, Para. VI. Criminal penalty for bail jumping, § 16-10-51. Physical disability or incarceration of principal as bar to judgment decreeing forfeiture of appearance bond, § 17-6-72. Arraignment hearings in Juvenile Court, Uniform Rules for the Juvenile Courts of Georgia, Rules 10.1 — 10.4.

JUDICIAL DECISIONS

Alteration of the indictment does not bar forfeiture. — Alteration of the indictment, with the consent and by the express authority of the defendant in the indictment or presentment, will not relieve the defendant's surety of a forfeiture if the surety does not produce the body of the surety's principal as the surety contracted to do. Green v. Russell, 176 Ga. 354, 168 S.E. 65, answer conformed to, 46 Ga. App. 510, 168 S.E. 68 (1933).

Defects in the indictment do not bar forfeiture. — Surety on a criminal bond cannot, in answer to scire facias brought for the purpose of forfeiting that instrument, prevent forfeiture if the principal in bond is absent merely because of defects in the indictment. Green v. Russell, 176 Ga. 354, 168 S.E. 65, answer conformed to, 46 Ga. App. 510, 168 S.E. 68 (1933).

Bail bond contract which was executed without return date filled in because arraignment date had not been set was not fatally deficient when notice of arraignment was properly distributed. Jam Bonding Co. v. State, 179 Ga. App. 82, 345 S.E.2d 87 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 1 et seq., 88, 99, 171 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, § 166.

ALR. — Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371; 147 A.L.R. 1428; 148 A.L.R. 1400; 150 A.L.R. 1447; 151 A.L.R. 1462; 152 A.L.R. 1459; 153 A.L.R. 1431; 154 A.L.R. 1456; 156 A.L.R. 1457; 157 A.L.R. 1456.

Effect of pleading guilty after statute of limitations has run, 37 A.L.R. 1116.

Necessity of acknowledgement of bail bond in open court, 38 A.L.R. 1108.

Right to recover cash bail or securities taken without authority, 44 A.L.R. 1499; 48 A.L.R. 1430.

Liability of bail as affected by escape of principal during his detention on separate charge, 45 A.L.R. 1037.

Negotiable instruments law as affecting rights as between holder of check or draft and attaching creditor, receiver, assignee for creditors, or administrator of drawer whose rights attached before presentment, 84 A.L.R. 412.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Dismissal or vacation of indictment as terminating liability or obligation of surety or bail bond, 18 A.L.R.3d 1354.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Bail: effect on surety's liability under

bail bond of principal's subsequent incarceration in other jurisdiction, 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

17-6-18. Amendment of bonds and giving of new security.

All bonds taken under requisition of law in the course of a judicial proceeding may be amended and new security given if necessary.

History. — Orig. Code 1863, § 3434; Code 1868, § 3454; Code 1873, § 3505; Code 1882, § 3505; Civil Code 1895, § 5123; Civil Code 1910, § 5707; Code 1933, § 81-1204.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-131. Amendment of bail in magistrate court proceedings, Uniform Rules for the Magistrate Courts, Rule 23.4.

OPINIONS OF THE ATTORNEY GENERAL

Authority to set and amend bonds. — Once the clerk of the superior court properly files an indictment or once a valid accusation is entered, the superior court has exclusive jurisdiction over the case, including all bond issues, unless the court invokes the court's authority to delegate jurisdiction to the magistrate court under O.C.G.A. § 15-1-9.1(e) or O.C.G.A. § 17-16-1(h). 1997 Op. Att'y Gen. No. 97-19.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bonds, § 1 et seq.

C.J.S. — 11 C.J.S., Bonds, § 1.

ARTICLE 2

SURETIES

U.S. Code. — Sureties, Federal Rules of Criminal Procedure, Rule 46(e).

PART 1

GENERAL PROVISIONS

Cross references. — Suretyship generally, T. 10, C. 7.

17-6-30. Fees of sureties.

(a) Sureties on criminal bonds in any court shall not charge or receive more than 15 percent of the face amount of the bond set, which amount includes the principal and all applicable surcharges, as compensation from defendants or from anyone acting for defendants;

provided, however, that a surety may charge and receive a minimum of $50.00 per bonded charge or offense as compensation, regardless of whether such compensation exceeds 15 percent of the face amount of any bond set.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor.

History. — Ga. L. 1921, p. 243, §§ 1, 8; Code 1933, §§ 27-501, 27-9903; Ga. L. 1958, p. 120, § 1; Ga. L. 1982, p. 1254, § 1; Ga. L. 1999, p. 546, § 1; Ga. L. 2006, p. 430, § 1/HB 594; Ga. L. 2014, p. 444, § 3-2/HB 271.

Law reviews. — For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971). For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 106 (1999).

JUDICIAL DECISIONS

Violation of O.C.G.A. § 17-6-30 gives the injured party a civil cause of action. — See Borison v. Christian, 257 Ga. App. 257, 570 S.E.2d 696 (2002).

Civil cause of action for recovery of amount paid in excess of statutory maximum. — After two bail bondspersons violated O.C.G.A. § 17-6-30 by accepting compensation from a family in an amount exceeding the then existing statutory maximum of ten percent as payment for posting bail bonds for a family member, the family had a civil cause of action against the bondspersons and was entitled to recover the amount of compensation which was in excess of the statutory maximum. Borison v. Christian, 257 Ga. App. 257, 570 S.E.2d 696 (2002).

Cited in Lunsford v. State, 72 Ga. App. 700, 34 S.E.2d 731 (1945); Croy v. Skinner, 410 F. Supp. 117 (N.D. Ga. 1976).

OPINIONS OF THE ATTORNEY GENERAL

Bondsman may obtain an indemnification agreement from a third party conditioned upon paying the amount of the bond and any actual costs without being in violation of O.C.G.A. § 17-6-30. 1994 Op. Att'y Gen. No. U94-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 7, 42, 43, 44, 76 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170. 72 C.J.S., Principal and Surety, § 57 et seq.

ALR. — Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

Dismissal or vacation of indictment as terminating liability or obligation of surety or bail bond, 18 A.L.R.3d 1354.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in other jurisdiction, 33 A.L.R.4th 663.

17-6-31. Surrender of principal by surety; forfeiture of bond; death of principal.

(a) When the court is not in session, a surety on a bond may surrender the surety's principal to the sheriff or to the responsible law enforcement officer of the jurisdiction in which the case is pending in order to be released from liability.

(b) When the court is in session, a surety on a bond may surrender the surety's principal in open court.

(c) The principal shall also be considered surrendered by plea of guilty or nolo contendere to the court or if the principal is present in person when the jury or judge, if tried without a jury, finds the principal guilty or if the judge dead dockets the case prior to entry of judgment and, upon such plea or finding of guilty or dead docketing, the surety shall be released from liability.

(d)(1) Furthermore, the surety shall be released from liability if, prior to entry of judgment, there is:

(A) A deferred sentence;

(B) A presentence investigation;

(C) A court ordered pretrial intervention program;

(D) A court ordered educational and rehabilitation program;

(E) A fine;

(F) A dead docket; or

(G) Death of the principal.

(2) Furthermore, the surety may be released from liability at the discretion of the court if:

(A) The principal used a false name when he or she was bound over and committed to jail or a correctional institution and was subsequently released from such facility unless the surety knew or should have known that the principal used a false name; and

(B) The surety shows to the satisfaction of the court that he or she acted with due diligence and used all practical means to secure the attendance of the principal before the court.

(e) If the prosecuting attorney does not try the charges against a defendant within a period of two years in the case of felonies and one year in the case of misdemeanors after the date of posting bond, then judgment rendered after such period may not be enforced against the surety on the bond and the surety shall thereafter be relieved of liability

on the bond. This subsection shall not apply where the prosecuting attorney's failure to try the charges is due to the fault of the principal.

(f) No judgment shall be rendered on any appearance bond if it is shown to the satisfaction of the court that the surety was prevented from returning the principal to the jurisdiction because such principal was on active military duty.

History. — Orig. Code 1863, § 4624; Code 1868, § 4648; Code 1873, § 4746; Code 1882, § 4746; Penal Code 1895, § 935; Penal Code 1910, § 960; Code 1933, § 27-904; Ga. L. 1943, p. 282, § 1; Ga. L. 1982, p. 1224, § 1; Ga. L. 1986, p. 1588, § 1; Ga. L. 1987, p. 1342, § 1; Ga. L. 1992, p. 2933, § 1; Ga. L. 1997, p. 973, § 2.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 106 (1997).

JUDICIAL DECISIONS

Constitutionality. — Former Code 1933, §§ 27-904 and 27-906 (see O.C.G.A. §§ 17-6-31 and 17-6-71) fail to describe the procedure by which the surety may be relieved as therein provided for after final judgment, are not on this account void for uncertainty and indefiniteness as the statutes name the court in which the relief must be had as being the same court rendering the final judgment, and make it mandatory upon such court to relieve the surety, thus requiring the court to act in such manner as a court may properly act to effectually grant such relief. To the extent these sections are silent, former Code 1933, § 3-105 (see O.C.G.A. § 9-2-3) may be resorted to. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

This section did not offend Ga. Const. 1945, Art. III, Sec. VII, Para. VIII (see Ga. Const. 1983, Art. III, Sec. V, Para. III) which inhibited the passage of legislation containing more than one subject matter or including matter not referred to in the caption. State v. Resolute Ins. Co., 221 Ga. 815, 147 S.E.2d 433 (1966).

More than one subject matter in bail legislation. — Georgia Laws 1943, p. 282, while amending former Code 1933, §§ 27-904 and 27-906 (see O.C.G.A. §§ 17-6-31 and 17-6-71), which deal with the subject of bail in criminal cases, by providing for service of the forfeiture proceeding and for relief of the surety after final judgment, does not contain more than one subject matter in violation of Ga. Const. 1877, Art. III, Sec. VII, Para. VIII (see Ga. Const., 1983, Art. III, Sec. V, Para. III). Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

O.C.G.A. § 17-6-31(d)(2)(A) and (d)(2)(B) are written in the conjunctive and both subparagraphs therefore must be true for that paragraph to apply; i.e., the principal must have given a false name when bound over and then released, and the surety must show due diligence. Raburn Bonding Co. v. State, 244 Ga. App. 386, 535 S.E.2d 763 (2000).

"Fault." — Since "fault," as used in O.C.G.A. § 17-6-31(e), regarding a surety's liability on a bond, is not a term of art, but is a word of general use; thus, the word is to be given the word's ordinary and everyday meaning. A.A. Prof'l Bail v. State of Ga., 265 Ga. App. 42, 592 S.E.2d 866 (2004).

Since no trial was scheduled for the defendant for more than one year after the date bond was posted and when the only "fault" that could have been attributed to the defendant was filing a conflict letter for the scheduled arraignment, this was insufficient to satisfy the "fault" requirement in O.C.G.A. § 17-6-31(e), and a surety's motion to set aside a bond forfeiture should have been granted. A.A. Prof'l Bail v. State of Ga., 279 Ga. App. 113, 630 S.E.2d 620 (2006).

Surrender privilege exists independent of bond conditions. — O.C.G.A. § 17-6-31 does not constitute a compre-

hensive regulation of bail-bonding procedures, but merely establishes the procedure whereby the surety on the bond may accomplish a "surrender" of the principal. Moreover, the privilege of "surrender" exists independent of compliance with the condition of the bond. City of Macon v. Davis, 251 Ga. 332, 305 S.E.2d 116 (1983).

City ordinance regulating release on criminal release bond valid. — City ordinance which seeks to hold the surety liable on a criminal appearance bond until the fine imposed is collected does not conflict with Georgia case law, is authorized by O.C.G.A. § 36-32-4, and does not conflict with O.C.G.A. § 17-6-31. City of Macon v. Davis, 251 Ga. 332, 305 S.E.2d 116 (1983).

Bonding company may arrest or recapture principal. Garner v. Mears, 97 Ga. App. 506, 103 S.E.2d 610 (1958).

Bonding company liable for torts committed while recapturing principal — If, in the course of such procedure the bail's employee so authorized should commit an unlawful assault, illegal entry, or other like tort, this would not take the act of the employee outside the scope of employment so as to relieve the bonding company in an action against the company for damages resulting therefrom. Garner v. Mears, 97 Ga. App. 506, 103 S.E.2d 610 (1958).

Deputy sheriff may receive surrender of the principal. Ward v. Colquitt, 62 Ga. 267 (1879).

Arrest by unauthorized persons. — Son of bail bond surety, if the son is not the surety's agent, cannot empower a third person to arrest the principal. Coleman v. State, 121 Ga. 594, 49 S.E. 716 (1905).

Privilege of surrender exists independently of compliance with the condition of the bond and even before the time for compliance. American Sur. Co. v. State, 50 Ga. App. 777, 179 S.E. 407 (1934).

Intent to surrender principal must be expressed and understood. — Producing or presenting a principal in court is not all that is required to discharge the obligation and relieve securities from their liability under a criminal bond. In order for a surrender of the principal in open court to be effective, the attention of the court must be called to the presence of the defendant principal, and the intention to surrender must be definitely expressed and understood. Perkins v. Terrell, 1 Ga. App. 250, 58 S.E. 133 (1907); American Sur. Co. v. State, 50 Ga. App. 777, 179 S.E. 407 (1934).

Duty to produce principal for lesser included offenses. — Bail for a prisoner to answer one offense includes the duty to produce the prisoner for a lesser offense contained in the greater. Wells v. Terrell, 121 Ga. 368, 49 S.E. 319 (1904).

No discharge on habeas corpus when certiorari overruled. — Accused surrendered by principal to sheriff, after overruling of certiorari, has no right to discharge on habeas corpus since ruling is a final judgment subject to review. Franco v. Lowry, 164 Ga. 419, 138 S.E. 897 (1927).

Relief of surety after forfeiture upon surrender of principal and payment of costs. — This section made it mandatory upon the court to relieve the surety from liability after final judgment has been entered when the surety has surrendered the principal to the court and paid all the costs in the forfeiture proceeding. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945); Troup Bonding Co. v. State, 121 Ga. App. 25, 172 S.E.2d 476 (1970).

Surety not discharged by pretrial diversion program that was not "court ordered". — Bondsman was not released from liability on the bondsman's bond for an accused shoplifter under O.C.G.A. § 17-6-31(d)(1)(C) because of the shoplifter's entry into a pretrial diversion program because the statute applied only to "a court ordered" program, and in this case, the trial court had no involvement in the program. The enactment of O.C.G.A. § 15-18-80, allowing prosecutors to create pretrial diversion programs, did not implicitly amend § 17-6-31(d)(1)(C) or eliminate court-ordered programs. AA-Prof'l Bail Bonding v. Deal, 332 Ga. App. 857, 775 S.E.2d 217 (2015).

Forfeiture judgment not vacated upon surrender of principal. — While this section made it mandatory to relieve the surety from liability after final judgment when the surety had surrendered the principal and paid all the costs in the

forfeiture proceeding, the final judgment was not vacated and set aside upon surrender of the principal. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945); O.K. Bonding Co. v. State, 151 Ga. App. 711, 261 S.E.2d 448 (1979).

Failure of surety to act with due diligence. — Trial court did not abuse the court's discretion in issuing a judgment of forfeiture against the surety upon consideration of evidence showing that the surety failed to exercise due diligence in locating the principal after finding that the principal had used an alias. Delta Bail Bonds v. State, 245 Ga. App. 491, 538 S.E.2d 146 (2000).

Surety acted with due diligence. — Bond forfeiture was properly set aside under O.C.G.A. § 17-6-31(d)(2) because the surety acted with due diligence in investigating the principal's identity since the surety reasonably relied on the county jail to alert the surety as to aliases, the surety verified the bond application information, and the surety had no access to other databases regarding aliases. State v. Anytime Bail Bonding, Inc., 301 Ga. App. 832, 690 S.E.2d 193 (2009).

Relieving surety from liability on bond. — Last provision of this section referred to a final judgment on the forfeiture of an appearance bond, and does not mean that the sureties can be relieved from liability on a bond after a final disposition of the criminal case against the principal upon the production of the principal after the criminal case is disposed of. Crow v. State, 90 Ga. App. 340, 82 S.E.2d 722 (1954).

Release of surety was error. — Trial court erred in releasing the surety, pursuant to O.C.G.A. § 17-6-31(d)(2), when the court improperly admitted two unauthenticated documents and expert opinion testimony as to the true name of the principal since this determination did not require the drawing of a conclusion beyond the ken of the average layman; thus, the surety failed to present any competent evidence of the principal's true name and failed to show that the principal was incarcerated under a false name. State of Ga. v. A 24 Hour Bail Bonding, 280 Ga. App. 463, 634 S.E.2d 99 (2006).

Rearrest for higher offense stemming from same transaction discharges surety. — Surety is discharged when the principal is rearrested under indictment for a higher grade of offense growing out of the same transaction for which the principal was originally arrested. Benson v. Harris, 19 Ga. App. 328, 91 S.E. 491 (1917).

Principal rearrested for separate and distinct offense. — Surety is not discharged when the principal is rearrested for a separate and distinct offense unless the principal's custody by the state prevents the surety from surrendering the principal at the appointed time. Cooper v. Brown, 10 Ga. App. 730, 73 S.E. 1101 (1912); Benson v. Harris, 19 Ga. App. 328, 91 S.E. 491 (1917).

Discharge of surety. — Surety is discharged when the surety before final judgment at the next term produces the principal. Boswell v. Colquitt, 73 Ga. 63 (1884).

Surety is discharged even if bail or surety's agent must recapture the principal. Clark v. Gordon, 82 Ga. 613, 9 S.E. 333 (1889).

Surety is discharged when principal pays costs of forfeiture and produces a new bond which is accepted. Fleming v. Smith, 10 Ga. App. 701, 73 S.E. 1074 (1912).

Bond forfeiture improper. — When a criminal defendant was charged in municipal court with misdemeanor traffic offenses, demanded a jury trial, requiring transfer of the defendant's case to state court, and filed pre-trial motions, all resulting in a failure to try the defendant on the charges within one year of the defendant's bond, the surety on the defendant's bond was not liable when the defendant did not appear because the defendant's exercise of the defendant's rights to a jury trial and to file pre-trial motions was not "fault" under the provisions of O.C.G.A. § 17-6-31(e); thus, the trial court abused its discretion when it denied the surety's motion to set aside its bond forfeiture order. A.A. Prof'l Bail v. State of Ga., 265 Ga. App. 42, 592 S.E.2d 866 (2004).

Discharge of surety except as to costs. — If, pending appeal of forfeiture, the principal is tried and acquitted, the

surety is discharged except as to costs. Williams v. McDaniel, 77 Ga. 4 (1886).

Surety not discharged by postponement of trial. Paris v. State, 25 Ga. App. 707, 104 S.E. 510 (1920).

Failure of the district attorney to apply for requisition papers does not discharge surety. Paris v. State, 25 Ga. App. 707, 104 S.E. 510 (1920).

Surety not discharged by tender of additional bail when unapproved and unaccepted. Pittman v. Dorsey, 25 Ga. App. 596, 103 S.E. 854 (1920).

When surety brings the principal into court and arranges a special date for trial and is surety on a separate bond for principal's appearance at such trial, surety is not discharged. Bird v. Terrell, 128 Ga. 386, 57 S.E. 777 (1907).

What constitutes discharge for purposes of exonerating surety. — Bare verbal permission given by the court to the principal after entering a plea of guilty, to depart and return later in the day to receive sentence, is not a legal discharge, and will not exonerate the surety from the obligation under the recognizance. American Sur. Co. v. State, 50 Ga. App. 777, 179 S.E. 407 (1934).

Principal on active military duty. — When the bondsman was prevented from performing because the principal returned to duty with the Army in Germany, the bondsman performance was excused; no judgment should have been entered on the bond in the first place and no gratuity was involved in remitting the bond because the contract was unenforceable. Raburn Bonding Co. v. State, 244 Ga. App. 386, 535 S.E.2d 763 (2000).

Forfeiture by alien. — As an alien who suffered a bond forfeiture for failing to appear at the alien's arraignment on child cruelty charges was not an individual on active military duty, the alien could not rely on the holding in Raburn Bonding Co. v. State of Ga., 244 Ga. App. 386; 535 S.E.2d 763 (2000) as a basis for an argument that the forfeiture of the alien's bond should not have been allowed. Gomez-Ramos v. State, 297 Ga. App. 113, 676 S.E.2d 382 (2009).

Mistake of fact causing surrender of the principal will not affect the question of the surety's discharge. Wiggins v. Tyson, 112 Ga. 744, 38 S.E. 86 (1901).

When the surety gives assistance to police officials which contributes to the arrest of the fugitive defendant and initiates an action to surrender the defendant to the superior court, the surety should be relieved of the penalty on forfeiture of the bond. Troup Bonding Co. v. State, 121 Ga. App. 25, 172 S.E.2d 476 (1970).

When the principal pleads guilty, and fails thereafter to appear to abide sentence, in the absence of a surrender of the principal by the surety, or the principal's discharge by the court, the surety is liable upon the recognizance. American Sur. Co. v. State, 50 Ga. App. 777, 179 S.E. 407 (1934).

Surrender of principal following payment for nonappearance. — Surety had no standing either in law or equity to reclaim any portion of the funds paid over to satisfy a judgment entered against the surety for nonappearance of the principal, even though the principal was subsequently arrested and brought to trial. American Druggists' Ins. Co. v. Harris, 177 Ga. App. 481, 339 S.E.2d 759 (1986).

Motion to vacate a judgment on the ground that the bond is insufficient to require the defendant's appearance is maintainable without prepayment of costs. Hardwick v. Shahan, 30 Ga. App. 526, 118 S.E. 575 (1923).

Continuance properly denied. — Court did not abuse the court's discretion in failing to grant a bondsman a continuance to secure the defendant's appearance, although the bondsman asserted that the bondsman had been unable to produce the defendant in court due to the actions of certain law enforcement officials, when the only evidence offered in support of this assertion consisted of the bondsman's testimony that "we were held off for over thirty days going into Florida to keep from messing up ongoing investigations some other people had ... ." Taylor v. State, 194 Ga. App. 245, 390 S.E.2d 601 (1990).

Cited in Bates v. State, 4 Ga. App. 486, 61 S.E. 888 (1908); Robinson v. Brown, 146 Ga. 257, 91 S.E. 31 (1916); Jordan v. State, 41 Ga. App. 779, 154 S.E. 725 (1930); McCook v. Long, 193 Ga. 299, 18 S.E.2d 488 (1942); Arnold v. State, 92 Ga.

App. 647, 89 S.E.2d 556 (1955); O.K. Bonding Co. v. Carter, 133 Ga. App. 32, 209 S.E.2d 717 (1974); Foster v. State, 136 Ga. App. 201, 220 S.E.2d 751 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Bondsman's powers of arrest. — If the accused refuses to surrender, the bondsman can seize and hold the accused in order to make delivery. The bondsman's rights include broad powers of pursuit into another state, arrest, and detention. No process is needed as the bondsman's powers arise, not from the powers of the state, but from the relationship of principal and bondsman. 1970 Op. Att'y Gen. No. U70-78.

No refund when principal surrendered after forfeiture. — This section provided for the relief of a bondsman from liability prior to the time that the bondsman pays the forfeiture to the county. After payment to the county of a final judgment on an appearance bond forfeiture, the bondsman was not entitled to a refund of the forfeiture even though the bondsman later surrendered the principal to county authorities. 1976 Op. Att'y Gen. No. U76-28.

Release of principal who is serving sentence on another charge. — District attorney lacks authority to grant release to a surety on a bail bond when the principal is serving a sentence on another charge. 1969 Op. Att'y Gen. No. 69-432.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 101 et seq., 141, 152.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 191, 215 et seq.

ALR. — Practicing or pretending to practice law without authority as contempt, 36 A.L.R. 533; 100 A.L.R. 236.

Surrender of principal by sureties on bail bond, 73 A.L.R. 1369.

Negotiable instruments law as affecting rights as between holder of check or draft and attaching creditor, receiver, assignee for creditors, or administrator of drawer whose rights attached before presentment, 84 A.L.R. 412.

Death of principal as exoneration, defense, or ground for relief, of sureties on bail or appearance bond, 63 A.L.R.2d 830.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in other jurisdiction, 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

Part 2

Professional Bondsmen

Cross references. — Penalty for participation in bail bond business by elected state official, § 45-11-8.

17-6-50. Persons deemed professional bondsmen; criminal background investigation information to be provided to clerk of court.

(a) Bondsmen or persons who hold themselves out as signers or sureties of bonds for compensation are declared to be professional bondsmen.

(b) A professional bondsperson is one who holds himself or herself out as a signer or surety of bonds for compensation who must meet the following qualifications:

(1) Is 18 years of age or over;

(2) Is a resident of the State of Georgia for at least one year before making application to write bonds;

(3) Is a person of good moral character and has not been convicted of a felony or any crime involving moral turpitude; and

(4) Is approved by the sheriff and remains in good standing with respect to all applicable federal, state, and local laws and all rules and regulations established by the sheriff in the county where the bonding business is conducted.

(c) The sheriff of the county in which the bonding business is conducting business or is seeking approval to conduct business shall initiate a criminal background investigation to ensure that a professional bondsman has not been convicted of a felony or a crime involving moral turpitude in this state or any other jurisdiction. The sheriff shall require the professional bondsman to furnish two full sets of fingerprints which the sheriff shall submit to the Georgia Crime Information Center. The center shall submit a full set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(d) It shall be the duty of each professional bondsman approved by the sheriff in accordance with this part to provide the clerk of each court before which one or more of such professional bondsman's principals are required to appear with the business name, complete address, telephone number, and e-mail address of the chief operating officer or his or her designee of such professional bondsman for the purpose of receiving any notices that may be sent pursuant to Code Section 17-6-71. Each professional bondsman shall have the duty to keep such information current and accurate. It shall be the duty of each clerk of court to keep, maintain, and update such information as provided by a professional bondsman.

History. — Ga. L. 1921, p. 243, § 5; Code 1933, § 27-502; Ga. L. 1994, p. 532, § 3; Ga. L. 2002, p. 942, § A; Ga. L. 2009, p. 688, § 1/HB 147.

JUDICIAL DECISIONS

Construction. — Because the two requirements of O.C.G.A. § 17-6-50(b)(3) are stated in the conjunctive, the mere fact that a bondsman was never convicted of crimes for which the bondsman was arrested was not dispositive, and the lack of prior convictions did not necessarily equate to good moral character. Pryor Org., Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001).

"Good moral conduct." — Term "good moral conduct" in O.C.G.A. § 17-6-50(b)(3), referring to the qualifications of a professional bondsman, is sufficiently def-

inite to apprise an individual purporting to serve as a professional bondsperson that he or she cannot engage in unauthorized acts of law enforcement. Pryor Org., Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001).

Approval of sureties. — Applicants for a certificate to operate as a bail bond company failed to state a procedural due process violation under O.C.G.A. §§ 17-6-15 and 17-6-50 because Georgia law gave the sheriffs broad discretion to determine who was an acceptable surety to write bonds in their respective counties and the provisions did not require a sheriff to accept any specific applicant. A.A.A. Always Open Bail Bonds, Inc. v. Dekalb County, 129 Fed. Appx. 522 (11th Cir. 2005) (Unpublished).

Standing to challenge requirements of statute. — Applicant to become a professional bondsperson whose prior felony convictions were not removed by an order restoring the applicant's civil and political rights, issued by the Board of Pardons and Paroles, lacked standing to assert that the requirement of O.C.G.A. § 17-6-50 that a professional bondsperson have no felony convictions conflicts with the Board's constitutional authority. Harrison v. Wigington, 269 Ga. 388, 497 S.E.2d 568 (1998).

Cited in Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

OPINIONS OF THE ATTORNEY GENERAL

Section applies to limitation on public officials. — O.C.G.A. § 45-11-8, prohibiting elected officials from engaging in the bail bond business, pertains to the definition found in O.C.G.A. § 17-6-50. 1980 Op. Att'y Gen. No. 80-85.

Restoration of civil and political rights does not negate a conviction for purposes of O.C.G.A. § 17-6-50(b)(3), nor does it negate the separate necessity for finding that the applicant is of good moral character. 1997 Op. Att'y Gen. No. U97-10.

Approval of sureties. — Former Code 1933, §§ 27-901, 27-902, and 27-801 (see O.C.G.A. §§ 17-6-1, 17-6-2, and 17-7-90) provided for the approval of sureties by sheriffs or judicial officers. Qualifications, such as solvency and reliability, may be inquired into before approval. 1970 Op. Att'y Gen. No. U70-83.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 42 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170.

ALR. — Qualification of surety on bail bond as affected by lien or encumbrance on his real property, 56 A.L.R. 1097.

Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

Validity of statute abolishing commercial bail bond business, 19 A.L.R.4th 355.

17-6-50.1. Continuing education programs for professional bondsmen; fee; annual requirement; certificate of completion.

(a) The Georgia Association of Professional Bondsmen shall approve continuing education programs offered by professional associations, educational institutions, government agencies, and others as deemed appropriate for professional bondsmen to attend.

(b) The fee for continuing education programs for professional bondsmen shall not exceed $250.00 annually.

(c) Professional bondsmen shall be required to obtain eight hours of continuing education annually.

(d) On or before January 31 of each year, each professional bondsman shall submit a certificate of completion of eight hours of approved continuing education to the individual or department which is responsible for issuing bail bonds for each jurisdiction in which he or she is doing business.

History. — Code 1981, § 17-6-50.1, enacted by Ga. L. 2002, p. 791, § 1; Ga. L. 2015, p. 1217, § 1/SB 195.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, "bondsman" was substituted for "bondsmen" in subsection (d).

17-6-51. Suggesting employment of attorneys during negotiations regarding signing of bond or any time subsequent thereto.

Professional bondsmen, their agents, or representatives shall not suggest or advise the employment of or name for employment any attorney or attorneys to represent a defendant, during the negotiations for the bondsmen to sign the bond or subsequent thereto.

History. — Ga. L. 1921, p. 243, § 2; Code 1933, § 27-503.

JUDICIAL DECISIONS

Cited in Jackson v. State, 140 Ga. App. 288, 231 S.E.2d 805 (1976); State v. Jackson, 188 Ga. App. 259, 372 S.E.2d 823 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 8.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170.

ALR. — Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

17-6-52. Soliciting business or loitering around jails or courts to solicit business; giving of advice by law enforcement officers as to services of professional bondsmen.

Professional bondsmen, their agents, or employees shall not solicit business as bondsmen or loiter about or around jails, places where prisoners are confined, or the courts for the purpose of engaging in or soliciting business as such bondsmen. No state or municipal law enforcement officer or keeper or employee of a penal institution may suggest to or give advice to, in any manner whatsoever, any prisoner

regarding the services of a professional bondsman to write a criminal bond for the appearance of a prisoner in any court at any time.

History. — Ga. L. 1921, p. 243, § 3; Code 1933, § 27-504.

Cross references. — Prohibition against loitering near inmates generally, § 42-5-17.

JUDICIAL DECISIONS

Constitutionality generally. — This section was not unconstitutional because the statute was in conflict with Ga. Const. 1976, Art. I, Sec. II, Para. III (see Ga. Const. 1983, Art. I, Sec. I, Para. II) or Ga. Const. 1976, Art. I, Sec. I, Para. XXV (see Ga. Const. 1983, Art. I, Sec. I, Para. XXVIII) or with the due process clauses of the state and federal Constitutions; nor is the statute unconstitutional because the statute's provisions are arbitrary and unreasonable. Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751 (1923).

Variance between title and subject matter of legislation. — Georgia Laws 1921, p. 243, from which Ga. L. 1921, p. 243, § 3 (see O.C.G.A. § 17-6-52) was codified was not unconstitutional because the law violated Ga. Const. 1976, Art. III, Sec. VII, Para. IV (see Ga. Const. 1983, Art. III, Sec. V, Para. III). If the body of the Act contained any matters different from what was expressed in the title, those matters can be rejected, as the remainder of the Act set forth a complete scheme, which was capable of enforcement. Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751 (1923).

Construction. — O.C.G.A. § 17-6-52, which prohibits professional bondsmen from loitering around jails or courts to solicit business, is a criminal statute and must be strictly construed in favor of a bondsman. The statute's underlying purpose is to regulate the business of professional bondsmen, which affords a peculiar opportunity for fraud and imposition upon the persons whom bondsmen serve. Pryor Org., Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001).

Free market solicitation by bondsman not prohibited. — Construing O.C.G.A. § 17-6-52 strictly, the statute is not intended to have such a far-reaching application as to prohibit a bondsman's free-market solicitation of the general public by means of a commercial filmed on location at a jail or court facility. Pryor Org., Inc. v. Stewart, 274 Ga. 487, 554 S.E.2d 132 (2001).

Clarity of language as to agency and soliciting business. — This section was not void for lack of clearness and definiteness in that the statute failed to state what acts and things would constitute agency on the part of their employees, and to define the meaning of soliciting business by bondsmen. Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751 (1923).

Cited in State v. Jackson, 188 Ga. App. 259, 372 S.E.2d 823 (1988).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of loitering statutes and ordinances, 72 A.L.R.5th 1.

17-6-53. Giving advice or directions to defendants who are principals in bonds regarding defense or disposition of cases.

Professional bondsmen, their agents, or employees shall not advise defendants who are principals in bonds signed by them or give any

directions in the defense or disposition of the cases in which they sign bonds.

History. — Ga. L. 1921, p. 243, § 4; Code 1933, § 27-505.

JUDICIAL DECISIONS

Cited in State v. Jackson, 188 Ga. App. 259, 372 S.E.2d 823 (1988).

RESEARCH REFERENCES

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170.

ALR. — Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

17-6-54. No further compensation after becoming surety; when sum received to be returned to defendant; right to surrender defendant and to keep sum paid when defendant forfeits.

(a) No professional bondsman or his or her agents or employees who receive compensation for becoming the surety on a criminal bond shall thereafter receive any other sum in the case. If the surety surrenders a defendant into the custody of the court, the sheriff, or another law enforcement officer in the jurisdiction where the bond was made before final disposition of the case, the surety is required to return to the principal the compensation received for signing the bond as surety if such surrender of the defendant is for reasons other than:

(1) The defendant's arrest for a crime other than a traffic violation or misdemeanor;

(2) The defendant's cosigner attests in writing the desire to be released from the bond;

(3) The defendant fails to provide to the court and the surety the defendant's change of address;

(4) The defendant fails to pay any fee due to the surety after being notified by certified mail or statutory overnight delivery that the same is past due;

(5) The defendant fails to notify the court and the surety upon leaving the jurisdiction of the court; or

(6) The defendant provides false information to the surety.

(b) In the event of a forfeiture on the bond by the defendant, the surety shall have the right to surrender into custody the defendant who

is the principal on the bond without returning any compensation paid by the defendant for the signing of the bond.

History. — Ga. L. 1921, p. 243, §§ 6, 7; Code 1933, §§ 27-506, 27-507; Ga. L. 1996, p. 1233, § 2; Ga. L. 2000, p. 1589, § 3.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to paragraph (a)(4) shall apply to notices delivered on or after July 1, 2000.

Law reviews. — For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Receipt of an uncashed check does not constitute "any other sum" in excess of the fee for becoming a surety on a criminal bond under this section. Johnson v. State, 135 Ga. App. 51, 217 S.E.2d 382 (1975).

Cited in Lunsford v. State, 72 Ga. App. 700, 34 S.E.2d 731 (1945).

OPINIONS OF THE ATTORNEY GENERAL

Requiring collateral as security for bond is not the receipt of "any other sum." 1980 Op. Att'y Gen. No. U80-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 101 et seq., 113.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 159, 161, 185, 186, 261 et seq.

ALR. — Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

Dismissal or vacation of indictment as terminating liability or obligation of surety or bail bond, 18 A.L.R.3d 1354.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

17-6-55. Penalty for violation of part.

Any person who violates any Code section in this part shall be guilty of a misdemeanor.

History. — Ga. L. 1921, p. 243, § 8; Code 1933, § 27-9903.

JUDICIAL DECISIONS

Receipt of an uncashed check did not constitute "any other sum" in excess of the fee for becoming a surety on a criminal bond under this section. Johnson v. State, 135 Ga. App. 51, 217 S.E.2d 382 (1975).

Cited in Lunsford v. State, 72 Ga. App. 700, 34 S.E.2d 731 (1945).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170, 259, 260.

ALR. — Practicing or pretending to practice law without authority as contempt, 36 A.L.R. 533; 100 A.L.R. 236.

17-6-56. Bail recovery agents; requirements; registration.

(a) As used in this Code section and Code Sections 17-6-57 and 17-6-58, the term "bail recovery agent" means any person who performs services or takes action for the purpose of apprehending the principal on a bail bond granted in this state or capturing a fugitive who has escaped from bail in this state for gratuity, benefit, or compensation.

(b) A bail recovery agent must be a United States citizen, 25 years of age or older, and must obtain a license pursuant to Code Section 16-11-129.

(c) Any sheriff of a county shall require any professional bondsman who is a resident of or doing business in the sheriff's county to register his or her bail recovery agents in that county. The professional bondsman must submit to the sheriff, in a form and manner to be determined by the sheriff, a list of all bail recovery agents whose services may be used by such bondsman.

History. — Code 1981, § 17-6-56, enacted by Ga. L. 1999, p. 546, § 1.1.

Law reviews. — For note on 1999 enactment of §§ 17-6-56 to 17-6-58, see 16 Ga. St. U.L. Rev. 106 (1999).

JUDICIAL DECISIONS

Vicarious liability for failure to register. — When a bond recovery agent was registered as an agent in Fulton County in 2000 but had not renewed that registration for 2001 when the agent apprehended in that county a principal on a bond issued by a professional bondsman who employed the agent, the failure of the county to maintain a system for the registration of individual agents precluded a successful prosecution of the agent for violating O.C.G.A. § 17-6-58, and the agent could not be held vicariously liable for the bondsman's alleged failure to register the agent in violation of O.C.G.A. § 17-6-56(c). Additionally, O.C.G.A. § 17-6-58(a) did not provide the agent with fair notice that the agent could be held criminally responsible for acting as a bail recovery agent in Fulton County if the agent failed to renew the agent's registration in that county. Perkins v. State, 277 Ga. 323, 588 S.E.2d 719 (2003).

17-6-56.1. Continuing education programs for bail recovery agents; fee; annual requirement; certificate of completion.

(a) The Georgia Association of Professional Bondsmen shall approve continuing education programs offered by professional associations, educational institutions, government agencies, and others as deemed appropriate for bail recovery agents to attend.

(b) The fee for continuing education programs for bail recovery agents shall not exceed $125.00 annually.

(c) Bail recovery agents shall be required to obtain eight hours of continuing education annually.

(d) On or before January 31 of each year, each bail recovery agent shall submit a certificate of completion of eight hours of approved continuing education to the individual or department which is responsible for issuing bail bonds for each jurisdiction in which he or she is doing business.

History. — Code 1981, § 17-6-56.1, enacted by Ga. L. 2002, p. 791, § 2.

17-6-57. Bail recovery agents; notification to local police; out-of-state agents; identification card.

(a) Any bail recovery agent who enters any local police jurisdiction in pursuit of and for the purpose of apprehending the principal on a bail bond or capturing a fugitive or engaging in surveillance of such principal or fugitive shall, prior to taking any action in his or her capacity as a bail recovery agent in that local police jurisdiction, notify by facsimile transmission or telephone the sheriff and police chief of the local police jurisdiction in which the surveillance, apprehension, or capture is to take place unless it is to take place in public.

(b) An out-of-state bail recovery agent shall submit proof to the sheriff or police chief that he or she is qualified to be a bail recovery agent under the requirements of his or her home state. An out-of-state bail recovery agent shall deliver a certified copy of the bail bond or of the forfeiture or failure to appear to the sheriff or chief of police. Such out-of-state bail recovery agent, if not qualified in his or her home state or if his or her home state does not require bail recovery agents to be qualified, shall employ a Georgia bail recovery agent who is lawfully registered pursuant to this part.

(c) Each professional bondsman shall issue a uniform identification card to each bail recovery agent registered by the professional bondsman which identification card shall include the bail recovery agent's

name, height, weight, address, photograph, and signature. The identification card shall also include the signature of the professional bondsman who has registered the bail recovery agent as required in subsection (c) of Code Section 17-6-56. A bail recovery agent shall be required to carry such identification card while acting in the capacity as a bail recovery agent.

History. — Code 1981, § 17-6-57, enacted by Ga. L. 1999, p. 546, § 1.1.

JUDICIAL DECISIONS

Cited in Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

17-6-58. Penalty for violation; liability.

(a) Any bail recovery agent who fails to register with the local sheriff or who is otherwise unqualified to act as a bail recovery agent but who nonetheless attempts to apprehend or capture a principal on a bail bond or a fugitive or who succeeds in apprehending or capturing such person shall be guilty of a misdemeanor upon conviction for the first violation and shall be guilty of a felony upon conviction for the second and all subsequent violations punishable by imprisonment for not less than one nor more than five years.

(b) Any bondsman or bonding company owner, surety, or agent who hires a bail recovery agent who is not qualified to act as a bail recovery agent pursuant to Code Sections 17-6-56 and 17-6-57 shall be guilty of a misdemeanor upon conviction for the first violation and shall be guilty of a felony upon conviction for the second and all subsequent violations punishable by imprisonment for not less than one nor more than five years, or a fine of not more than $10,000.00, or both.

(c) No bail recovery agent shall wear, carry, or display any uniform, badge, shield, card, or other item with any printing, insignia, or emblem that purports to indicate that such bail recovery agent is an employee, officer, or agent of any state or federal government or any political subdivision of any state or federal government. A violation of this subsection shall be punished upon conviction as a felony punishable by imprisonment for not less than one nor more than five years, or a fine of not more than $10,000.00, or both.

(d) A bail recovery agent who enters the wrong property, causes damage to said property, or causes injury to anyone thereon is liable for all damages.

History. — Code 1981, § 17-6-58, enacted by Ga. L. 1999, p. 546, § 1.1.

JUDICIAL DECISIONS

Fair notice required. — When a bond recovery agent was registered as an agent in Fulton County in 2000 but had not renewed that registration for 2001 when the agent apprehended in that county a principal on a bond issued by a professional bondsman who employed the agent, the failure of the county to maintain a system for the registration of individual agents precluded a successful prosecution of the agent for violating O.C.G.A. § 17-6-58, and the agent could not be held vicariously liable for the bondsman's alleged failure to register the agent in violation of O.C.G.A. § 17-6-56(c). Additionally, § 17-6-58(a) did not provide the agent with fair notice that the agent could be held criminally responsible for acting as a bail recovery agent in Fulton County if the agent failed to renew the agent's registration in that county. Perkins v. State, 277 Ga. 323, 588 S.E.2d 719 (2003).

ARTICLE 3

PROCEEDINGS FOR FORFEITURE OF BONDS OR RECOGNIZANCES

17-6-70. When forfeiture occurs.

(a) A bond forfeiture occurs at the end of the court day upon the failure of appearance of a principal of any bond or recognizance given for the appearance of that person.

(b) An appearance bond shall not be forfeited unless the clerk of the court gave the surety at least 72 hours' written notice, exclusive of Saturdays, Sundays, and legal holidays, before the time of the required appearance of the principal. Notice shall not be necessary if the time for appearance is within 72 hours from the time of arrest, provided the time for appearance is stated on the bond, or where the principal is given actual notice in open court.

History. — Laws 1831, Cobb's 1851 Digest, p. 861; Code 1863, § 4584; Code 1868, § 4605; Code 1873, § 4702; Ga. L. 1878-79, p. 57, § 1; Code 1882, § 4702; Penal Code 1895, § 936; Penal Code 1910, § 961; Code 1933, § 27-905; Ga. L. 1966, p. 430, § 1; Code 1981, § 17-6-70; Ga. L. 1982, p. 1224, § 2; Ga. L. 1986, p. 1588, § 2; Ga. L. 1987, p. 1342, § 2; Ga. L. 1990, p. 8, § 17; Ga. L. 1992, p. 6, § 17; Ga. L. 1992, p. 2933, § 2.

Cross references. — Limitation on power of General Assembly to relieve principals or securities upon forfeited recognizances, Ga. Const. 1983, Art. III, Sec. VI, Para. VI.

JUDICIAL DECISIONS

Enforcement of criminal bonds or recognizances. — Criminal bonds or recognizances must be enforced according to the procedure prescribed by statute; i.e., by entering a rule nisi, issuing a scire facias, and entering a judgment absolute, and not by an action on the debt. Garner v. Chambers, 75 Ga. App. 756, 44 S.E.2d 507 (1947).

Trial court's denial of a surety's motion

to set aside a judgment of forfeiture absolute was properly denied since: (1) the defendant and the surety were ordered to appear before the trial court and show cause why the bond should not be forfeited; (2) neither the defendant nor the surety appeared; (3) the surety did not receive notice of the judgment until five months after the hearing; (4) the trial court followed O.C.G.A. §§ 17-6-70 and 17-6-71 to the letter; and (5) even if O.C.G.A. § 15-6-21(c) obligated the trial court to serve notice of the judgment absolute, the surety failed to exercise any diligence whatsoever, and any harm the surety suffered was self-imposed. Reliable Bonding Co. v. State, 262 Ga. App. 280, 585 S.E.2d 192 (2003).

Rule nisi commences forfeiture proceeding. — Real beginning of a forfeiture proceeding is the issuance of the rule nisi and its signature by the judge. Perkins v. Terrell, 1 Ga. App. 250, 58 S.E. 133 (1907).

Voluntary bond may be forfeited by scire facias. Smith v. Spencer, 63 Ga. 702 (1879).

Neither trial nor waiver thereof is a requisite to forfeiture. — It is not requisite to the forfeiture of a bail that there shall have been a committing trial or an express waiver thereof by the obligor. Bird v. Terrell, 128 Ga. 386, 57 S.E. 777 (1907).

No need to allege that case called in order on the docket. — It is not necessary that it be alleged in the scire facias that the case was called in its order on the docket, or that the state had announced ready for trial. Collins v. Smith, 7 Ga. App. 653, 67 S.E. 847 (1910).

Record must show that the principal was called and failed to appear. Park v. State, 4 Ga. 329 (1848).

It must appear that there was an opportunity to produce the principal. Wellmaker v. Terrell, 3 Ga. App. 791, 60 S.E. 464 (1908).

Bonding company was given proper notice when a copy of the trial calendar was mailed to the company ten days prior to the defendant's scheduled trial date. Taylor v. State, 194 Ga. App. 245, 390 S.E.2d 601 (1990).

Record must show a judgment of forfeiture before a bail can be made liable. Spicer v. State, 9 Ga. 49 (1850).

When forfeiture not premature. — When a criminal recognizance is forfeited at one term, and a scire facias is issued and made returnable to a later term and is duly served before that term, and when at the term to which it is returnable the case against the principal is called, and upon the principal's failure to appear, forfeiture absolute is taken, such forfeiture is not premature. Robinson v. Brown, 146 Ga. 257, 91 S.E. 31 (1916).

Triggering dates for the applicable statutory notice and hearing provisions in bond forfeiture proceedings are not limited to calculation from the date of a principal's initial time of required appearance and failure to appear; the statute allows initiation of the notice and hearing procedures after any time of required appearance and failure to appear thereat. Griffin v. State, 194 Ga. App. 624, 391 S.E.2d 675 (1990).

Commencing of forfeiture proceedings after traverse jurors discharged. — When, after one panel of the traverse jurors has been discharged for the term, and all cases, including criminal cases, have been continued, the solicitor general (now district attorney) cannot proceed to forfeit a recognizance and issue scire facias returnable to the next term, and at that term have final judgment of forfeiture against the surety, although the principal does not appear at either term. Lamb v. State, 73 Ga. 587 (1884).

When and where scire facias returnable. — Scire facias required by law to be issued upon the forfeiture of a criminal bond or recognizance must be made returnable to the term of court next following the term at which the bond or recognizance was forfeited. Garner v. Chambers, 75 Ga. App. 756, 44 S.E.2d 507 (1947).

It is no defense that someone without authority has informed the obligor that the obligor has been discharged. Duffey v. Harris, 19 Ga. App. 646, 91 S.E. 1006 (1917).

Plea of duress is not a defense. Spicer v. State, 9 Ga. 49 (1850).

Attack on indictment against principal. — It avails one nothing to attack the indictment returned against the principal, unless the indictment appears to be

void. Williams v. Candler, 119 Ga. 179, 45 S.E. 989 (1903).

Blood relationship between principal and district attorney as a defense. — Fact that the solicitor general (now district attorney) who presents the indictment of the principal to the grand jury is a blood relation of the principal, and that the solicitor general's (district attorney's) successor who takes the forfeiture nisi is a relation by marriage, presents no defense when both are out of office when the case is heard. Salter v. State, 125 Ga. 760, 54 S.E. 685 (1906).

Defense that the district attorney failed to announce ready for trial for the state has no merit when a case is called in its regular order. Collins v. Smith, 7 Ga. App. 653, 67 S.E. 847 (1910); Duffey v. Harris, 19 Ga. App. 646, 91 S.E. 1006 (1917).

Continuance did not render original notice invalid. — Final judgment of forfeiture on a criminal appearance bond posted by the surety was proper under O.C.G.A. § 17-6-70(a) because the surety received notice of the execution hearing within the statutory time period under O.C.G.A. § 17-6-71(a) and the execution hearing took place within the required window. That the state sought and obtained a continuance from the originally-scheduled date for the execution hearing did not magically render the original notice invalid; because the original notice was valid, that notice was also not later invalidated by a subsequent notice of a new hearing date. Powell v. State, 313 Ga. App. 535, 722 S.E.2d 158 (2012).

Cited in O.K. Bonding Co. v. Carter, 133 Ga. App. 32, 209 S.E.2d 717 (1974); Ace Bonding Co. v. State, 152 Ga. App. 477, 263 S.E.2d 256 (1979); State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980); Osborne Bonding Co. v. Harris, 179 Ga. App. 13, 345 S.E.2d 116 (1986); Daza v. State, 224 Ga. App. 383, 480 S.E.2d 623 (1997); Easy Out Bonding v. State, 224 Ga. App. 706, 481 S.E.2d 834 (1997); Northeast Atlanta Bonding Co. v. State, 308 Ga. App. 573, 707 S.E.2d 921 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Release of principal serving sentence on another charge. — District attorney lacks authority to grant release to a surety on a bail bond when the principal is serving a sentence on another charge. 1969 Op. Att'y Gen. No. 69-432.

It is not necessary that a jury be present for the forfeiture of bonds. 1965-66 Op. Att'y Gen. No. 66-170.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 127 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 228 et seq., 246 et seq.

ALR. — Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371; 147 A.L.R. 1428; 148 A.L.R. 1400; 150 A.L.R. 1447; 151 A.L.R. 1462; 152 A.L.R. 1459; 153 A.L.R. 1431; 154 A.L.R. 1456; 156 A.L.R. 1457; 157 A.L.R. 1456.

Right to recover cash bail or securities taken without authority, 44 A.L.R. 1499; 48 A.L.R. 1430.

Failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite arraignment and plea, 90 A.L.R. 298.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

17-6-70.1. Proceedings for forfeiture of bonds or recognizances generally.

Repealed by Ga. L. 1983, p. 1203, § 1, effective March 29, 1983.

Editor's notes. — This Code section was based on Ga. L. 1982, p. 1658, § 1 and Ga. L. 1983, p. 3, § 14.

17-6-71. Execution hearing on failure of principal to appear.

(a) The judge shall, at the end of the court day, upon the failure of the principal to appear, forfeit the bond, issue a bench warrant for the principal's arrest, and order an execution hearing not sooner than 120 days but not later than 150 days after such failure to appear. Notice of the execution hearing shall be served by the clerk of the court in which the bond forfeiture occurred within ten days of such failure to appear by certified mail or by electronic means as provided in Code Section 17-6-50 to the surety at the address listed on the bond or by personal service to the surety within ten days of such failure to appear at its home office or to its designated registered agent. Service shall be considered complete upon the mailing of such certified notice. Such ten-day notice shall be adhered to strictly. If notice of the execution hearing is not served as specified in this subsection, the surety shall be relieved of liability on the appearance bond.

(b) If at the execution hearing it is determined that judgment should be entered, the judge shall so order and a writ of fieri facias shall be filed in the office of the clerk of the court where such judgment is entered. The provisions of this subsection shall apply to all bail bonds, whether returnable to superior court, state court, probate court, magistrate court, or municipal court.

History. — Laws 1831, Cobb's 1851 Digest, p. 862; Code 1863, § 4585; Code 1868, § 4606; Code 1873, § 4703; Code 1882, § 4703; Penal Code 1895, § 937; Penal Code 1910, § 962; Code 1933, § 27-906; Ga. L. 1943, p. 282, § 2; Ga. L. 1953, Jan.-Feb. Sess., p. 452, § 1; Code 1981, § 17-6-71; Ga. L. 1982, p. 1224, § 2; Ga. L. 1983, p. 1203, § 2; Ga. L. 1986, p. 1588, § 3; Ga. L. 1987, p. 1342, § 3; Ga. L. 1989, p. 556, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1990, p. 2336, § 1; Ga. L. 1992, p. 2933, § 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2009, p. 688, § 2/HB 147; Ga. L. 2015, p. 1217, § 2/SB 195.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 212 (1989).

JUDICIAL DECISIONS

Analysis

General Consideration
Timing
Notice

General Consideration

More than one subject matter in bail legislation. — Ga. L. 1943, p. 282, while amending former Code 1933, §§ 27-904 and 27-906 (see O.C.G.A. §§ 17-6-31 and 17-6-71), which dealt with the subject of bail in criminal cases, by providing for service of the forfeiture proceeding and for relief of the surety after final judgment, did not contain more than one subject matter in violation of the Georgia Constitution (see Ga. Const. 1983, Art. III, Sec. V, Para. III). Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

Procedure for relief of surety not void for uncertainty. — Former Code 1933, §§ 27-904 and 27-906 (see O.C.G.A. §§ 17-6-31 and 17-6-71) although failing to describe the procedure by which the surety may be relieved as therein provided for after final judgment, are not on this account void for uncertainty and indefiniteness as the statutes name the court in which the relief must be had as being the same court rendering the final judgment, and make it mandatory upon such court to relieve the surety, thus requiring the court to act in such manner as a court may properly act to effectually grant such relief, and to the extent that these sections are silent, the provisions of former Code 1933, § 3-105 (see O.C.G.A. § 9-2-3) may be resorted to. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

Enforcement of criminal bonds or recognizances. — Criminal bonds or recognizances must be enforced according to the procedure prescribed by statute; i.e., by entering a rule nisi, issuing a scire facias, and entering a judgment absolute, and not by an action on the debt. Garner v. Chambers, 75 Ga. App. 756, 44 S.E.2d 507 (1947).

Trial court's denial of a surety's motion to set aside a judgment of forfeiture absolute was properly denied since: (1) the defendant and the surety were ordered to appear before the trial court and show cause why the bond should not be forfeited; (2) neither the defendant nor the surety appeared; (3) the surety did not receive notice of the judgment until five months after the hearing; (4) the trial court followed O.C.G.A. §§ 17-6-70 and 17-6-71 to the letter; and (5) even if O.C.G.A. § 15-6-21(c) obligated the trial court to serve notice of the judgment absolute, the surety failed to exercise any diligence whatsoever, and any harm the surety suffered was self-imposed. Reliable Bonding Co. v. State, 262 Ga. App. 280, 585 S.E.2d 192 (2003).

Bonds to which statute applicable. — Whether the defendant was admitted to bail under former Code 1933, § 70-308 (see O.C.G.A. § 5-5-46), was pending decision on defendant's motion for new trial, or under former Code 1933, § 6-1005 (see O.C.G.A. § 5-6-45) was pending decision on defendant's appeal, the forfeiture procedures of former Code 1933, § 27-906 (see O.C.G.A. § 17-6-71) applied to the bond. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Procedure for forfeiture of bond granted. — Forfeiture of an appeal or supersedeas bond granted under former Code 1933, § 6-1005 (see O.C.G.A. § 5-6-45) was accomplished pursuant to former Code 1933, § 27-906 (see O.C.G.A. § 17-6-71) by issuing a rule nisi and a writ of scire facias. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Nature of proceeding. — Proceeding by a scire facias to forfeit a criminal recognizance is a civil case, distinctly separate from the criminal indictment, and ancillary thereto for one purpose only, the securing of the defendant's presence. Perkins v. Terrell, 1 Ga. App. 250, 58 S.E. 133 (1907).

Proceeding brought for forfeiture of a bond is a summary civil action accomplished pursuant to O.C.G.A. § 17-6-71. Farmer v. State, 199 Ga. App. 576, 405 S.E.2d 569 (1991).

Judgment by motion is a mere nullity. — Suit by scire facias or otherwise is necessary for entering a judgment on a recognizance bond; a judgment by motion in such a case is a mere nullity. Robinson v. Gordon, 85 Ga. 559, 11 S.E. 844 (1890); Braxton v. Candler, 112 Ga. 459, 37 S.E. 710 (1900).

Judgment by motion can be entered at the return term following the issuance and service of the scire facias upon the principal and surety when neither files an answer nor shows a sufficient cause to the contrary. Coffin v. Dorsey, 27

General Consideration (Cont'd)

Ga. App. 131, 107 S.E. 564 (1921).

While the forfeiture proceeding is a civil case, this does not mean that a separate civil action has to be filed and that the trial court cannot summarily render the court's decision. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Surety's agreement that liability be determined under statute. — When the surety enters into a security bond in a criminal case, the surety impliedly agrees that the surety's liability may be determined under this section without the state's initiation of a separate action. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Securities become quasi-parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgment may be rendered on the securities' bonds. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Issuance of scire facias generally. — Scire facias is to be issued from the court of the county in which the indictment issues, rather than that in which the bail resides. Cooper v. State, 17 Ga. 437 (1855).

County clerk (now the clerk of the court) issues the scire facias on the recognizance, returnable to the next term of court. If issued too late to be returned to the next term, a new scire facias should be issued returnable to the succeeding term. In such case, no new forfeiture of the bond need be entered. Wright v. State, 51 Ga. 524 (1874); Rowland v. Towns, 120 Ga. 74, 47 S.E. 581 (1904); Bird v. Terrell, 128 Ga. 386, 57 S.E. 777 (1907).

It is proper to direct the scire facias to all and singular the sheriffs of this state. It may thus be directed to a sheriff of another county than that in which the indictment is found. Fryer v. State, 142 Ga. 81, 82 S.E. 497 (1914).

Service of scire facias against the principal is not a prerequisite to a judgment against the principal's bail. Fryer v. State, 142 Ga. 81, 82 S.E. 497 (1914).

What is insufficient service of scire facias. — Mere knowledge by the bondsman that the matter will be heard at a certain term, or the writing of letters to the bail bondsman by the clerk or other officials, will not suffice for service of scire facias. Accredited Sur. & Cas. Co. v. Busbee, 137 Ga. App. 808, 224 S.E.2d 852 (1976).

Scire facias upon a criminal recognizance is amendable at the trial term, so as to make it conform in the description to the bond upon which it issued. Myrick v. State, 13 Ga. 190 (1853).

Amendment of rule nisi by county court to acquire jurisdiction. — See Warren v. Slaton, 14 Ga. App. 734, 82 S.E. 307 (1914).

Scire facias as issued may not be amended to make scire facias returnable at a different term. Warren v. Slaton, 14 Ga. App. 734, 82 S.E. 307 (1914).

When and where scire facias returnable. — Scire facias required by law to be issued upon the forfeiture of a criminal bond or recognizance must be made returnable to the term of court next following the term at which the bond or recognizance was forfeited. Garner v. Chambers, 75 Ga. App. 756, 44 S.E.2d 507 (1947).

Response to forfeiture and issuance of scire facias. — When a criminal recognizance has been duly forfeited and a scire facias has been issued and served, the principal has until the state case against the principal has been called at the next term to appear and answer the charge, and the surety has until that time to produce the principal to answer the charge against the principal. If the principal fails to appear, or the surety fails to produce the principal and shows no sufficient excuse or reason for not doing so, it is proper for the court to enter against them a judgment absolute upon the scire facias. Coffin v. Dorsey, 27 Ga. App. 131, 107 S.E. 564 (1921).

When jury trial required. — Jury trial is not required when a bond is forfeited, unless the trial court agrees that there are genuine issues of material fact to be resolved. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

When judgment may be rendered. — Judgment may not be rendered before the time is up for the surety to produce the principal. Russell v. State, 45 Ga. 9 (1872); Boswell v. Colquitt, 73 Ga. 63 (1884).

Judgment may be rendered at the term to which the scire facias is returnable, if no sufficient reason is shown to the contrary. Bird v. Terrell, 128 Ga. 386, 57 S.E. 777 (1907).

There may be a judgment of dismissal and for costs only, but this does not invalidate the appearance bond of the defendant or relieve defendant's sureties. Perkins v. Terrell, 1 Ga. App. 250, 58 S.E. 133 (1907).

Amount of the bond need not be specified in the judgment. Spicer v. State, 9 Ga. 49 (1850).

Relief of surety upon surrender of principal and payment of costs. — Former Code 1933, §§ 27-904 and 27-906 (see O.C.G.A. §§ 17-6-31 and 17-6-71) were mandatory upon the court to relieve the surety from liability after final judgment had been entered, when the surety had surrendered the principal to the court and paid all the costs in the forfeiture proceeding. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

Forfeiture judgment not set aside upon surrender of principal and payment of costs. — Former Code 1933, §§ 27-904 and 27-906 (see O.C.G.A. §§ 17-6-31 and 17-6-71), while making it mandatory upon the court, after rendering final judgment of forfeiture of a criminal bond, to relieve the surety from liability thereunder upon the surety surrendering the principal into court and paying all costs, did not authorize in such a case the setting aside of such final judgment, and motion praying only that such judgment be set aside because the principal had been surrendered into court and costs paid, was properly dismissed on demurrer. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

Surety not relieved by arrest and detention by another state. — While ordinarily, if an act of the state prevents the appearance of the principal for trial, the surety is relieved of the liability under the bond, such rule does not apply as to an arrest and detention by another state. Walls v. State, 111 Ga. App. 337, 141 S.E.2d 606 (1965).

Fact that the principal in a bail bond, given for appearance in the courts of this state for trial of an offense committed in this state, is unable to appear because the principal is confined in jail in another state for a violation of the laws of that state, is not a defense to a scire facias issued against the principal and the principal's surety pursuant to a forfeiture of the bond. Walls v. State, 111 Ga. App. 337, 141 S.E.2d 606 (1965).

Appeal from denial of surety is motion to dismiss and judgment for state. — When a surety orally objected during a bond forfeiture hearing to reinitiated bond forfeiture proceedings under O.C.G.A. § 17-6-70, and the trial court issued judgment rule absolutes in the state's favor and denied the surety's motion to dismiss, the matter was properly treated as a direct appeal. Griffin v. State, 194 Ga. App. 624, 391 S.E.2d 675 (1990).

Appellate jurisdiction from forfeiture order was proper. — Contrary to the state's contention, a direct appeal was authorized from an order forfeiting a surety's criminal appearance bond because the trial court entered a final judgment of forfeiture pursuant to O.C.G.A. § 17-6-71(b) after conducting an execution hearing; thus, appellate jurisdiction was proper. Anytime Bail Bonding, Inc. v. State, 299 Ga. App. 695, 683 S.E.2d 358 (2009), cert. denied, No. S10C0045, 2010 Ga. LEXIS 154 (Ga. 2010).

Cited in Green v. Spires, 189 Ga. 719, 7 S.E.2d 246 (1940); B & J Bonding Co. v. Bell, 232 Ga. 623, 208 S.E.2d 555 (1974); Stitt v. Busbee, 136 Ga. App. 44, 220 S.E.2d 59 (1975); Dubs v. State, 139 Ga. App. 236, 228 S.E.2d 213 (1976); Ace Bonding Co. v. State, 152 Ga. App. 477, 263 S.E.2d 256 (1979); Osborne Bonding Co. v. Harris, 179 Ga. App. 13, 345 S.E.2d 116 (1986); ACE Bonding Co. v. State, 180 Ga. App. 261, 349 S.E.2d 15 (1986); Jam Bonding Co. v. State, 184 Ga. App. 246, 361 S.E.2d 238 (1987); AAA Bonding Co. v. State, 192 Ga. App. 684, 386 S.E.2d 50 (1989); Spring-U Bonding Co. v. State, 200 Ga. App. 533, 408 S.E.2d 831 (1991); Smith v. Deering, 880 F. Supp. 816 (S.D. Ga. 1994).

Timing

Strict compliance with ten day notice period was required. — When the

Timing (Cont'd)

defendant failed to appear for a hearing, O.C.G.A. § 17-6-71(a) directed the trial court to forfeit the defendant's bond, issue a bench warrant, order an execution hearing, and notify the surety of the execution hearing within ten days; because notice was not sent to the surety until 11 days passed, the forfeiture case should have been dismissed. Anytime Bail Bonding, Inc. v. State of Georgia, 350 Ga. App. 288, 828 S.E.2d 662 (2019).

Forfeiture allowed in event of less than strict compliance. — Trial court did not err in forfeiting the bond for the principal's failure to appear for arraignment even though the state served the surety 12 days after the principal's failure to appear; O.C.G.A. § 17-6-71 does not bar forfeiture in the event of less than strict compliance. Classic City Bonding Co. v. State, 256 Ga. App. 577, 568 S.E.2d 834 (2002).

Triggering dates for the applicable statutory notice and hearing provisions in bond forfeiture proceedings are not limited to calculation from the date of a principal's initial time of required appearance and failure to appear; the statute allows initiation of the notice and hearing procedures after any time of required appearance and failure to appear thereat. Griffin v. State, 194 Ga. App. 624, 391 S.E.2d 675 (1990).

Expiration date of bond. — It would be unrealistic to limit a bond to a single, specified date and not to require that the bond be continued in effect until the appeal is finally decided. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Time for order and notice of bond forfeiture. — Trial court is not required to sign a forfeiture order on the same day as the defendant's failure to appear as a condition to issuing a judgment absolute. The "end of the court day" language in O.C.G.A. § 17-6-71(a) is directory and not a limitation of the court's authority, particularly when the surety is not harmed. Easy Out Bonding v. State, 224 Ga. App. 706, 481 S.E.2d 834 (1997); Anytime Bonding Co. v. State, 228 Ga. App. 232, 491 S.E.2d 399 (1997).

Although the language of the first sentence of O.C.G.A. § 17-6-71(a) requires a trial court to enter an order of forfeiture of bond on the same court day that the defendant failed to appear, this language has been held to be directory, and the holding that the language is directory was not superseded by a 2009 amendment to the statute. Don Johnson Bonding Co. v. State of Ga., 342 Ga. App. 387, 803 S.E.2d 774 (2017).

Delay in execution hearings. — Surety must show harm as well as error before the surety will be relieved of liability based on failure to conduct an execution hearing within the time prescribed by O.C.G.A. § 17-6-71. A surety's failure to keep track of the surety's indemnitors was not caused by delayed execution hearings, but was the result of the surety's erroneous assumption that the surety was relieved of liability under the bonds -- by operation of law -- 150 days after the principals' initial failure to appear in court. United States Bonds v. State, 224 Ga. App. 758, 481 S.E.2d 887 (1997); Osborne Bonding & Sur. Co. v. State, 228 Ga. App. 383, 491 S.E.2d 837 (1997).

Surety showed no harm when instead of setting a hearing after the principal failed to appear for trial, the trial court placed the case on a bench warrant calendar, then scheduled a hearing and gave the surety notice of the hearing after the principal failed to appear at the calendar call. Accordingly, it was proper to order forfeiture of the bond. Troup Bonding Co. v. State of Ga., 292 Ga. App. 5, 663 S.E.2d 734 (2008).

Continuance did not render original notice invalid. — Final judgment of forfeiture on a criminal appearance bond posted by the surety was proper because the surety received notice of the execution hearing within the statutory time period under O.C.G.A. § 17-6-71(a) and the execution hearing took place within the required window. That the state sought and obtained a continuance from the originally scheduled date for the execution hearing did not magically render the original notice invalid; because the original notice was valid, it was also not later invalidated by a subsequent notice of a new hearing date. Powell v. State, 313 Ga. App. 535, 722 S.E.2d 158 (2012).

Notice

Notice. — Unlike O.C.G.A. § 17-6-71(a), which requires that a notice of the hearing be sent to the surety, § 17-6-71(b) does not expressly require that a notice of judgment be sent to the surety. Reliable Bonding Co. v. State, 262 Ga. App. 280, 585 S.E.2d 192 (2003).

Notice sufficient for final judgment of forfeiture. — Trial court did not err when the court entered a final judgment of forfeiture because the first occasion for the satisfaction of the notice requirement arose when the defendant failed for a second time to appear at a pretrial hearing after the hearing was rescheduled due to the fact that notice was not given to the surety. Furthermore, because notice was given to the surety within ten days of the second hearing, there was strict compliance with the statutory notice requirement under O.C.G.A. § 17-6-71(a). Northeast Atlanta Bonding Co. v. State, 308 Ga. App. 573, 707 S.E.2d 921 (2011).

Substantial compliance with notice requirement. — Trial court properly denied a surety's motion to dismiss the state's motion for bond forfeiture regarding a principal who failed to appear as the state substantially complied with the notice requirements of O.C.G.A. § 17-6-71(a) even though the surety did not submit the surety's motion until 15 days after the failure to appear and did not serve the surety with notice of the motion until 22 days from the date of the principal's failure to appear. Further, the surety failed to show any harm from the alleged notice violation. Northeast Atlanta Sur. Co. v. Perdue, 294 Ga. App. 32, 668 S.E.2d 508 (2008).

Lack of notice to surety. — If the record shows on the record's face noncompliance with statutory service and notice requirements, the proceedings and resultant judgment must be set aside. Osborne Bonding Co. v. State, 163 Ga. App. 648, 295 S.E.2d 577 (1982) (construing section prior to 1982 amendment).

OPINIONS OF THE ATTORNEY GENERAL

Bond forfeitures reduced to judgment. — In the absence of any specific statutory authority, bond forfeitures which have been reduced to judgment by a rule absolute may not be settled or satisfied by a compromise agreement. 1989 Op. Att'y Gen. U89-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 141 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, § 329 et seq.

ALR. — Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371; 147 A.L.R. 1428; 148 A.L.R. 1400; 150 A.L.R. 1447; 151 A.L.R. 1462; 152 A.L.R. 1459; 153 A.L.R. 1431; 154 A.L.R. 1456; 156 A.L.R. 1457; 157 A.L.R. 1456.

Right to recover cash bail or securities taken without authority, 44 A.L.R. 1499; 48 A.L.R. 1430.

Failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite arraignment and plea, 90 A.L.R. 298.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Dismissal or vacation of indictment as terminating liability or obligation of surety or bail bond, 18 A.L.R.3d 1354.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

17-6-72. Conditions not warranting forfeiture of bond for failure to appear; remission of forfeiture.

(a) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court by the written statement of a licensed physician that the principal on the bond was prevented from attending court due to a mental or physical disability or the principal on the bond was receiving inpatient treatment as involuntary treatment, as such terms are defined in Code Section 37-3-1.

(b) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that the principal on the bond was prevented from attending because he or she was detained by reason of arrest, sentence, or confinement in a penal institution or jail in the State of Georgia, or so detained in another jurisdiction, or because he or she was involuntarily confined or detained pursuant to court order in a mental institution in the State of Georgia or in another jurisdiction. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement. Such notice may be sent from the holding institution by mail or e-mail or delivered by hand or by facsimile machine. Upon the presentation of such written notice to the clerk of the proper court, the prosecuting attorney, and the sheriff or other law enforcement officer having jurisdiction over the case, along with a letter of intent to pay all costs of returning the principal to the jurisdiction of the court, such notice and letter shall serve as the surety's request for a detainer or hold to be placed on the principal. Should there be a failure to place a detainer or hold within ten business days of the surety's service of a detainer or hold request, and after such presentation of such notice and letter of intent to pay costs, the surety shall then be relieved of the liability for the appearance bond without further order of the court.

(c) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that prior to the entry of the judgment on the forfeiture the principal on the bond is in the custody of the sheriff or other responsible law enforcement agency. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement. Such notice may be sent from the holding institution by mail or e-mail or delivered by hand or by facsimile machine. Upon presentation of such written notice to the clerk of the proper court, the prosecuting attorney, and the sheriff or other law enforcement officer having jurisdiction over the case along with a letter of intent to pay all costs of returning the principal to the jurisdiction of the court, such notice and letter shall serve as the surety's request for a detainer or hold to be placed against the principal. Should there be a

failure to place a detainer or hold within ten business days of the surety's service of a detainer or hold request, and after presentation of such notice and letter of intent to pay costs, the surety shall then be relieved of the liability for the appearance bond without further order of the court.

(c.1) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that the principal on the bond was prevented from attending because he or she was deported or removed from the United States by federal authorities. Official documentation from a federal official or agency shall be considered proof of the principal's deportation or removal. Such documentation may be delivered by mail or e-mail or delivered by hand or by facsimile machine.

(d) In cases in which subsection (e) of this Code section is not applicable, on application filed within 120 days from the payment of judgment, the court shall order remission under the following conditions:

(1) Provided the bond amount has been paid within 120 days after judgment and the delay has not prevented prosecution of the principal and upon application to the court with prior notice to the prosecuting attorney of such application, said court shall direct remission of 95 percent of the bond amount remitted to the surety if the principal is produced or otherwise appears before the court that has jurisdiction of the bond within such 120 day period. Should the surety, within two years of the principal's failure to appear, locate the principal in the custody of the sheriff in the jurisdiction where the bond was made or in another jurisdiction causing the return of the principal to the jurisdiction where the bond was made, apprehend, surrender, or produce the principal, if the apprehension or surrender of the principal is substantially procured or caused by the surety, or if the location of the principal by the surety causes the adjudication of the principal in the jurisdiction in which the bond was made, the surety shall be entitled to a refund of 50 percent of the bond amount. The application for 50 percent remission shall be filed no later than 30 days following the expiration of the two-year period following the date of judgment; or

(2) Remission shall be granted upon condition of the payment of court costs and of the expenses of returning the principal to the jurisdiction by the surety.

(e)(1) If, within 120 days from payment of the judgment, the surety surrenders the principal to the sheriff or responsible law enforcement officer, or said surrender has been denied by the sheriff or responsible law enforcement officer, or the surety locates the principal in custody

in another jurisdiction, the surety shall only be required to pay costs and 5 percent of the face amount of the bond, which amount includes all surcharges. If it is shown to the satisfaction of the court, by the presentation of competent evidence from the sheriff or the holding institution, that said surrender has been made or denied or that the principal is in custody in another jurisdiction or that said surrender has been made and that 5 percent of the face amount of the bond and all costs have been tendered to the sheriff, the court shall direct that the judgment be marked satisfied and that the writ of fieri facias be canceled.

(2)(A) The court shall direct that the judgment be marked satisfied and that the writ of fieri facias be canceled, if within 120 days from payment of the judgment, the surety:

(i) Tenders an amount equal to 5 percent of the face amount of the bond and all costs to the sheriff; and

(ii) Provides, in writing, the court and the prosecuting attorney for the court that has jurisdiction of the bond with competent evidence giving probable cause to believe that the principal is located in another jurisdiction within the United States and states that it will provide for the reasonable remuneration for the rendition of the principal, as estimated by the sheriff; and

(B) The prosecuting attorney for the court that has jurisdiction of the bond:

(i) Declines, in writing, to authorize or facilitate extradition; or

(ii) Within ten business days of the notice provided pursuant to division (2)(A)(ii) of this subsection, fails to enter the appropriate extradition approval code into the computerized files maintained by the Federal Bureau of Investigation National Crime Information Center thereby indicating an unwillingness to extradite the principal.

History. — Ga. L. 1965, p. 266, §§ 1-3; Code 1981, § 17-6-72; Ga. L. 1982, p. 1224, § 2; Ga. L. 1982, p. 1658, § 2; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 1203, § 3; Ga. L. 1985, p. 982, § 1; Ga. L. 1986, p. 1588, § 4; Ga. L. 1987, p. 1342, § 4; Ga. L. 1989, p. 556, § 2; Ga. L. 1990, p. 2336, § 2; Ga. L. 1992, p. 2933, § 4; Ga. L. 1996, p. 1233, § 3; Ga. L. 2009, p. 688, § 2A/HB 147; Ga. L. 2013, p. 1106, § 1/SB 225; Ga. L. 2015, p. 1217, § 3/SB 195.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-11. Conditioning of appearance bond or recognizance on appearance by accused before court at time fixed for arraignment, § 17-6-17.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 212 (1989).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 17-6-72 does not violate the anti-gratuities clause of the Georgia Constitution since by apprehending absconded criminals and delivering the criminals to the state bail bonding companies perform a valuable service for the state inasmuch as the companies relieve law enforcement officers from the duty, thereby permitting officers to direct their energies to other areas of law enforcement. AAA Bail Bonding Co. v. State, 259 Ga. 411, 383 S.E.2d 125 (1989).

The 1987 and 1989 versions of O.C.G.A. § 17-6-72(f) violated the right to due process under the state and federal constitutions to the extent the statute required the surety to pay the judgment in full before being permitted to present arguments in support of remission. State v. Johnson, 261 Ga. 363, 404 S.E.2d 563 (1991).

Purpose. — Intention of the General Assembly in enacting Ga. L. 1965, p. 266, §§ 1-3 (see O.C.G.A. § 17-6-72) was to supply a remedy for the exigency of former Code 1933, § 27-906 (see O.C.G.A. § 17-6-71). Stitt v. Busbee, 136 Ga. App. 44, 220 S.E.2d 59 (1975).

Time for filing. — O.C.G.A. § 17-6-72 sets a limited time period for filing and measures the time from the surety's payment of judgment on the bond rather than from the apprehension of the principal. This is required even when the principal is found and returned at some time beyond that period. State v. Hightower, 199 Ga. App. 770, 406 S.E.2d 117 (1991).

Surety was not entitled to any remission of the bond payment because the surety did not apply for remission within 90 days of paying the judgment as the surety could have done inasmuch as the principal had been apprehended with the surety's help 34 days after payment. State v. Hightower, 199 Ga. App. 770, 406 S.E.2d 117 (1991).

Forfeiture exception in O.C.G.A. § 17-6-72(b). — Deportation of an illegal alien to Mexico with an inability to return to the United States is not the functional equivalent of a "sentence" and resulting "detention" as contemplated by O.C.G.A. § 17-6-72(b). Vargas v. State, 243 Ga. App. 725, 534 S.E.2d 173 (2000).

Construction of § 17-6-72(d)(1). — Because the purpose of O.C.G.A. § 17-6-72(d)(1) was remedial and had to therefore be construed in favor of the surety in interpreting the statute and avoiding a meaningless result, the trial court properly allowed a surety a remission of 50 percent of the bond amount since the surety filed the surety's application for the remission at any time within 30 days following the expiration of the two-year period following the date of judgment. State of Ga. v. Free At Last Bail Bonds, 285 Ga. App. 734, 647 S.E.2d 402 (2007).

Location of principal in another jurisdiction. — Surety met the requirements of O.C.G.A. § 17-6-72(d)(1) by locating the principal in custody under an alias in another jurisdiction and placing a "hold" or detainer on the principal. Osborne Bonding & Sur. Co. v. State, 224 Ga. App. 459, 480 S.E.2d 900 (1997).

Remission of forfeiture. — Surety who advised both the county where the bond was issued and the county where the principal was arrested of the principal's status and identity substantially procured or caused the principal's apprehension and return under the terms of the 1992 version of O.C.G.A. § 17-6-72. Osborne Bonding & Sur. Co. v. State, 224 Ga. App. 590, 481 S.E.2d 578 (1997).

Since a surety on four criminal bonds did not pay the judgments on its forfeited bonds, O.C.G.A. § 17-6-72(d)(3), allowing reduction, rather than § 17-6-72(d)(1), allowing remission, controlled. Because the individuals were all arrested by county authorities without any involvement of the surety, the surety failed to show that the surety was entitled to a remission of the bonds. Confidential Bonding Co. v. State of Ga., 279 Ga. App. 794, 632 S.E.2d 684 (2006).

Under the plain and ordinary language of O.C.G.A. § 17-6-72(d)(1), a bondsman who failed to assist in the arrest of the principal of its bond was not entitled to a 50 percent remission of the bond, and the district attorney's consent to the bonds-

man's motion had no legal effect as such was not accepted by the trial court. Joe Ray Bonding Co. v. State of Ga., 284 Ga. App. 687, 644 S.E.2d 501 (2007).

Consent to reduction. — State's participation in a proposed consent order to allow reduction of the payment on a forfeited bond did not conclusively establish that one of the statutory conditions for reduction was met and the court was authorized to require that such fact be established by the surety through the prescribed evidence. Osborne Bonding & Sur. Co. ex rel. Castaneda v. State, 225 Ga. App. 896, 485 S.E.2d 235 (1997).

Judgment of forfeiture not set aside. — Surety, which did not receive notice of the entry of a judgment of forfeiture in time to obtain remission of the forfeited sum, under O.C.G.A. § 17-7-72(d)(10), was not entitled to have the judgment set aside as the surety received notice of the hearing at which the forfeiture was considered and chose not to appear or determine whether a judgment was entered following the hearing. Reliable Bonding Co. v. State, 262 Ga. App. 280, 585 S.E.2d 192 (2003).

Forfeiture exceptions did not apply. — Bond forfeiture exceptions found in O.C.G.A. § 17-6-72(b), (c) did not apply to an alien's bond forfeiture because the alien's failure to appear at an arraignment was because the alien had been deported, not because the alien was in a penal institution or jail because of an arrest or sentence, was confined to a mental institution because of a court order, or was in the custody of a sheriff or other responsible law enforcement agency. Gomez-Ramos v. State, 297 Ga. App. 113, 676 S.E.2d 382 (2009).

Criminal history calculation. — Sentence imposed for defendant's 2008 bank robbery was vacated and the case was remanded for resentencing because the defendant's bond forfeiture should not factor into the calculation of the defendant's criminal history under U.S. Sentencing Guidelines Manual § 4A1.2(a) (2008) if the defendant's failure to attend the February 2008 arraignment was involuntary under O.C.G.A. § 17-6-72(b), and the district court, assuming that all Georgia bond forfeitures should be considered convictions for purposes of calculating criminal history under the sentencing guidelines pursuant to O.C.G.A. § 40-13-58, did not determine whether the defendant's failure to attend the arraignment was willful or involuntary. United States v. Daniel, 358 Fed. Appx. 79 (11th Cir. 2009) (Unpublished).

Cited in Stitt v. Busbee, 136 Ga. App. 44, 220 S.E.2d 59 (1975); Caffey v. State, 140 Ga. App. 275, 231 S.E.2d 77 (1976); AAA Bonding Co. v. State, 192 Ga. App. 684, 386 S.E.2d 50 (1989); Smith v. Deering, 880 F. Supp. 816 (S.D. Ga. 1994); Northeast Atlanta Bonding Co. v. State, 308 Ga. App. 573, 707 S.E.2d 921 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Forfeiture date depends on wording of bond. — Date of forfeiture of the appearance bond depends entirely upon the wording of each particular bond. In the event the bond indicates an appearance at a term of court, forfeiture does not occur until the end of that particular term of court. However, if the bond is returnable on a specific date, then the 60-day provision commences to run from that date. 1965-66 Op. Att'y Gen. No. 66-30.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 171.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 165 et seq., 273 et seq., 348.

ALR. — Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371; 147 A.L.R. 1428; 148 A.L.R. 1400; 150 A.L.R. 1447; 151 A.L.R. 1462; 152 A.L.R. 1459; 153 A.L.R. 1431; 154 A.L.R. 1456; 156 A.L.R. 1457; 157 A.L.R. 1456.

Right to recover back cash bail or securities taken without authority, 48 A.L.R. 1430.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in other jurisdiction, 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

17-6-73. Address of principal and surety on bond or recognizance.

Every bond or recognizance given to secure the appearance of any person in any criminal proceeding shall have entered thereon the mailing address of the principal and each surety.

History. — Code 1981, § 17-6-73, enacted by Ga. L. 1982, p. 1224, § 2.

JUDICIAL DECISIONS

Bond without surety's address is valid. — Although the language of the statute requires that the surety's address be included on the bond, that language is directory, and a bond which does not include the surety's address is enforceable against the surety. Jam Bonding Co. v. State, 184 Ga. App. 246, 361 S.E.2d 238 (1987).

Purpose of the address requirement is to facilitate identifying and locating the surety, and the absence of the address does not in and of itself affect the validity of the bond contract. Jam Bonding Co. v. State, 184 Ga. App. 246, 361 S.E.2d 238 (1987).

ARTICLE 4

BONDS FOR GOOD BEHAVIOR AND TO KEEP THE PEACE

PART 1

BONDS FOR GOOD BEHAVIOR

JUDICIAL DECISIONS

Proceedings under bond provisions are criminal or quasi-criminal in nature, and the statute's provisions therefore must be construed in favor of the individual against whom the statutes are applied. Dukes v. Dukes, 119 Ga. App. 842, 168 S.E.2d 902 (1969).

17-6-90. Issuance of notice to appear for show cause hearing; requirement of bond; hearing; payment of court costs by affiant; issuance of order of arrest.

(a) Any judicial officer authorized to hold a court of inquiry may, upon the application of others under oath or upon his or her own

motion, issue a notice to appear for a show cause hearing to any person whose conduct in the county is sufficient to justify the belief that the safety of any one or more persons in the county or the peace or property of the same is in danger of being injured or disturbed thereby. Such show cause hearing shall be held within seven days of such application or motion. Upon sufficient cause being shown, the court may require from the person a bond with sureties for such person's good behavior with reasonable conditions to ensure the safety of persons or property in the county or the preservation of the peace of the county for a period of up to six months.

(b) All bonds posted under this Code section shall be returnable in the court which required the bond and shall be amendable in the court's discretion.

(c) If it is determined at a hearing that there was not sufficient cause for a hearing to have been held, the affiant who caused the bond to be imposed shall pay all court costs.

(d) At the time of or at any time after the filing of an application as provided in subsection (a) of this Code section, the judicial officer may, in his or her sound discretion, issue an order of arrest for the person or persons named in the application if the sworn allegations regarding the conduct of such person or persons is sufficient to justify the belief that there is imminent danger of injury to any person in the county, damage to any property in the county, or disturbance of the peace of the county. Upon the arrest of such person, a hearing as provided in subsection (a) of this Code section shall be held within 24 hours; otherwise, such person shall be released on bond with sureties and reasonable conditions for his or her good behavior until a hearing can be held.

(e) As used in this Code section, the term "county" means the county in which the judicial officer is authorized to hold a court of inquiry.

History. — Orig. Code 1863, § 4627; Code 1868, § 4651; Code 1873, § 4749; Code 1882, § 4749; Penal Code 1895, § 1235; Penal Code 1910, § 1317; Code 1933, § 76-101; Ga. L. 1974, p. 322, § 1; Ga. L. 1978, p. 1924, § 1; Ga. L. 1986, p. 1151, § 1; Ga. L. 2007, p. 493, § 1/SB 106; Ga. L. 2013, p. 584, § 3/HB 146.

JUDICIAL DECISIONS

Former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110) were penal statutes. Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940); Foster v. Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

Strict construction. — Former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110) were to be strictly construed in favor of the individual against whom the statutes are sought to be applied. Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940).

Standing to challenge statute. — Plain language of Georgia's good behavior bond statute, O.C.G.A. § 17-6-90(a), controls two things: (1) the timing and circumstances under which a judicial officer may issue a notice to appear for a show cause hearing; and (2) what action that

judicial officer may take following the show cause hearing, including what conditions may be placed on a peace bond. Parker v. Leeuwenburg, 300 Ga. 789, 797 S.E.2d 908 (2017).

In a declaratory judgment action facially challenging Georgia's good behavior bond statute, O.C.G.A. § 17-6-90, the trial court judgment granting summary judgment to the appellees was vacated because § 17-6-90(a) did not regulate the appellants' conduct and, in the absence of current peace bonding proceedings or even an allegation that a judicial officer in the county would exercise such discretion, the appellants failed to show nothing more than a hypothetical concern regarding § 17-6-90(a) and, therefore, lacked standing to challenge it. Parker v. Leeuwenburg, 300 Ga. 789, 797 S.E.2d 908 (2017).

Power of superior court judge to issue peace warrant for the arrest and jailing of a person. — Judge of the superior court did not have power under former Code 1933, § 76-101 (see O.C.G.A. § 17-6-90) to issue a peace warrant for arrest and commitment to jail of a person upon grounds of that section; but the judge has such power under former Code 1933, § 76-201 (see O.C.G.A. § 17-6-110). Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940).

Jurisdiction of justices of the peace. — Jurisdiction to issue peace warrants and to hear and determine the cases arising thereunder was expressly conferred upon justices of the peace by former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110). Young v. Fain, 121 Ga. 737, 49 S.E. 731 (1905).

Certiorari does not lie to these proceedings before a justice of the peace. Stephens v. Wallis, 75 Ga. 726 (1885).

Bar to investigation of case behind merits. — Lawful process issued by a court of competent jurisdiction is a bar to any investigation of the merits of the case behind such process. Young v. Fain, 121 Ga. 737, 49 S.E. 731 (1905).

Magistrate has no authority to insert in the warrant directions to levy on property for costs. Stephens v. Wallis, 75 Ga. 726 (1885).

Cited in Britt v. Whitehall Income Fund, 891 F. Supp. 1578 (M.D. Ga. 1993).

OPINIONS OF THE ATTORNEY GENERAL

Return to county of issuance. — Peace warrant proceedings must be returned to the superior court of the county in which the warrant was issued. 1974 Op. Att'y Gen. No. U74-7.

Collection of costs in peace warrant proceeding. — Collection of costs in a peace warrant proceeding which was never returned to the superior court for disposition would be a violation of former Code 1933, §§ 89-9909 and 89-9910 (see O.C.G.A. § 45-11-5) and a misdemeanor. 1974 Op. Att'y Gen. No. U74-7.

Purpose of provision for return to state court. — Former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110) vested jurisdiction for the return of good behavior or peace bonds in the state court in counties in which such a court was established. That change in jurisdiction, not procedure, was the purpose of Ga. L. 1978, p. 1924. 1978 Op. Att'y Gen. No. U78-50.

Probate court jurisdiction. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, the court may also issue warrants and require bond pursuant to either O.C.G.A. § 17-6-90 or O.C.G.A. § 17-6-110. 1995 Op. Att'y Gen. No. U95-1.

17-6-91. Extension of bond by court; right of sureties to surrender principal.

A bond for good behavior posted pursuant to Code Section 17-6-90 may be extended for a period of six months by the court which required the bond. The sureties on the bond shall have the privilege of surrendering their principal as in other cases of bail.

History. — Orig. Code 1863, § 4629; Code 1868, § 4653; Code 1873, § 4751; Code 1882, § 4751; Penal Code 1895, § 1237; Penal Code 1910, § 1319; Code 1933, § 76-103; Code 1981, § 17-6-93; Ga. L. 1986, p. 1151, § 2; Code 1981, § 17-6-91, as redesignated by Ga. L. 2013, p. 584, § 3/HB 146.

Editor's notes. — Ga. L. 2013, p. 584, § 3/HB 146, repealed former Code Section 17-6-91, pertaining to the right of a person to require a bond against a spouse, effective July 1, 2013. The former Code section was based on Orig. Code, 1863, § 4634; Code 1868, § 4658; Code 1873, § 4756; Code 1882, § 4756; Penal Code 1895, § 1242; Penal Code 1910, § 1324; Code 1933, § 76-104.

17-6-92. Violation of bond; contempt of court.

Upon oral or written complaint by the injured party or upon motion by the prosecuting attorney, the court may, in its discretion, issue a rule for contempt against a party who violates the bond posted pursuant to Code Section 17-6-90. Upon hearing the rule, if the court finds that there has been a violation of the bond, the court may impose a sentence for contempt of court. If it should appear to the court from the evidence and the court finds that the violation of the bond was provoked or brought about by the conduct of the prosecuting witness, the witness, after notice and the opportunity for a hearing, may be ruled for contempt of court and sentenced as provided by law.

History. — Code 1981, § 17-6-94, enacted by Ga. L. 1986, p. 1151, § 3; Code 1981, § 17-6-92, as redesignated by Ga. L. 2013, p. 584, § 3/HB 146.

Editor's notes. — Ga. L. 2013, p. 584, § 3/HB 146, repealed former Code Section 17-6-92, pertaining to institution of action for breach of bond and disposition of recovery, effective July 1, 2013. The former Code section was based on Orig. Code 1863, § 4628; Code 1868, § 4652; Code 1873, § 4750; Code 1882, § 4750; Penal Code 1895, § 1236; Penal Code 1910, § 1318; Code 1933, § 76-102; Ga. L. 1981, p. 622, § 1.

17-6-93. Redesignated.

Editor's notes. — Ga. L. 2013, p. 584, § 3/HB 146, effective July 1, 2013, redesignated former Code Section 17-6-93 as present Code Section 17-6-91.

17-6-94. Redesignated.

Editor's notes. — Ga. L. 2013, p. 584, § 3/HB 146, effective July 1, 2013, redesignated former Code Section 17-6-94 as present Code Section 17-6-92.

Part 2

Bonds to Keep the Peace

JUDICIAL DECISIONS

Nature of peace bond proceedings. — In the strictest sense, proceedings requiring a peace bond are neither criminal nor civil proceedings, although the proceedings are more in the nature of criminal than civil proceedings. Foster v.

Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

Primary purpose of the peace warrant proceeding is not to award the person seeking the warrant's protection money damages for injuries which the person may receive, but to prevent violence and keep the peace. Foster v. Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

Cited in Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Return and final disposition of peace warrant. — While a peace warrant may be issued by a judicial officer authorized to hold a court of inquiry, the warrant is returnable to the superior court, and can be finally disposed of only by the superior court, not by the magistrate. 1970 Op. Att'y Gen. No. U70-121.

Duration of bondsman's liability. — Bondsman is not relieved of the bondsman's obligations under a peace bond after a breach of the bond's terms, even though the bondsman's returns the accused to the court, and such accused is committed to jail. The bondsman remains liable for any breach of the bond as long as the bond is in effect. 1970 Op. Att'y Gen. No. U70-121.

17-6-110. Issuance of warrant; requirement of bond; hearing; payment of costs by affiant.

(a) Upon the information of any person, under oath, that he is in fear of bodily harm to himself or his family, or of violent injury to his property, from another person, any judicial officer authorized to hold a court of inquiry may issue his warrant requiring the arrest of such other person. If, after the return of the warrant and upon hearing the evidence of both parties, the court is satisfied that probable cause for such fear exists, the court may require the accused to give bond, with good security, to keep the peace as against the person, family, or property of the affiant. If the accused fails to give bond, the court shall commit him to jail. Any person against whom a warrant issues must, within 24 hours, be brought for a hearing before the court which issued the warrant or be released on bond by the sheriff.

(b) Nothing in this Code section shall prohibit the sheriff from releasing the person at any time prior to the hearing after posting bond. The amount of the bond shall be set by the sheriff but in no event shall the amount set by the sheriff exceed $1,000.00. Such bond shall contain the same conditions as a bond required after a hearing by the court of inquiry, except that, in counties in which a state court is established, all bonds posted under this Code section shall be returnable in the state court rather than in the superior court. Within five days after being released on bond by the sheriff, the person shall be entitled to a hearing before the court of inquiry.

(c) If it is determined at the hearing that there was not sufficient cause for the warrant to have been issued, the affiant who caused the warrant to be issued shall pay all court costs.

(d) A judicial officer shall not be required to issue the warrant provided for in this Code section until the person requesting the issuance of the warrant deposits with the judicial officer a sum, not to exceed $12.00, to be applied against the total cost in the proceedings. At the termination of the proceedings, any part of the deposit remaining because of dismissal or because the costs are assessed against another party shall be refunded to the depositor. If the person requesting the issuance of the warrant is unable to pay any deposit, fee, or other cost which would normally be required in the court and subscribes an affidavit to the effect that because of his indigence he is unable to pay these costs, the person shall be relieved from paying the costs and his rights shall be the same as if he had paid the costs.

History. — Laws 1850, Cobb's 1851 Digest, p. 865; Code 1863, § 4630; Code 1868, § 4654; Code 1873, § 4752; Code 1882, § 4752; Penal Code 1895, § 1238; Penal Code 1910, § 1320; Code 1933, § 76-201; Ga. L. 1962, p. 121, § 1; Ga. L. 1974, p. 322, § 2; Ga. L. 1978, p. 1924, § 2; Ga. L. 1990, p. 8, § 17.

JUDICIAL DECISIONS

Former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110) were penal statutes. Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940); Foster v. Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

Strict construction. — Former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110) were to be strictly construed in favor of the individual against whom the statutes are sought to be applied. Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940).

Jurisdiction of justices of the peace. — Jurisdiction to issue peace warrants was expressly conferred upon justices of peace by former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110). Young v. Fain, 121 Ga. 737, 49 S.E. 731 (1905).

What constitutes a breach of the peace. — To call a person a liar and raise a stick to strike the man, if in anger, is a menace of violence and is calculated to excite, alarm, or provoke a breach of the peace, and constitutes a breach of a bond to keep the peace. Rumsey v. Bullard, 5 Ga. App. 802, 63 S.E. 921 (1909).

Husband is competent to institute peace warrant proceedings against his wife. Foster v. Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

Peace officer not to act as negotiator. — In all cases when information reaches the peace officer, the officer should resort at once to the officer's authority, and not assume the role of a negotiator. Mitchell v. State, 71 Ga. 128 (1883).

What constitutes substantial compliance with section. — When a judge issues a peace warrant, not on information under oath of a person apprehensive of injury to the person, or family, or property by another, to appear before the judge at a stated time and place but in the discretion of the arresting officer to be allowed to go on the person's own recognizance, such warrant is not in compliance with former Code 1933, § 76-201 (see O.C.G.A. § 17-6-110). But if after arrest and release on the person's own recognizance the person arrested appears before the judge and is afforded a hearing at which evidence under oath is introduced to show danger of such injury to the person, family, or property of the person named in the warrant, this will be a substantial compliance with that section, affording the judge jurisdiction to order the giving of a bond to keep the peace, and on failure thereof to be committed to jail. Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940).

Power of superior court judge to issue peace warrant. — Judge of the

superior court did not have power under former Code 1933, § 76-101 (see O.C.G.A. § 17-6-90) to issue a peace warrant for arrest and commitment to jail of a person upon grounds therein stated; but the judge had such power under former Code 1933, § 76-201. Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940).

Presumption that bond is properly executed. — When a bond to keep the peace is executed in the terms prescribed by law, in order to sustain an action for the breach thereof, it is not necessary for the plaintiff to show that all of the steps prescribed by law for obtaining such a bond were in fact taken, there being a presumption that the bond was executed as the result of adherence to the statutory provisions. Jones v. Talmadge, 72 Ga. App. 50, 32 S.E.2d 926 (1945).

Sheriff's authority to accept peace bond. — County sheriff has no authority to accept a peace bond as the sheriff does a bond in a misdemeanor case, in the absence of an order of the committing officer rendered after judicial inquiry or after the accused has waived the accused's right to a preliminary hearing. Dukes v. Dukes, 119 Ga. App. 842, 168 S.E.2d 902 (1969).

When bond must be returned. — It is essential to the validity of a peace bond or good behavior bond that the proceedings be returned to the next term of the superior court after the bond is given, and failure to make the return on time vitiates the obligation. Newberry v. State, 238 Ga. 134, 231 S.E.2d 739 (1977).

Peace bond or bond for good behavior must be returned to the next term of the superior court, when the bond expires by the bond's own limitation, unless the bond is continued upon good cause shown. Newberry v. State, 238 Ga. 134, 231 S.E.2d 739 (1977).

Hearing required absent waiver. — In the absence of waiver, the law requires that the accused be given a preliminary hearing before exacting from the accused a peace bond. Dukes v. Dukes, 119 Ga. App. 842, 168 S.E.2d 902 (1969).

Amount of judgment on bond in case of breach. — In an action against the obligor and the obligor's sureties in a peace bond given in proceedings under this section, for a breach of the statute, judgment for the full amount of the penalty stipulated in the bond will be awarded against the defendant and the defendant's sureties in case of a recovery. Shirley v. Terrell, 134 Ga. 61, 67 S.E. 436 (1910).

When costs may be collected. — It is not lawful to collect any costs in a peace warrant case until after the warrant is returned to and passed upon by the superior court. Levar v. State, 103 Ga. 42, 29 S.E. 467 (1897).

Certiorari does not lie to these proceedings. Stephens v. Wallis, 75 Ga. 726 (1885).

Cited in Turner v. Austin, 236 Ga. 607, 225 S.E.2d 20 (1976); Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980); Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988); Bogan v. State, 255 Ga. App. 413, 565 S.E.2d 588 (2002); State v. Davis, 339 Ga. App. 214, 793 S.E.2d 507 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Duties of superior court. — Superior court must take hold of and finally dispose of all peace warrant cases, and determine upon whom the costs of the warrant shall fall. 1958-59 Op. Att'y Gen. p. 56.

Probate court jurisdiction. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, the probate court may also issue warrants and require bond pursuant to O.C.G.A. § 17-6-90 or O.C.G.A. § 17-6-110. 1995 Op. Att'y Gen. No. U95-1.

Any person posting a bond may waive the hearing provided by this section. 1974 Op. Att'y Gen. No. U74-103.

Purpose of provisions for return of bond to state court. — Former Code 1933, §§ 76-101 and 76-201 (see O.C.G.A. §§ 17-6-90 and 17-6-110) vested jurisdiction for the return of good behavior or peace bonds in the state court in counties in which such a court was established. That change in jurisdiction, not procedure, was the purpose of Ga. L. 1978, p.

1924. 1978 Op. Att'y Gen. No. U78-50.

Bond limit on sheriff. — Bond limit of $1,000.00 is imposed on the sheriff and does not affect the justice of the peace. 1974 Op. Att'y Gen. No. U74-103.

Assessment of costs against depositor. — Depositor should be charged for costs only to the extent that costs are assessed against the depositor and should not be required to pay costs charged against another party. The extent of the refund is determined by who is required to pay the costs. 1969 Op. Att'y Gen. No. 69-20.

Deposit held in trust by issuing officer. — The $12.00 deposit is held in trust by the officer who issues the warrant pending the outcome of the case, at which time the deposit's return or disposition will be governed by the cost liability of the parties. 1970 Op. Att'y Gen. No. U70-181.

When collection of costs permitted. — It is not lawful to collect any costs in a peace warrant case until after the warrant shall have been returned to and passed upon by the superior court. 1958-59 Op. Att'y Gen. p. 56.

17-6-111. Right of person to require bond against spouse.

A person may require a bond to keep the peace against the spouse of such person.

History. — Orig. Code 1863, § 4634; Code 1868, § 4658; Code 1873, § 4756; Code 1882, § 4756; Penal Code 1895, § 1242; Penal Code 1910, § 1324; Code 1933, § 76-205.

JUDICIAL DECISIONS

Cited in Foster v. Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

17-6-112. Actions constituting violations of bond; right of action for breach of bond generally; imposition of additional penalty for contempt of court; finding of prosecuting witness in contempt.

(a) Actual violence, a threat of violence, or any other act intended and calculated to excite alarm or to provoke a breach of the peace shall be a violation of the bond posted pursuant to Code Section 17-6-110. For every such act, the party at whose instance the bond was required shall have a right of action.

(b) In counties having a population of not less than 200,000 nor more than 250,000 according to the United States decennial census of 1950 or any future such census in which there is located a municipal court, upon oral or written complaint by the injured party, the court may in its discretion issue a rule for contempt against the offending defendant. Upon hearing the rule, if the court finds that there has been a violation of the bond, the court may, in addition to the remedy provided in subsection (a) of this Code section, impose a sentence for contempt of court. If it should appear to the court from the evidence and the court finds that the breach of the peace was provoked or brought about by the

conduct of the prosecuting witness, the witness may be ruled for contempt of court and sentenced as provided by law.

History. — Orig. Code 1863, § 4631; Code 1868, § 4655; Code 1873, § 4753; Code 1882, § 4753; Penal Code 1895, § 1239; Penal Code 1910, § 1321; Code 1933, § 76-202; Ga. L. 1959, p. 3085, § 1; Ga. L. 1982, p. 2107, § 16.

JUDICIAL DECISIONS

Cited in Talmadge v. Ruby, 90 Ga. App. 299, 83 S.E.2d 40 (1954).

RESEARCH REFERENCES

ALR. — What constitutes breach of peace bond, 54 A.L.R. 388.

17-6-113. Effect of provoking breach of bond.

If the person who required the bond provokes a violation thereof by the person who posted the bond, no recovery shall be had.

History. — Orig. Code 1863, § 4632; Code 1868, § 4656; Code 1873, § 4754; Code 1882, § 4754; Penal Code 1895, § 1240; Penal Code 1910, § 1322; Code 1933, § 76-203.

JUDICIAL DECISIONS

Cited in Talmadge v. Ruby, 90 Ga. App. 299, 83 S.E.2d 40 (1954).

17-6-114. Discharge or extension of bond by court.

The superior or state court, as the case may be, may discharge the bond at any time unless a motion is made to extend it, accompanied by evidence to satisfy the court of the necessity of the extension.

History. — Orig. Code 1863, § 4633; Code 1868, § 4657; Code 1873, § 4755; Code 1882, § 4755; Penal Code 1895, § 1241; Penal Code 1910, § 1323; Code 1933, § 76-204.

JUDICIAL DECISIONS

Action on peace bond generally. — Plaintiff's cause of action on a peace bond was predicated upon the breach of the bond's condition, and if the bond was in force and effect at the time of the breach, an action will lie until barred by the statute of limitations, even though no extension of the bond was made by the superior court pursuant to this section, after the breach of the bond and before the action was instituted. Jones v. Talmadge, 72 Ga. App. 50, 32 S.E.2d 926 (1945).

When return to be made. — It is essential to the validity of a peace bond or good behavior bond that the proceedings be returned to the next term of the supe-

rior court after the bond is given and failure to make the return on time vitiates the obligation. Dukes v. Dukes, 119 Ga. App. 842, 168 S.E.2d 902 (1969).

Review of motion to discharge peace officer. — Denial of a motion to discharge a peace bond is reviewable by the appellate courts of this state. Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980).

Cited in Hall v. Browning, 71 Ga. App. 835, 32 S.E.2d 424 (1944).

OPINIONS OF THE ATTORNEY GENERAL

Duties of superior court. — Superior court must take hold of and finally dispose of all peace warrant cases, and determine upon whom the costs of the warrant shall fall. 1958-59 Op. Att'y Gen. p. 56.

Hearing on motion to extend or discharge bond. — After a good behavior or peace bond has been properly returned to the court, the court should grant a hearing on a motion to discharge or extend the bond. 1978 Op. Att'y Gen. No. U78-50.

When costs collected. — It is not lawful to collect any costs in a peace warrant case until after the warrant shall have been returned to and passed upon by the superior court. 1958-59 Op. Att'y Gen. p. 56.

CHAPTER 7

PRETRIAL PROCEEDINGS

Article 1

General Provisions

Sec.

17-7-1. Jailing of prisoners where no jail in county or when deemed necessary by sheriff; fees and costs; authority to levy and collect tax.
17-7-2. When sheriff not required to receive prisoner from another county.
17-7-3. List of children in detention pending trial provided to chief judge and prosecuting attorney.

Article 2

Commitment Hearings

17-7-20. Persons who may hold courts of inquiry; procedure where offense committed in county which is member of regional jail authority.
17-7-21. Holding of court of inquiry by several judicial officers; procedure for deciding questions.
17-7-22. Powers of presiding officer in court of a municipal corporation to bind over or commit criminal offenders to jail.
17-7-23. Duties of court of inquiry; preclusion of certain courts from trying charges involving Code Section 16-11-126.
17-7-24. Time granted parties to prepare case and to secure counsel; granting of bail where hearing delayed.
17-7-25. Power of court to compel attendance of witnesses.
17-7-26. Authority to require bonds to secure appearance of witnesses.
17-7-27. Sheriffs and constables to accept bond for appearance of witnesses; approval of sureties by sheriff.
17-7-28. Hearing of evidence by court of inquiry; right of accused to testify; application of rules of evidence; effect of failure of accused to testify.
17-7-29. Commitment of defendant for different offense than stated in warrant.
17-7-30. Form of commitment.
17-7-31. Endorsement of names of state's witnesses on warrant.
17-7-32. Disposition of commitment form, warrant, and other papers; delivery of accused to person in charge of jail.
17-7-33. Billing and payment of costs of justice of the peace and constable [Repealed].
17-7-34. Effect of informality in commitment or prior proceedings.

Article 3

Indictments

17-7-50. Right to grand jury hearing within 90 days where bail refused; right to have bail set absent hearing within 90 day period.
17-7-50.1. Time for presentment of child's case to a grand jury; exception.
17-7-51. Special presentments treated as indictments; entry upon minutes; prosecutions upon special presentments.
17-7-52. Procedure for indictment or special presentment of peace officer for crime in performance of duties; notification; rights of officer.
17-7-53. Operation of two returns of "no bill" on charge as bar to future prosecution for same charge.
17-7-53.1. Quashing of second grand jury indictment or presentment bars further prosecution.
17-7-54. Form of indictment by grand jury.

Sec.
17-7-55. Empaneling concurrent grand juries.

Article 4

Accusations

17-7-70. Trial upon accusations in felony cases; trial upon accusations of felony and misdemeanor cases in which guilty plea entered and indictment waived.
17-7-70.1. Trial upon accusations in certain felony and misdemeanor cases; trial upon plea of guilty or nolo contendere.
17-7-71. Trials of misdemeanors; trial of misdemeanor motor vehicle violations; form and contents of accusations; amendment of accusation; service of amendment upon defendant; continuances.
17-7-72. Jurisdiction of probate courts to try certain drug and alcohol offenses.
17-7-73. Trial of litter offenses upon summons or citation without accusation.

Article 5

Arraignment and Pleas Generally

17-7-90. Issuance of bench warrant; execution; receiving bail, fixing bond, and approving sureties.
17-7-91. Date of arraignment; notice; service of notice and fee therefor; notice to surety on bond; arraignment; receipt and entering of plea; establishment of time for trial; effect of appearance and plea on notice requirement.
17-7-92. Service of notice of filing of indictment, special presentment, or accusation against corporation; return of service; failure of corporation to appear or enter plea; judgment and execution against corporate property.
17-7-93. Reading of indictment or accusation; answer of accused to charge; recordation of "guilty" plea and pronouncement of judgment; withdrawn guilty pleas; pleas by immigrants.
17-7-94. Recordation and effect of plea of "not guilty" or of standing mute.
17-7-95. Plea of nolo contendere in noncapital felony cases; imposition of sentence; use of plea in other proceedings; use of plea to effect civil disqualifications; imposition of sentence upon plea deemed jeopardy.
17-7-96. Prosecuting officer to enter arraignment and plea on indictment or accusation.
17-7-97. Proceedings upon failure of clerk to record arraignment and plea; effect of proceedings.

Article 6

Demurrers, Motions, and Special Pleas and Exceptions

PART 1

GENERAL PROVISIONS

17-7-110. Time for filing pretrial motions.
17-7-111. Demurrers and special pleas to be in writing; right to plead "not guilty" if demurrer or plea denied.
17-7-112. Plea of misnomer.
17-7-113. Time for making exception to form of indictment or accusation.

PART 2

INSANITY AND MENTAL INCOMPETENCY

17-7-129. Mental capacity to stand trial; release of competency evaluation to prosecuting attorney.
17-7-130. Proceedings upon plea of mental incompetency to stand trial.
17-7-130.1. Evidence as to defendant's sanity at time of offense; examination and testimony by psychiatrist or psychologist.

Sec.
17-7-131. Proceedings upon plea of insanity or mental incompetency at time of crime.

PART 3

CHANGE OF VENUE

17-7-150. Procedures for change of venue; transfer of case; appeal from denial of change of venue.
17-7-151. Transfer upon change of venue of evidence, list of witnesses, and papers; issuance of subpoenas to witnesses and others by clerk of court selected to try case.
17-7-152. Subsequent changes of venue.

Article 7

Demand for Trial; Announcement of Readiness for Trial

17-7-170. Demand for speedy trial; service; discharge and acquittal for lack of prosecution; expiration; reversal on direct appeal; mistrial and retrial; special pleas of incompetency.
17-7-171. Time for demand for speedy trial in capital cases; discharge and acquittal when no trial held before end of two court terms of demand; counting of terms in cases in which death penalty is sought; special pleas of incompetency.
17-7-172. Requirement of announcement by state of readiness for trial prior to announcement by defendant; speedy trial.

Article 8

Procedure for Securing Attendance of Witnesses at Grand Jury or Trial Proceedings

17-7-190. Subpoena of material witnesses for state for appearance before grand jury; furnishing of prosecuting officers with list of persons subpoenaed.
17-7-191. Subpoena process for witnesses of defendant; when subpoenas may be extended to witnesses outside of county.
17-7-192. Continuance for nonattendance of witnesses not subpoenaed by defendant.

Article 9

Discovery

17-7-210, 17-7-211. [Repealed].

RESEARCH REFERENCES

Am. Jur. Trials. — Controlling Trial Publicity, 1 Am. Jur Trials 303. Coram Nobis Practice in Criminal Cases, 18 Am. Jur. Trials 1.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Delivery of accused offenders from court-martial jurisdiction to civil authority for trial, § 38-2-347. Detainers requesting that Department of Offender Rehabilitation retain custody of inmate pending delivery of inmate to proper authorities to stand trial upon pending indictment or accusation, T. 42, C. 6. Motions, demurrers, special pleas, and certain items in criminal matters, Uniform Superior Court Rules, Rule 31.

RESEARCH REFERENCES

ALR. — Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.

17-7-1. Jailing of prisoners where no jail in county or when deemed necessary by sheriff; fees and costs; authority to levy and collect tax.

When there is no secure jail in a county or when it is deemed necessary by the sheriff, any person committing an offense in the county may be sent to a jail in another county determined to be suitable by the sheriff. The county where the offense is committed shall be primarily liable for jail fees and costs and shall pay the same monthly in advance to the county holding the prisoner. For the purpose of raising funds to pay the costs, the county governing authority may levy and collect an additional tax.

History. — Ga. L. 1865-66, p. 40, §§ 1-3; Code 1868, § 4642; Code 1873, § 4740; Code 1882, § 4740; Penal Code 1895, § 920; Penal Code 1910, § 945; Code 1933, § 27-416; Ga. L. 1995, p. 291, § 1.

Cross references. — Jails generally, T. 42, C. 4.

JUDICIAL DECISIONS

Sheriff, not judge, has the authority to transfer a prisoner awaiting trial to a jail in another county, and then only when the jail in the county where the prisoner is confined is in an unsafe condition. Howington v. Wilson, 213 Ga. 664, 100 S.E.2d 726 (1957).

Liability for medical attention. — County which sends a prisoner to another county for safekeeping is liable to the county in which the prisoner is confined for medical attention to the prisoner. Talbot County v. Mansfield, 115 Ga. 766, 42 S.E. 72 (1902).

Cited in Brand v. State, 258 Ga. 378, 369 S.E.2d 896 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 7 et seq., 22 et seq.

17-7-2. When sheriff not required to receive prisoner from another county.

The sheriff shall not be bound to receive a prisoner from another county until the jail fees and costs are provided for as set forth in Code Section 17-7-1.

History. — Ga. L. 1865-66, p. 40, § 2; Code 1868, § 4643; Code 1873, § 4741; Code 1882, § 4741; Penal Code 1895, § 921; Penal Code 1910, § 946; Code 1933, § 27-417.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 7 et seq., 22 et seq.

17-7-3. List of children in detention pending trial provided to chief judge and prosecuting attorney.

The official in charge of any facility in which a child is detained pending trial in the superior, state, or juvenile courts, including but not limited to sheriffs, regional jail authorities, and the Department of Juvenile Justice, shall furnish at least once a week a list of all children so detained to the chief judge, or his or her designee, and the prosecuting attorney for the court or courts having jurisdiction to adjudicate the case against the child. The list shall include the following information pertaining to each child:

(1) The child's name;

(2) The date of arrest;

(3) The offense charged or other reason for being held;

(4) The amount of the bond, if known; and

(5) Whether the child is represented by an attorney and, if represented, the name of the attorney.

History. — Code 1981, § 17-7-3, enacted by Ga. L. 2006, p. 172, § 1/SB 135.

ARTICLE 2

COMMITMENT HEARINGS

Cross references. — Committal hearings in magistrate court, Uniform Rules for the Magistrate Courts, Rule 25.

JUDICIAL DECISIONS

There is no federal constitutional right to a preliminary hearing. Pitts v. Hopper, 402 F. Supp. 119 (N.D. Ga. 1974), aff'd, 520 F.2d 941 (5th Cir. 1975).

Preliminary hearing is not a required step in a felony prosecution and once an indictment is obtained there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing. Bridges v. State, 154 Ga. App. 811, 270 S.E.2d 60 (1980); Clarke v. State, 158 Ga. App. 749, 282 S.E.2d 1 (1981).

Denial of commitment hearing basis for overturning conviction. — Court of Appeals will not overturn a conviction on direct appeal or on collateral attack because a commitment hearing was denied the appellant. Bridges v. State, 154 Ga. App. 811, 270 S.E.2d 60 (1980).

In no event will a conviction be overturned on direct appeal or on collateral attack because a commitment hearing was denied appellant. Clarke v. State, 158 Ga. App. 749, 282 S.E.2d 1 (1981).

After indictment and subsequent conviction, lack of a commitment hearing will not be construed as reversible error. Clarke v. State, 158 Ga. App. 749, 282 S.E.2d 1 (1981).

Cited in Moye v. Georgia, 330 F. Supp. 290 (N.D. Ga. 1971).

OPINIONS OF THE ATTORNEY GENERAL

Bail of person arrested by campus police officer. — Person arrested by a campus police officer for violation of a state criminal law should be incarcerated in the county jail, as the sheriff, by virtue of that office, is the county jailer. Whether the accused is to be admitted to bail and the amount of the bail are matters which are addressed to the commitment court. 1970 Op. Att'y Gen. No. 70-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 69 et seq. 53 Am. Jur. 2d, Mentally Impaired Persons, § 22 et seq.

C.J.S. — 16D C.J.S., Constitutional Law, § 2167.

ALR. — Right of person accused of crime to exclude public from preliminary hearing or examination, 31 A.L.R.3d 816.

17-7-20. Persons who may hold courts of inquiry; procedure where offense committed in county which is member of regional jail authority.

Any judge of a superior or state court, judge of the probate court, magistrate, or officer of a municipality who has the criminal jurisdiction of a magistrate may hold a court of inquiry to examine into an accusation against a person legally arrested and brought before him or her. The time and place of the inquiry shall be determined by such judicial officer. Should the county in which the offense is alleged to have been committed be a member of a regional jail authority created under Article 5 of Chapter 4 of Title 42, the "Regional Jail Authorities Act," the judge may order the court of inquiry to be conducted alternatively in the county in which the offense is alleged to have been committed or in facilities available at the regional jail or by audio-visual communication between the two locations and between the accused, the court, the attorneys, and the witnesses.

History. — Orig. Code 1863, § 4611; Code 1868, § 4633; Code 1873, § 4730; Code 1882, § 4730; Penal Code 1895, § 906; Penal Code 1910, § 931; Code 1933, § 27-401; Ga. L. 1982, p. 493, §§ 1, 2; Ga. L. 1983, p. 884, § 3-19; Ga. L. 1996, p. 742, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "known as" was deleted following "Title 42," in the last sentence.

Law reviews. — For article discussing preliminary hearings in felony cases as necessary to satisfy due process requirements, see 12 Ga. St. B.J. 207 (1976).

For note, "A 'Critical' Question of State Law: Georgia's Ambiguous Treatment of Initial Appearance Hearings and the Implications of Bail Reform," see 54 Ga. L. Rev. 363 (2019).

JUDICIAL DECISIONS

Function of the preliminary commitment hearing is to authorize the keeping in custody of one accused with probable cause of committing a crime, pending determination by the grand jury from evidence presented to the grand jury that the accused should stand trial for the offense. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Term "accusation" in a recognizance includes the term "warrant." Cox v. Dorsey, 152 Ga. 532, 110 S.E. 236 (1922).

Justices of the peace are vested with county-wide jurisdiction in issuing search warrants. State v. Varner, 248 Ga. 347, 283 S.E.2d 268 (1981) (decided prior to the 1983 amendment).

Powers of magistrates. — Magistrate of one county has no authority to hold a court of inquiry against a person charged with committing a crime in another county. Burrow v. Southern Ry., 139 Ga. 733, 78 S.E. 125 (1913).

Probate court judge authorized to hold court of inquiry. — Defendant's motion to suppress evidence seized pursuant to a warrant issued by a probate court judge was properly denied because the probate court judge was authorized to hold a court of inquiry under O.C.G.A. § 17-7-20 and, therefore, was authorized to issue a search warrant under O.C.G.A. § 17-5-21(a). O.C.G.A. § 40-13-21(b), assuming that statute required the state court to issue a warrant, pertained to the jurisdiction of probate courts in misdemeanor traffic cases and did not apply in this felony case. Joyner v. State, 347 Ga. App. 159, 817 S.E.2d 822 (2018).

Authority to issue search warrant does not vanish within restricted area. — O.C.G.A. § 17-5-22 (when considered with O.C.G.A. §§ 17-7-20 and 17-5-21) means that the authority of a judicial officer to issue a search warrant to be executed within the area of the officer's jurisdiction does not vanish when the officer physically steps into an area where the officer's authority is restricted within the county in which the officer serves. State v. Varner, 248 Ga. 347, 283 S.E.2d 268 (1981).

There is no requirement that a superior court judge conduct the preliminary hearing. Burson v. State, 183 Ga. App. 647, 359 S.E.2d 731, cert. denied, 183 Ga. App. 905, 359 S.E.2d 731 (1987).

Failure to grant a preliminary hearing is not reversible error. Sims v. State, 148 Ga. App. 733, 252 S.E.2d 910 (1979).

Effect of failure to hold commitment hearing. — Failure to conduct a commitment hearing prior to a defendant's motion to dismiss the indictment cannot constitute harmful error, nor would reversal of the judgment be warranted even if no commitment hearing had ever been held, because a preliminary hearing is not a required step in a felony prosecution once an indictment is obtained. Forehand v. State, 138 Ga. App. 468, 226 S.E.2d 297 (1976).

Preliminary hearing is not a required step in a felony prosecution, and once an indictment is obtained there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing. Sims v. State, 148

Ga. App. 733, 252 S.E.2d 910 (1979); Albert v. State, 152 Ga. App. 708, 263 S.E.2d 685 (1979).

No conviction on direct appeal or on collateral attack will be overturned because a commitment hearing is denied an appellant. Sims v. State, 148 Ga. App. 733, 252 S.E.2d 910 (1979).

Preliminary commitment hearing is not inherently a critical stage of criminal proceedings in this state. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Lack of counsel at hearing. — Failure to make counsel available to the defendant at a preliminary commitment hearing, when the defendant enters a plea of guilty that is not introduced in evidence at the defendant's trial, is not a denial of due process of law under U.S. Const., amend. 14. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Arresting officer has no authority to accept bond from one arrested under warrant for felony, but should return the party arrested to the county in which the crime was alleged to have been committed for examination before a judicial officer of that county and the fixing of bail by such officer in case of commitment. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

Cited in Georgia v. Port, 3 F. 117 (N.D. Ga. 1880); Ormond v. Ball, 120 Ga. 916, 48 S.E. 383 (1904); Crow v. State, 55 Ga. App. 288, 190 S.E. 65 (1937); Rhodes v. Pearce, 189 Ga. 623, 7 S.E.2d 251 (1940); Pennaman v. Walton, 220 Ga. 295, 138 S.E.2d 571 (1964); Whisman v. State, 223 Ga. 124, 153 S.E.2d 548 (1967); Pruitt v. State, 123 Ga. App. 659, 182 S.E.2d 142 (1971); Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973); Gill v. Decatur County, 129 Ga. App. 697, 201 S.E.2d 21 (1973); Granger v. State, 235 Ga. 681, 221 S.E.2d 451 (1975); Tarpkin v. State, 236 Ga. 67, 222 S.E.2d 364 (1976); Contreras v. State, 242 Ga. 369, 249 S.E.2d 56 (1978); Branch v. State, 248 Ga. 300, 282 S.E.2d 894 (1981); Lambert v. McFarland, 612 F. Supp. 1252 (N.D. Ga. 1984).

OPINIONS OF THE ATTORNEY GENERAL

Training and certification of probate judges. — Probate judges who hold courts of inquiry pursuant to O.C.G.A. § 17-7-20 need not obtain training and certification from the Georgia Justice Courts Training Council. 1982 Op. Att'y Gen. No. 82-69.

Probate court jurisdiction to set bail. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, the probate court may also set bail for any criminal offense not included in O.C.G.A. § 17-6-1(a). 1995 Op. Att'y Gen. No. U95-1.

Probate court jurisdiction to issue warrants and require bond. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, a probate court may also issue warrants and require bond pursuant to either O.C.G.A. § 17-6-90 or O.C.G.A. § 17-6-110. 1995 Op. Att'y Gen. No. U95-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 587, 589.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 124 et seq.

ALR. — Unlawful arrest as bar to prosecution under subsequent indictment or information, 56 A.L.R. 260.

17-7-21. Holding of court of inquiry by several judicial officers; procedure for deciding questions.

The judicial officer before whom the accused is brought may associate with him, in the investigation, one or more magistrates, in which event a majority shall decide all questions. If there are only two presiding, the original officer shall determine all the questions where the court is not in agreement.

History. — Orig. Code 1863, § 4612; Code 1868, § 4634; Code 1873, § 4731; Code 1882, § 4731; Penal Code 1895, § 907; Penal Code 1910, § 932; Code 1933, § 27-402; Ga. L. 1984, p. 22, § 17.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 479 et seq., 594.

17-7-22. Powers of presiding officer in court of a municipal corporation to bind over or commit criminal offenders to jail.

Any mayor, recorder, or other proper officer presiding in any court of a municipal corporation shall have authority to bind over or commit to jail offenders against any criminal law whenever, in the course of an investigation before such officer, a proper case therefor is made out by the evidence.

History. — Ga. L. 1880-81, p. 176, § 2; Code 1882, § 786c; Penal Code 1895, § 927; Penal Code 1910, § 952; Code 1933, § 27-423.

Law reviews. — For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Procedure when violations of state law and municipal ordinance are both charged. — When a motorist is charged with a state offense and with violation of a municipal ordinance, both charges based on a single act, and the motorist appears before a municipal court judge, that judge is a judicial officer of the municipality of which the judge is a public servant, and it is within the judge's power to determine whether the act alleged to have been committed by the motorist constitutes a state offense for which the judge should be bound over to the grand jury, in the judge's capacity as committing magistrate of this state, or whether such act constituted a violation of an ordinance of the city, in the capacity as judge of the municipal court. The single act cannot be both. When the municipal court judge finds that there is probable cause to believe that the state offense of involuntary manslaughter has been committed and binds the motorist over to the grand jury, the judge loses jurisdiction of the case. Trowbridge v. Dominy, 92 Ga. App. 177, 88 S.E.2d 161 (1955).

Municipal judge does not lose absolute judicial immunity, for purposes of a federal civil rights action, by directing the entry of criminal charges against a witness appearing before the judge in a

pending case, based upon evidence before the judge. Harris v. Deveaux, 780 F.2d 911 (11th Cir. 1986).

Waiver of investigation established probable cause. — Waiver of a preliminary hearing by the defendant in a criminal prosecution for shoplifting was tantamount to a finding by the magistrate that there was a sufficient cause to believe the defendant guilty, thereby giving rise to a prima facie establishment of probable cause for defendant's arrest and prosecution, voiding the defendant's suit for malicious prosecution and false imprisonment. Garmon v. Warehouse Groceries Food Ctr., Inc., 207 Ga. App. 89, 427 S.E.2d 308 (1993).

Cited in Manor v. Donahoo, 117 Ga. 304, 43 S.E. 719 (1903); Webb v. Ethridge, 849 F.2d 546 (11th Cir. 1988).

OPINIONS OF THE ATTORNEY GENERAL

Limits on authority. — Mayors and recorders have only commitment jurisdiction as to violations of state statutes, such as that prohibiting possession of liquor on which taxes have not been paid. Mayors and recorders have no jurisdiction to levy fines or otherwise punish such violations. 1970 Op. Att'y Gen. No. U70-124.

17-7-23. Duties of court of inquiry; preclusion of certain courts from trying charges involving Code Section 16-11-126.

(a) The duty of a court of inquiry is simply to determine whether there is sufficient reason to suspect the guilt of the accused and to require him to appear and answer before the court competent to try him. Whenever such probable cause exists, it is the duty of the court to commit.

(b) Any court, other than a superior court or a state court, to which any charge of a violation of Code Section 16-11-126 is referred for the determination required by this Code section shall thereafter have and exercise only the jurisdiction of a court of inquiry with respect to the charge and with respect to any other criminal violation arising from the transaction on which the charge was based and shall not thereafter be competent to try the accused for the charge or for any other criminal violation arising from the transaction on which the charge was based, irrespective of the jurisdiction that the court otherwise would have under any other law.

History. — Orig. Code 1863, § 4618; Code 1868, § 4640; Code 1873, § 4738; Code 1882, § 4738; Penal Code 1895, § 912; Penal Code 1910, § 937; Code 1933, § 27-407; Ga. L. 1980, p. 415, § 1; Ga. L. 2010, p. 963, § 2-11/SB 308.

Editor's notes. — Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews. — For article discussing preliminary hearings in felony cases as necessary to satisfy due process requirements, see 12 Ga. St. B.J. 207 (1976). For article discussing the grand jury's ability to indict the accused contrary to the findings of the preliminary hearing, see 13 Ga. St. B.J. 195 (1977). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

For note, "Bail in Georgia: Elimination

of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Section creates no right to discovery. — There is no general right to discovery in a criminal case, and nothing in O.C.G.A. §§ 17-7-23 and 17-7-28 creates one, or authorizes the defendant to go on a "fishing expedition" for evidence concededly beyond the scope of the real purpose of the commitment hearing. Pruitt v. State, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

Purpose of a commitment hearing. — Purpose of a commitment hearing is to authorize the keeping in custody of one accused with probable cause of committing a crime until the grand jury determines whether the accused should stand trial. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964); Phillips v. Stynchcombe, 231 Ga. 430, 202 S.E.2d 26 (1973); Hunt v. Hopper, 232 Ga. 53, 205 S.E.2d 303 (1974); State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

Purpose of a commitment hearing is simply to determine whether there is probable cause to believe that the accused is guilty of the crime charged, and if so, to bind the accused over for indictment by the grand jury. Jackson v. State, 225 Ga. 39, 165 S.E.2d 711 (1969), cert. denied, 399 U.S. 934, 90 S. Ct. 2248, 26 L. Ed. 2d 805 (1970); Douglas v. State, 132 Ga. App. 694, 209 S.E.2d 114 (1974); State v. Middlebrooks, 236 Ga. 52, 222 S.E.2d 343 (1976); First Nat'l Bank & Trust Co. v. State, 237 Ga. 112, 227 S.E.2d 20 (1976); J.T.M. v. State, 142 Ga. App. 635, 236 S.E.2d 764 (1977); Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991); Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987); overruled on other grounds, Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007); Moore v. Kemp, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987), 489 U.S. 1091, 109 S. Ct. 1560, 103 L. Ed. 2d 863, aff'd, 972 F.2d 319 (11th Cir. 1989).

Guilt or innocence not determined. — Decision of the committing court settles nothing as to the guilt or innocence of the defendant. First Nat'l Bank & Trust Co. v. State, 237 Ga. 112, 227 S.E.2d 20 (1976).

Right to hearing is statutory, not constitutional. — Incarcerated state defendant has a statutory but not a constitutional right to a preliminary commitment hearing. Jackson v. Smith, 435 F.2d 1284 (5th Cir. 1970), cert. denied, 402 U.S. 947, 91 S. Ct. 1639, 29 L. Ed. 2d 116 (1971).

Accused has no constitutional right to a preliminary hearing. Hunt v. Hopper, 232 Ga. 53, 205 S.E.2d 303 (1974).

Defendant's right to know charges. — Defendant is not entitled to be informed of the charges against the defendant prior to trial other than by indictment. First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Commitment hearing is a critical stage of the criminal proceedings and the defendant is entitled to counsel. State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

Absence of a commitment hearing does not divest the criminal court of jurisdiction. Johnson v. State, 126 Ga. App. 757, 191 S.E.2d 614 (1972).

Hearing not requisite to trial for a felony. — Holding of a commitment hearing is not a requisite to a trial for commission of a felony. Holmes v. State, 224 Ga. 553, 163 S.E.2d 803 (1968); Smith v. Brown, 228 Ga. 584, 187 S.E.2d 142 (1972); Burston v. Caldwell, 288 Ga. 795, 187 S.E.2d 900 (1972); Johnson v. State, 126 Ga. App. 757, 191 S.E.2d 614 (1972); Brand v. Wofford, 230 Ga. 750, 199 S.E.2d 231 (1973); Douglas v. State, 132 Ga. App. 694, 209 S.E.2d 114 (1974); State v. Middlebrooks, 236 Ga. 52, 222 S.E.2d 343 (1976); First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Return of indictment eliminates need for hearing. — Once an indictment has been returned, the necessity for a committal hearing has been eliminated. Douglas v. State, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

Effect of issuance of indictment prior to hearing. — Defendant is not deprived of any constitutional right if the grand jury issues an indictment against the defendant prior to the holding of a preliminary hearing. First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Failure to hold a preliminary commitment hearing prior to an indictment of the defendant did not require that the indictment be quashed even though the defendant had been induced to make bond upon a magistrate's promise to hold such a hearing. State v. Ruff, 176 Ga. App. 303, 335 S.E.2d 687 (1985).

When a prosecutor requested a continuance of the defendant's preliminary hearing to accommodate the prosecutor's trial schedule but an indictment was returned before a rescheduled hearing could be conducted, a plea in abatement was not warranted. Chisholm v. State, 231 Ga. App. 835, 500 S.E.2d 14 (1998).

State's burden at a commitment hearing is simply to show probable cause to believe the accused guilty and, if so, to bind the accused over to the grand jury for indictment, rather than to show guilt beyond a reasonable doubt, as at trial. Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

Silence of accused at commitment hearing carries no inference as to guilt. — Individual accused of criminal misconduct might often determine as a matter of tactics or strategy that the presentation of a defense at a commitment hearing would serve little or no constructive purpose. Indeed, it might impose a disadvantage upon the accused to prematurely disclose the accused's defenses. In such cases, silence of the accused and the decision of the accused to present no evidence can carry no reasonable inference as to the accused's guilt. Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

Person not imprisoned until after indictment has no right to a preliminary hearing. First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Effect of indictment on judicial oversight or review of decision to prosecute. — Once an indictment is obtained, there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing. State v. Middlebrooks, 236 Ga. 52, 222 S.E.2d 343 (1976); First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Return of indictment deprives committal court of jurisdiction. — Committal court has no jurisdiction to determine whether or not there is probable cause for indictment, after the indictment has already been returned. First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Trial court has no authority to quash an indictment on the issue of lack of probable cause, that issue having already been decided by the committing court. First Nat'l Bank & Trust Co. v. State, 237 Ga. 112, 227 S.E.2d 20 (1976).

Effect of illegal detention or arrest. — Illegal detention without a valid probable cause hearing does not preclude indictment by the grand jury. Illegal arrest or detention does not void a subsequent conviction. State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

Reversal for lack of hearing. — After a conviction, the lack of a commitment hearing is not considered to be reversible error. State v. Middlebrooks, 236 Ga. 52, 222 S.E.2d 343 (1976); Collins v. State, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Supreme Court will not overturn a conviction either on direct appeal or on collateral attack because a commitment hearing was denied the appellant. State v. Middlebrooks, 236 Ga. 52, 222 S.E.2d 343 (1976).

Probable cause for trial. — In defendant's weapons case there was probable

cause to bind the defendant over for trial when a law enforcement officer's statement that the defendant had been convicted of racketeering was sufficient to show probable cause on the element of possession of guns by a felon. As to the defendant's possession of the guns, all 29 were found in the house occupied by the defendant, including two in the defendant's bedroom. State v. Graddy, 262 Ga. App. 98, 585 S.E.2d 147 (2003), aff'd, 277 Ga. 765, 596 S.E.2d 109 (2004).

Lack of hearing rendered harmless by indictment, trial, and conviction. — Since the purpose of the commitment hearing is to determine whether there is probable cause to hold the accused for trial the subsequent indictment, trial, and conviction of the accused render omission of the hearing harmless. Thrash v. Caldwell, 229 Ga. 585, 193 S.E.2d 605 (1972); Allen v. Caldwell, 231 Ga. 442, 202 S.E.2d 35 (1973); Douglas v. State, 132 Ga. App. 694, 209 S.E.2d 114 (1974); First Nat'l Bank & Trust Co. v. State, 137 Ga. App. 760, 224 S.E.2d 866, aff'd, 237 Ga. 112, 227 S.E.2d 20 (1976).

Denial of hearing not grounds for habeas corpus. — Claim of denial of a preliminary hearing or commitment hearing is not a valid ground of a petition for a writ of habeas corpus. Allen v. Caldwell, 231 Ga. 442, 202 S.E.2d 35 (1973).

Failure to provide counsel at hearing. — Failure to provide counsel at a probable cause hearing may not be raised after conviction by petitioners for writ of habeas corpus. State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

Arresting officer has no authority to accept bond from one arrested under warrant for felony, but should return the party arrested to the county in which the crime was alleged to have been committed for examination before a judicial officer of that county and the fixing of bail by such officer in case of commitment. Paulk v. Sexton, 203 Ga. 82, 45 S.E.2d 768 (1947).

Hearsay evidence. — District attorney's declaratory judgment claim, which sought an order requiring magistrate judges to admit and consider hearsay evidence at preliminary hearings to determine whether to bind over a defendant for grand jury indictment, was proper as involving a justiciable controversy under O.C.G.A. § 9-4-2 because the magistrate court established a standard practice requiring the production of direct evidence in addition to hearsay evidence to support a bindover determination at a preliminary hearing; the result was uncertainty and insecurity in the district attorney as to the district attorney's office's burden of proof and production at future preliminary hearings. Bethel v. Fleming, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

Admission of hearsay evidence in preliminary hearings. — Trial court did not err in ruling that hearsay evidence had to be admitted as legal evidence at preliminary hearings because magistrate judges were required to admit and weigh hearsay evidence in preliminary hearings; the public's interest in justice and safety is implicated when criminal charges are preliminarily dismissed against persons who were arrested pursuant to a showing of probable cause sufficient to obtain an arrest warrant. Bethel v. Fleming, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

Cited in Georgia v. Port, 3 F. 124 (N.D. Ga. 1880); Sanders v. Paschal, 186 Ga. 837, 199 S.E. 153 (1938); Harris v. Norris, 188 Ga. 610, 4 S.E.2d 840 (1939); Cooper v. Lunsford, 203 Ga. 166, 45 S.E.2d 395 (1947); Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 111 S.E.2d 259 (1959); Pennaman v. Walton, 220 Ga. 295, 138 S.E.2d 571 (1964); Sweeney v. Balkcom, 358 F.2d 415 (5th Cir. 1966); Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97 (1971); T.K. v. State, 126 Ga. App. 269, 190 S.E.2d 588 (1972); Baker v. State, 127 Ga. App. 403, 194 S.E.2d 122 (1972); Tarpkin v. State, 236 Ga. 67, 222 S.E.2d 364 (1976); Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984); Lambert v. McFarland, 612 F. Supp. 1252 (N.D. Ga. 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 548 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 124 et seq.

ALR. — Admissibility of plea of guilty at preliminary hearing, 141 A.L.R. 1335.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Scope and extent and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

Propriety of consideration of credibility of witness in determining probable cause at state preliminary hearing, 84 A.L.R.3d 811.

17-7-24. Time granted parties to prepare case and to secure counsel; granting of bail where hearing delayed.

A reasonable time shall be given to the defendant and prosecutor for the preparation of the case. In no event shall the defendant be forced to attend the hearing without the aid of counsel if there is a reasonable probability of his securing counsel without too great delay. Where the hearing is postponed to a future day at the instance of either party or the court, it shall not be necessary to commit the defendant to jail pending the hearing; but he shall have the right to give bail for appearance at the hearing before the court of inquiry if the offense is bailable under the authority of the court.

History. — Orig. Code 1863, § 4613; Ga. L. 1865-66, p. 236, § 1; Code 1868, § 4635; Code 1873, § 4732; Code 1882, § 4732; Penal Code 1895, § 908; Penal Code 1910, § 933; Code 1933, § 27-403.

Cross references. — Constitutional guarantee of benefit of counsel, Ga. Const. 1983, Art. I, Sec. I, Para. XIV.

Law reviews. — For article, "The Indigent Defendant in Georgia Prior to Gideon v. Wainwright," see 2 Ga. St. B.J. 207 (1965).

For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971).

JUDICIAL DECISIONS

Right to employ retained counsel. — Due process requirements guarantee to a defendant unable to employ counsel the right to have counsel appointed by the court, but no less do the requirements entitle an accused who is able to employ counsel a reasonable opportunity to obtain representation of the accused's choice, and the accused is not compelled to accept court appointed defenders instead of an attorney in whom the accused reposes greater confidence merely to speed the accused's trial by a day or two. Foote v. State, 136 Ga. App. 301, 220 S.E.2d 786 (1975).

Denial of right to counsel of own choice. — Improper denial of the defendant's right to be represented by counsel of the defendant's own choosing is violative of Ga. Const. 1976, Art. I, Sec. I, Para. XI (see Ga. Const. 1983, Art. I, Sec. I, Para. XIV) and this section, and abrogates the right of procedural due process. Johnson v. State, 139 Ga. App. 829, 229 S.E.2d 772 (1976).

Inquiry into defendant's representation by counsel. — While a defendant may not be actually denied the privilege of counsel at the defendant's commitment hearing if it is made to appear that the

defendant is able to procure one in a reasonable time, no affirmative duty rests on the judicial officer presiding at a commitment hearing to inquire into the defendant's representation by counsel, as upon a judge presiding over the actual trial of the defendant. The failure of the judicial officer to inform the defendant that the defendant has a right to secure counsel does not disclose that the defendant has been denied counsel as guaranteed by the Constitution. Harris v. Norris, 188 Ga. 610, 4 S.E.2d 840 (1939).

Discretion of court as to motions for postponement. — When it affirmatively appears that the possible time for investigation and preparation of the defense is short, and the defendant has not been dilatory in obtaining counsel, the discretion of the court on motions for postponement should be liberally exercised in favor of a fair trial. Foote v. State, 136 Ga. App. 301, 220 S.E.2d 786 (1975).

Judge's refusal of the request of a defendant for postponement, which in effect deprives the defendant of an opportunity to use normal facilities and resources to procure counsel of the defendant's own choice violated this section. Walker v. State, 194 Ga. 727, 22 S.E.2d 462 (1942).

Preliminary hearing without counsel as grounds for reversal. — When a preliminary hearing is held in the absence of the defendant's counsel, the reviewing court must reverse if the court determines that the lack of counsel might have contributed to the conviction. Mitchell v. State, 173 Ga. App. 560, 327 S.E.2d 537 (1985).

Cited in Whitman v. Bullock, 45 Ga. 173 (1872); Newsome v. Scott, 151 Ga. 639, 107 S.E. 854 (1921); Harris v. Norris, 188 Ga. 610, 4 S.E.2d 840 (1939); Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49 (1964); Whitfield v. State, 115 Ga. App. 231, 154 S.E.2d 294 (1967); Jackson v. State, 225 Ga. 39, 165 S.E.2d 711 (1969); Lambert v. McFarland, 612 F. Supp. 1252 (N.D. Ga. 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq. 21 Am. Jur. 2d, Criminal Law, § 562. 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 34 et seq.

C.J.S. — 6 C.J.S., Appearances, § 28. 8 C.J.S., Bail; Release and Detention Pending Proceedings, § 47 et seq. 16D C.J.S., Criminal Procedure and Rights of the Accused, § 2388 et seq.

ALR. — Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel, 84 A.L.R. 544.

Duty to advise accused as to right to assistance of counsel, 3 A.L.R.2d 1003.

Right to counsel in insanity or incompetency adjudication proceedings, 87 A.L.R.2d 950.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Scope and extent and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

Accused's right to represent himself in state criminal proceedings — modern state cases, 98 A.L.R.3d 13.

Denial of, or interference with, accused's right to have attorney initially contact accused, 18 A.L.R.4th 669.

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 A.L.R.4th 705.

Denial of accused's request for initial contact with attorney — cases involving offenses other than drunk driving, 18 A.L.R.4th 743.

Waiver of right to counsel by insistence upon speedy trial in state criminal case, 19 A.L.R.4th 1299.

17-7-25. Power of court to compel attendance of witnesses.

A court of inquiry shall have the same power to compel the attendance of witnesses as in other criminal cases, as set forth in and subject to all of the provisions of Chapter 13 of Title 24, at any location where the court shall conduct a hearing, provided that notice is given at least 24 hours prior to the hearing. A court of inquiry may order the arrest of witnesses if required to compel their attendance.

History. — Orig. Code 1863, § 4617; Code 1868, § 4639; Code 1873, § 4736; Code 1882, § 4736; Penal Code 1895, § 909; Penal Code 1910, § 934; Code 1933, § 27-404; Ga. L. 1996, p. 742, § 3; Ga. L. 2011, p. 99, § 29/HB 24.

Cross references. — Compulsory process to obtain witnesses, Ga. Const. 1983, Art. I, Sec. I, Para. XIV.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 534.

C.J.S. — 23 C.J.S., Criminal Procedure and Rights of the Accused, § 895 et seq. 98 C.J.S., Witnesses, § 3 et seq.

17-7-26. Authority to require bonds to secure appearance of witnesses.

In the event of a commitment of the accused person, the court, in its discretion, may require the witnesses, on behalf of the state or others, to give suitable bonds to secure their appearance at court, with or without sureties, as the circumstances seem to demand.

History. — Orig. Code 1863, § 4616; Code 1868, § 4638; Code 1873, § 4735; Code 1882, § 4735; Penal Code 1895, § 915; Penal Code 1910, § 940; Code 1933, § 27-410.

Cross references. — Posting of cash bonds generally, § 17-6-4.

JUDICIAL DECISIONS

When power to be exercised. — This power which existed in the courts at common law, being harsh and oppressive, should never be resorted to except in extreme cases. It is a matter, however, resting in the sound discretion of the court. Crosby v. Potts, 8 Ga. App. 463, 69 S.E. 582 (1910).

Cited in Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 554.
C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170.

17-7-27. Sheriffs and constables to accept bond for appearance of witnesses; approval of sureties by sheriff.

The sheriffs and constables shall accept bond in such reasonable amount as may be just and fair to secure the appearance of any witness to attend the courts, provided the sureties tendered and offered on the bond are approved by a sheriff of any county.

History. — Ga. L. 1921, p. 241, § 1; Code 1933, § 27-411.

JUDICIAL DECISIONS

Cited in Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq. 21 Am. Jur. 2d, Criminal Law, § 548 et seq. 81 Am. Jur. 2d, Witnesses, § 5.
C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 2 et seq., 170.

17-7-28. Hearing of evidence by court of inquiry; right of accused to testify; application of rules of evidence; effect of failure of accused to testify.

The court of inquiry shall hear all legal evidence submitted by either party. If the accused wishes to testify and announces in open court before the court of inquiry his or her intention to do so, the accused may testify in his or her own behalf. If the accused elects to testify, he or she shall be sworn as any other witness and may be examined and cross-examined as any other witness. The rules of evidence shall apply except that hearsay shall be admissible. The failure of an accused to testify shall create no presumption against the accused, and no comment may be made because of such failure.

History. — Orig. Code 1863, § 4614; Code 1868, § 4636; Code 1873, § 4733; Code 1882, § 4733; Penal Code 1895, § 910; Penal Code 1910, § 935; Code 1933, § 27-405; Ga. L. 1962, p. 453, § 1; Ga. L. 1973, p. 292, § 1; Ga. L. 2011, p. 99, § 30/HB 24.

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI. Testimony of accused in criminal case, § 24-5-506.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General

Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976). For article on the effect of a conviction that is based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For note, "Defendant as a Witness in a Criminal Proceeding," see 3 Mercer L. Rev. 335 (1952). For note discussing the unsworn statement formerly provided for in Georgia criminal trials, see 14 Mercer L. Rev. 412 (1963). For note discussing the unsworn statement in Georgia law (prior to its abolition in 1973), see 16 Mercer L. Rev. 441 (1965).

JUDICIAL DECISIONS

Analysis

General Consideration
Defendant's Right to Present Evidence
Evidence of Bad Character and Prior Convictions
Prosecutorial Comment on Failure to Testify

General Consideration

Section creates no right to discovery. — There is no general right to discovery in a criminal case, and nothing in O.C.G.A. §§ 17-7-23 and 17-7-28 creates one, or authorizes the defendant to go on a "fishing expedition" for evidence concededly beyond the scope of the real purpose of the commitment hearing. Pruitt v. State, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

This section was for the benefit of the state as well as the defendant; and while the duty there imposed upon a justice of the peace was clearly mandatory, it can have no reasonable relation to the legality of the commitment. Harris v. Norris, 188 Ga. 610, 4 S.E.2d 840 (1939).

Defendant's right to testify. — Trial court did not err by allowing the defendant to testify at trial because, although the defendant contended that the defendant was not sufficiently competent to knowingly waive the right to remain silent, the record showed that experts found the defendant competent to stand trial prior to the proceedings; the trial court engaged in a full and extensive colloquy with the defendant about the right to remain silent before the defendant took the stand at trial; and the defendant rejected counsel's strong recommendation that the defendant should not testify; thus, the defendant knowingly waived the right against self-incrimination and exercised the right to testify at trial after being fully informed of the consequences. Owens v. State, 298 Ga. 813, 783 S.E.2d 611 (2016), cert. denied, 137 S. Ct. 143, 196 L. Ed. 2d 110 (U.S. 2016).

Limits on examination of defendant. — Magistrate has no right to examine a defendant for the purpose of obtaining from the defendant contradictory statements. Cicero v. State, 54 Ga. 156 (1875).

Right to confrontation did not attach at preliminary hearing. — Because a preliminary hearing was ordinarily a much less searching exploration into the merits of a case than a trial, simply because the hearing's function was the more limited one of determining whether probable cause exists to hold the accused for trial, an accused did not have a constitutional right to confrontation as the right to confrontation applies only to trials. Gresham v. Edwards, 281 Ga. 881, 644 S.E.2d 122 (2007).

Hearsay evidence admissible in preliminary hearings. — Trial court did not err in ruling that hearsay evidence had to be admitted as legal evidence at preliminary hearings because magistrate judges were required to admit and weigh hearsay evidence in preliminary hearings; the public's interest in justice and safety is implicated when criminal charges are pre-

liminarily dismissed against persons who were arrested pursuant to a showing of probable cause sufficient to obtain an arrest warrant. Bethel v. Fleming, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

Use at trial of accused's statements at hearing. — There can be no doubt that a statement made by the accused upon the accused's commitment hearing is admissible against the accused upon the accused's trial in chief. Gresham v. State, 84 Ga. App. 403, 66 S.E.2d 255 (1951).

Instruction as to weight to be given defendant's testimony. — It is not error for the trial judge to fail to instruct the jury as to what weight is to be given the defendant's testimony because the defendant's testimony should be given the same weight and credit as any other witness. Jester v. State, 131 Ga. App. 269, 205 S.E.2d 444 (1974).

Application of abolition of unsworn statements to crimes committed before abolition. — Although a crime is alleged to have been committed prior to July 1, 1973, the effective date of Ga. L. 1973, p. 292, § 1, the law abolishing unsworn statements, the abolition can be applied to a defendant without violating the prohibition against ex post facto laws. Walker v. State, 132 Ga. App. 274, 208 S.E.2d 5 (1974).

This section was not relevant to a hearing on a revocation of a probationary sentence since such a hearing was not a criminal trial. Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

District attorney request for declaratory judgment on admissibility of hearsay evidence. — Supreme Court of Georgia reversed the judgment of the lower courts granting a district attorney a declaratory judgment because the district attorney did not have the right to bring a declaratory judgment action to obtain review of the probable cause decisions of magistrate judges at preliminary hearings or to challenge the admissibility of hearsay evidence at such hearings. Leitch v. Fleming, 291 Ga. 669, 732 S.E.2d 401 (2012).

Cited in Dumas v. State, 63 Ga. 600 (1879); Daniel v. State, 65 Ga. 199 (1880); Crosby v. State, 100 Ga. App. 49, 110 S.E.2d 94 (1959); Brown v. State, 223 Ga. 76, 153 S.E.2d 709 (1967); Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97 (1971); Highland v. State, 127 Ga. App. 518, 194 S.E.2d 332 (1972); Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973); White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974); Culpepper v. State, 132 Ga. App. 733, 209 S.E.2d 18 (1974); Hewell v. State, 232 Ga. 175, 205 S.E.2d 216 (1974); Veasley v. State, 142 Ga. App. 863, 237 S.E.2d 464 (1977); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978); Pennewell v. State, 148 Ga. App. 611, 251 S.E.2d 832 (1979); Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980); Davis v. State, 161 Ga. App. 358, 288 S.E.2d 631 (1982); Fuller v. State, 165 Ga. App. 55, 299 S.E.2d 397 (1983); Williams v. State, 165 Ga. App. 72, 299 S.E.2d 405 (1983).

Defendant's Right to Present Evidence

Defendant's testimony under oath generally. — When a defendant testifies under oath as any other witness, the testimony must be considered as sworn testimony and not merely a statement. Pittman v. State, 133 Ga. App. 902, 212 S.E.2d 505 (1975).

Cross-examination of defendant. — Defendant is permitted to be cross-examined as any other witness except as to general bad character or prior convictions. Such cross-examination may be thorough and sifting. Leonard v. State, 146 Ga. App. 439, 246 S.E.2d 450 (1978).

Failure to allow accused to call witnesses and present evidence. — Error is committed by the denial of the right of accused to call witnesses and present evidence at a preliminary hearing. However, such an error does not in and of itself afford grounds for relief if the defendant is subsequently indicted by a grand jury. Baldwin v. Sapp, 238 Ga. 597, 234 S.E.2d 513 (1977).

Failure to allow accused to examine potential state witnesses. — Imperfect commitment hearing, that is, one in which the appellant is not allowed to examine persons who are potential witnesses for the state on the trial, subpoenaed by the appellant for the purpose of discovery, does not authorize the trial

Defendant's Right to Present Evidence (Cont'd)

judge to quash the indictment or grant the appellant a new trial. Day v. State, 237 Ga. 538, 228 S.E.2d 913 (1976).

Evidence of Bad Character and Prior Convictions

Test for admission of evidence of other, wholly distinct crimes. — On a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly distinct, independent, and separate from that for which the accused is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible, unless there be shown some logical connection between the two from which it can be said that proof of the one tends to establish the other. Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980).

Before evidence of independent crimes is admissible, two conditions must be satisfied. First, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged that proof of the former tends to prove the latter. Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980).

Once the identity of the accused as a perpetrator of an offense separate and distinct from the one for which the accused is on trial has been proven, testimony concerning the independent crime may be admitted for the purpose of showing identity, motive, plan, scheme, bent of mind, and course of conduct. Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980).

Evidence of other offenses of the defendant is admissible only if some logical connection can be shown between the offenses and the crime charged from which it can be said that proof of one tends to establish the other, other than by merely showing the bad character of the accused. Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650 (1980).

If the evidence of other transactions tends to illustrate the transaction in issue, or to establish some necessary ingredient of the particular offense under investigation, the evidence is admissible. Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980).

Crimes for which defendant not arrested or charged. — Fact that the defendant was not arrested and charged with the commission of independent crimes does not render evidence of the commission of such crimes inadmissible for showing common motive, plan, or scheme. Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671 (1980).

Similar burglaries held admissible. — See Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980).

Similar schemes for theft by deception held admissible. — See Wilson v. State, 155 Ga. App. 560, 271 S.E.2d 694 (1980).

Evidence implying previous arrest or conviction for other crimes held admissible. — See Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671 (1980).

Prosecutorial Comment on Failure to Testify

When prohibition against comment applies. — Statutory prohibitions upon comment on the defendant's failure to testify are applicable only when the defendant fails to testify. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527 (1977).

Prosecutorial comment when defendant testifies. — If the defendant testifies in defendant's own behalf, there is no violation of U.S. Const., amend. 5 when the district attorney comments upon the defendant's failure, when the defendant testified, to explain or deny the testimony of particular witnesses. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527 (1977).

Prosecutorial comment places cost on assertion of U.S. Const., amend. 5. — Self-incrimination clause of U.S. Const., amend. 5 forbids comment by the prosecution on the defendant's silence. Comment by the prosecutor cuts down on the privilege against self-incrimination by making the privilege's assertion costly. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527 (1977).

Comment on failure to rebut state's proof. — While a prosecutor may not comment on a defendant's failure to testify, it is not error, nor is it improper, for the prosecutor to reflect upon the failure of the defense to present any evidence to rebut proof adduced by the state. Battle v. State, 155 Ga. App. 541, 271 S.E.2d 679 (1980).

Comment upon a defendant's failure to produce a witness is not error. Battle v. State, 155 Ga. App. 541, 271 S.E.2d 679 (1980).

Comment on trial witness' failure to testify at hearing. — Fact that the defendant is not permitted to present any evidence at the hearing does not require the grant of a mistrial when a trial witness is questioned about coming to the preliminary hearing and testifying, since inquiry into a trial witness' failure to disclose before trial the facts to which the witness testified is a legitimate subject of cross-examination. Such questioning indicates harmful error only when examination as to prior silence is directed toward a defendant. Day v. State, 237 Ga. 538, 228 S.E.2d 913 (1976).

Instruction regarding failure to testify. — Upon a proper and timely request, a defendant in a criminal proceeding is entitled to a jury instruction that defendant's failure to testify raises no presumption against the defendant. Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979), overruled on other grounds, Copeland v. State, 160 Ga. App. 786, 287 S.E.2d 120 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 554.

C.J.S. — 23 C.J.S., Criminal Procedure and Rights of the Accused, §§ 848 et seq., 990 et seq.

ALR. — What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 A.L.R. 1108.

Right to cross-examine accused as to previous prosecution for or conviction of crime as affecting his credibility, 103 A.L.R. 350; 161 A.L.R. 233.

Admissibility of plea of guilty at preliminary hearing, 141 A.L.R. 1335.

Accused who testifies in his own behalf as subject to cross-examination to show previous conviction in order to enhance punishment, 153 A.L.R. 1159.

Constitutional or statutory provision permitting comment on failure of defendant in criminal case to explain or deny by his testimony, evidence or facts against him, 171 A.L.R. 1267.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 A.L.R.2d 643.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 A.L.R.3d 723.

17-7-29. Commitment of defendant for different offense than stated in warrant.

A court of inquiry may commit the defendant for a different offense than that stated in the warrant if the evidence requires it.

History. — Orig. Code 1863, § 6422; Code 1868, § 4646; Code 1873, § 4744; Code 1882, § 4744; Penal Code 1895, § 913; Penal Code 1910, § 938; Code 1933, § 27-408.

JUDICIAL DECISIONS

Determination of nature of crime. — Nature of the crime in an indictment or accusation is to be determined from the description of the crime contained in the indictment or accusation; that is, from the acts alleged to have been committed which are contrary to the laws of the state. Wiley v. State, 124 Ga. App. 654, 185 S.E.2d 582 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 554, 555.

17-7-30. Form of commitment.

The following form, or one in substance the same, shall be deemed to be a sufficient commitment:

Georgia, _____ County.

_____ (name of the defendant) having been arrested on a warrant for the offense of _____ and brought before me, after hearing evidence it is ordered that he be committed for trial for the offense of _____. The jailer of said county (or any other county, if necessary) is required to receive and safely keep him until discharged by due process of law.

Witness my hand and seal, this _____ day of _____, _____.

_____

Judicial officer (Seal)

History. — Orig. Code 1863, § 4619; Code 1868, § 4641; Code 1873, § 4739; Code 1882, § 4739; Penal Code 1895, § 914; Penal Code 1910, § 939; Code 1933, § 27-409; Ga. L. 1999, p. 81, § 17.

JUDICIAL DECISIONS

Sheriff's duties as to custody, safety, and security of confinement. — Custody of a defendant, pending the defendant's trial under an indictment for a criminal offense, is in the sheriff of the county wherein the offense was committed, and the responsibility for defendant's safe and secure confinement in jail is that of the sheriff. Howington v. Wilson, 213 Ga. 664, 100 S.E.2d 726 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 554.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 109 et seq.

17-7-31. Endorsement of names of state's witnesses on warrant.

Whenever any judicial officer sitting as a court of inquiry binds over a defendant to appear at an appropriate court to answer any charge, it shall be the duty of the judicial officer to write on the warrant the names of each witness for the state who appeared at the commitment hearing.

History. — Ga. L. 1873, p. 31, § 1; Code 1873, § 4737; Code 1882, § 4737; Penal Code 1895, § 916; Penal Code 1910, § 941; Code 1933, § 27-412.

Cross references. — Right of accused to obtain list of witnesses on whose testimony the charge against the accused is founded, Ga. Const. 1983, Art. I, Sec. I, Para. XIV.

OPINIONS OF THE ATTORNEY GENERAL

Authority of justice of the peace to subpoena witnesses. — Justice of the peace is not authorized to issue subpoenas to material witnesses after a court of inquiry has been held and the accused bound over or committed to trial in the superior court. 1952-53 Op. Att'y Gen. p. 312.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 391 et seq., 548 et seq. 38 Am. Jur. 2d, Grand Jury, § 46 et seq.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 488 et seq. 23 C.J.S., Criminal Procedure and Rights of the Accused, § 895 et seq. 98 C.J.S. (Rev), Witnesses, §§ 2 et seq., 20 et seq.

ALR. — Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

Validity and construction of statutes permitting grand jury witnesses to be accompanied by counsel, 90 A.L.R.3d 1340.

17-7-32. Disposition of commitment form, warrant, and other papers; delivery of accused to person in charge of jail.

(a) The commitment form shall be delivered to the officer in whose charge the accused person is placed, and the officer shall deliver it with the accused person to the sheriff or the other person in charge of the jail. A memorandum of the commitment shall be entered on the warrant by the judicial officer.

(b)(1) The warrant and all other papers shall be forwarded to the clerk of the court having jurisdiction over the offense for delivery to the prosecuting attorney. After such delivery, if the prosecuting attorney decides to dismiss the case prior to filing an accusation or without seeking an indictment, he or she shall file a notice of such fact with the clerk of the court having jurisdiction over the offense. Such notice shall include the warrant number, if any, and any other identifying number assigned to the case by the Georgia Crime

Information Center. Within 30 days of receiving such notice, the clerk of court shall transmit a copy of such notice to the Georgia Crime Information Center.

(2) Nothing in this subsection shall prevent a prosecuting attorney who has probable cause from seeking charges against an accused within the applicable statute of limitations.

History. — Orig. Code 1863, § 4623; Code 1868, § 4647; Code 1873, § 4745; Code 1882, § 4745; Penal Code 1895, § 924; Penal Code 1910, § 949; Code 1933, § 27-420; Ga. L. 2016, p. 443, § 6B-1/SB 367.

Law reviews. — For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 139 (2016).

JUDICIAL DECISIONS

Cited in Fox v. State, 34 Ga. App. 74, 128 S.E. 222 (1924); Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936); Powell v. Gregg, 118 Ga. App. 225, 163 S.E.2d 251 (1968).

OPINIONS OF THE ATTORNEY GENERAL

No duty to file or record documents. — Clerks through whom documents are transmitted under O.C.G.A. § 17-7-72 have no duty to file or record the documents. 1983 Op. Att'y Gen. No. U83-38.

Court clerk must deliver the original of all warrants and other papers pertaining to commitment to the appropriate prosecuting attorney when the latter becomes available to receive the papers. 1983 Op. Att'y Gen. No. U83-38.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 554 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 109 et seq.

17-7-33. Billing and payment of costs of justice of the peace and constable.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Laws 1811, Cobb's 1851 Digest, p. 644; Ga. L. 1874, p. 90, § 2; Code 1882, § 4709b; Penal Code 1895, § 925; Penal Code 1910, § 950; Code 1933, § 27-421.

17-7-34. Effect of informality in commitment or prior proceedings.

No defendant shall be discharged on a writ of habeas corpus because of informality in the commitment or in the proceedings prior thereto, provided there has been substantial compliance with this article.

History. — Cobb's 1851 Digest, p. 856; Code 1863, § 4626; Code 1868, § 4650; Code 1873, § 4748; Code 1882, § 4748; Penal Code 1895, § 926; Penal Code 1910, § 951; Code 1933, § 27-422.

Cross references. — Further provisions regarding circumstances in which person shall not be discharged upon hearing of writ of habeas corpus, § 9-14-16.

JUDICIAL DECISIONS

Writ of habeas corpus cannot be employed to correct errors or irregularities in the commitment hearing. The judgment committing the defendant must be absolutely void. Harris v. Norris, 188 Ga. 610, 4 S.E.2d 840 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 547, 548, 554.

ARTICLE 3

INDICTMENTS

Cross references. — Grand juries generally, § 15-12-60 et seq.

JUDICIAL DECISIONS

Issuance of statement by grand jury as grounds for abatement of prosecution. — Fact that a grand jury at the preceding term of court started but did not complete investigations, and then gave out a statement that it recommended that its investigation continue is no reason to abate a prosecution based on an indictment returned by the grand jury at the succeeding term of the court, even if the act complained of, committed by the preceding grand jury, is violative of the law with respect to grand jury secrecy. Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418 (1939).

RESEARCH REFERENCES

ALR. — Joinder of counts for theft of property, or receiving stolen property, belonging to different persons, 18 A.L.R. 1077.

Effect of passing indictment to files, 18 A.L.R. 1153.

Indictment based on evidence illegally procured, 24 A.L.R. 1432.

Unlawful arrest as bar to prosecution under subsequent indictment or information, 56 A.L.R. 260.

Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567.

Mistaken belief as to constitutionality or unconstitutionality of statute as affecting criminal responsibility, 61 A.L.R. 1153.

Substitution by mistake of name of person other than defendant for defendant's name in indictment, information, or other criminal accusation, 79 A.L.R. 219.

Necessity in indictment charging violation of statute regarding wages, or hours, of naming particular employees, 81 A.L.R. 76.

Prejudice of member of grand jury against defendant as ground of attack on indictment, 88 A.L.R. 899.

Sufficiency of description of automobile, or automobile equipment or accessories, in indictment, information, or complaint in criminal proceedings, 100 A.L.R. 791.

Effect of unauthorized amendment of criminal information or indictment, 101 A.L.R. 1254.

Erroneous instructions by court to grand jury as ground for quashing indictment, 105 A.L.R. 575.

Admissibility of testimony or affidavits of grand jurors for purpose of impeaching indictment, 110 A.L.R. 1023.

Indictment or information which has been dismissed by prosecuting attorney as susceptible of reinstatement, 112 A.L.R. 386.

Sufficiency of indictment or information charging in words of statute offense relating to operation of automobile, 115 A.L.R. 357.

Defendant's plea to indictment or information as waiver of lack of preliminary examination, 116 A.L.R. 550.

Leave of court to file information, 120 A.L.R. 358.

Failure or refusal of grand jury upon investigation to find indictment as affecting right to file information, 120 A.L.R. 713.

Error in naming the offense covered by allegations of specific facts in complaint, indictment, or information, 121 A.L.R. 1088.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial, 133 A.L.R. 934.

Lost indictment: failure to make proof of loss and to enter order of substitution of certified copy until after defendant had been arraigned, 133 A.L.R. 1337.

Right of accused to attack indictment or information after reversal or setting aside of conviction, 145 A.L.R. 493.

Habeas corpus as remedy where one is convicted, upon plea of guilty or after trial, of offense other than one charged in indictment or information, 154 A.L.R. 1135.

Right to challenge personnel of grand jury, 169 A.L.R. 1169.

Suppression before indictment or trial of confession unlawfully obtained, 1 A.L.R.2d 1012.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses, 80 A.L.R.2d 1196.

Power of court to make or permit amendment of indictment with respect to allegations as to time, 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations as to place, 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations, 14 A.L.R.3d 1358.

Power of court to make or permit amendment of indictment with respect to allegations as to money, 16 A.L.R.3d 1076.

Power of court to make or permit amendment of indictment with respect to allegations as to criminal intent or scienter, 16 A.L.R.3d 1093.

Malicious prosecution: effect of grand jury indictment on issue of probable cause, 28 A.L.R.3d 748.

Necessity of alleging in indictment or information limitation-tolling facts, 52 A.L.R.3d 922.

Use of abbreviation in indictment or information, 92 A.L.R.3d 494.

Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation, 2 A.L.R.4th 980.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Presence of persons not authorized by Rule 6 (d) of Federal Rules of Criminal Procedure during session of grand jury as

warranting dismissal of indictment, 68 A.L.R. Fed. 798.

17-7-50. Right to grand jury hearing within 90 days where bail refused; right to have bail set absent hearing within 90 day period.

Any person who is arrested for a crime and who is refused bail shall, within 90 days after the date of confinement, be entitled to have the charge against him or her heard by a grand jury having jurisdiction over the accused person; provided, however, that if the person is arrested for a crime for which the death penalty is being sought, the superior court may, upon motion of the district attorney for an extension and after a hearing and good cause shown, grant one extension to the 90 day period not to exceed 90 additional days; and, provided, further, that if such extension is granted by the court, the person shall not be entitled to have the charge against him or her heard by the grand jury until the expiration of such extended period. In the event no grand jury considers the charges against the accused person within the 90 day period of confinement or within the extended period of confinement where such an extension is granted by the court, the accused shall have bail set upon application to the court.

History. — Code 1933, § 27-701.1, enacted by Ga. L. 1973, p. 291, § 1; Ga. L. 1996, p. 1233, § 4.

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Construction of "refused bail." — Rules of statutory construction prohibit the phrase "refused bail" from being considered in isolation and, consequently, to limit application of the mandate of O.C.G.A. § 17-7-50 to the circumstance in which a criminal defendant has made a request of the court for bond and bond has been refused. The language of the final sentence of the statute, "in the event no grand jury considers the charges against the accused person within the 90 day period of confinement . . . the accused shall have bail set upon application to the court," does not make a distinction between those detainees who are "refused bail" and those who are "without bail"; instead it states an entitlement to bail for the accused person who has not been indicted within 90 days of incarceration. State v. English, 276 Ga. 343, 578 S.E.2d 413 (2003).

Validity of detainer. — Defendant's motion for bond was properly denied because a purported detainer did not meet the requirements in O.C.G.A. § 42-6-2, did not constitute arrest and confinement of the defendant, did not require the presentment of the charges to a grand jury within 90 days, and did not entitle the defendant to automatic bail under O.C.G.A. § 17-7-50. Denson v. State, 317 Ga. App. 456, 731 S.E.2d 130 (2012).

Applicability and construction with O.C.G.A. § 17-6-1. — Section was applicable to the first 90 days of confinement, and that section was applicable to all crimes after 90 days of confinement. After 90 days without bail and without indictment, the mandate of that section was that bail must be set by the trial judge. Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975) (see O.C.G.A. § 17-6-1).

Applicability and construction with O.C.G.A. § 17-6-14. — Although pretrial habeas corpus was a proper remedy after the defendant challenged a failure to set bail, pursuant to O.C.G.A. § 17-6-14(a), the defendant's initial bond sufficed to provide for the defendant's appearance upon the trial of the original charges; however, because the defendant was indicted within 90 days of the defendant's re-arrest on new charges, the defendant was not entitled to habeas corpus relief under O.C.G.A. § 17-7-50. Rainwater v. Langley, 277 Ga. 127, 587 S.E.2d 18 (2003).

Failure to set bail after 90 days of confinement without indictment does not require a reversal of the convictions on the indictments returned after the 90-day period. The proper procedure is to make application to the proper appellate court for bail pursuant to this section. Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975).

When the defendant spent 90 days incarcerated without having charges against the defendant presented to the grand jury, the defendant was entitled to have bond set. Rawls v. Hunter, 267 Ga. 109, 475 S.E.2d 609 (1996).

Hospitalization as "confinement". — Because the defendant was under arrest, physically restrained, and under guard while in a hospital, the defendant was in "confinement," as the term was used in O.C.G.A. § 17-7-50; therefore, because the defendant was held for 90 days without grand jury action, the trial court erred in denying the defendant's motion for bail on the charges for which the defendant was arrested. Tatis v. State, 289 Ga. 811, 716 S.E.2d 203 (2011).

When the defendant was incarcerated for 94 days before filing for bond. — Even though the defendant did not petition for bond within 90 days of arrest and incarceration, the fact that the defendant remained in jail for 94 days prior to filing for bond was tantamount to the defendant being refused bail; thus, the trial court erred in denying the defendant bail. State v. English, 276 Ga. 343, 578 S.E.2d 413 (2003).

Bail set only on charge in arrest warrant, not subsequent indictment. — Pretrial petition for a writ of habeas corpus filed by a jail inmate was properly denied as both the trial court and the habeas court correctly held that the inmate was entitled to have bail set on only the charge set forth in the arrest warrant, and not the other six charges handed down in the grand jury's subsequently issued indictment. Bryant v. Vowell, 282 Ga. 437, 651 S.E.2d 77 (2007).

Cited in Isaacs v. State, 259 Ga. 717, 386 S.E.2d 316 (1989); State v. Coleman, 306 Ga. 529, 832 S.E.2d 389 (2019).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq. 38 Am. Jur. 2d, Grand Jury, § 1 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 85 et seq., 97 et seq.

ALR. — Abolition of death penalty as affecting right to bail of one charged with murder in first degree, 8 A.L.R. 1352.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Am. Jur. Trials. — Litigation of Variances in Criminal Indictments, 157 Am. Jur. Trials 187.

17-7-50.1. Time for presentment of child's case to a grand jury; exception.

(a) Any child who is charged with a crime that is within the jurisdiction of the superior court, as provided in Code Section 15-11-560 or 15-11-561, who is detained shall within 180 days of the date of detention be entitled to have the charge against him or her presented to the grand jury. The superior court shall, upon motion for an extension

of time and after a hearing and good cause shown, grant one extension to the original 180 day period, not to exceed 90 additional days.

(b) If the grand jury does not return a true bill against the detained child within the time limitations set forth in subsection (a) of this Code section, the detained child's case shall be transferred to the juvenile court and shall proceed thereafter as provided in Chapter 11 of Title 15.

(c) The provisions of this Code section shall not apply to any case in which the prosecuting attorney files notice with the court that the detained child is a codefendant to a case in which an adult is charged with committing the same offense and the state has filed a notice of its intention to seek the death penalty.

History. — Code 1981, § 17-7-50.1, enacted by Ga. L. 2006, p. 172, § 2/SB 135; Ga. L. 2013, p. 294, § 4-15/HB 242.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

JUDICIAL DECISIONS

State failed to meet time limit for presenting case. — Superior court erred in denying the defendant juvenile's motion to transfer the case to the juvenile court because the state failed to meet the time limit for presenting the case to the grand jury, and under the plain language of O.C.G.A. § 17-7-50.1(b), it was mandatory that the case be transferred back to the juvenile court; because the case should have been transferred, the superior court lacked jurisdiction to accept the defendant's guilty plea to aggravated assault, which was made only after the defendant's request for a certificate of immediate review was denied. Hill v. State, 309 Ga. App. 531, 710 S.E.2d 667 (2011).

Dismissal of indictment was affirmed because the appellate court found that absent an extension, charges against a juvenile had to be presented to a grand jury within 180 days of the juvenile's detention or the superior court lost jurisdiction. O.C.G.A. § 17-7-50.1 dealt specifically with juvenile dispositions and applied to this case. State v. Armendariz, 316 Ga. App. 394, 729 S.E.2d 538 (2012).

O.C.G.A. § 17-7-50.1 plainly adopts the date of detention, not the date of transfer, as the point from which the time is calculated, and the statute explicitly applies whether the child is initially subject to the jurisdiction of the superior court through committing an enumerated offense, O.C.G.A. § 15-11-28, or via a transfer to superior court after a petition and hearing. Hill v. State, 309 Ga. App. 531, 710 S.E.2d 667 (2011).

180-day time limit ran only while juvenile was detained. — Superior court erred in granting a juvenile's motion to transfer the juvenile's murder case to the juvenile court under O.C.G.A. § 17-7-50.1 because the juvenile was released on bond; the 180-day period of O.C.G.A. § 17-7-50.1(a) only ran during the time the juvenile was detained; therefore, Edwards v. State, 323 Ga. App. 864 (2013), was overruled. State v. Coleman, 306 Ga. 529, 832 S.E.2d 389 (2019).

Superior court loss of jurisdiction after 180 days. — Because a grand jury did not indict a juvenile within 180 days after the juvenile's detention as required by O.C.G.A. § 15-11-28(b)(2)(A)(vii) and no extension of time had been granted as of that date, the grand jury lost authority over the case by operation of law. The trial court's order granting the state's request for an out-of-time extension was void. Nunnally v. State, 311 Ga. App. 558, 716 S.E.2d 608 (2011).

Juvenile court erred in granting the state's motion to transfer the defendant juvenile's case back to the superior court pursuant to O.C.G.A. § 15-11-30.2 because the superior court had properly transferred the case to the juvenile court since the defendant was not indicted within 180 days of detention as required by O.C.G.A. § 17-7-50.1; the time limits set forth in § 17-7-50.1 are plainly stated and mandatory and clearly express the legislative intent that when a juvenile is detained and the superior court is exercising jurisdiction under either O.C.G.A. § 15-11-28(b) or O.C.G.A. § 15-11-30.2, the state must obtain an indictment within the specified time or the superior court loses the jurisdiction conferred by those provisions. In the Interest of C.B., 313 Ga. App. 778, 723 S.E.2d 21 (2012).

Same 180-day time limitation applies to both O.C.G.A. §§ 15-11-28(b) and 15-11-30.2, and that 180 days begins to run on the day the juvenile is detained whenever the superior court is exercising jurisdiction under either section; it necessarily follows that anytime the superior court loses jurisdiction which was conferred by § 15-11-28(b) because the state failed to obtain an indictment within 180 days of the date the juvenile was detained, the time will also have expired within which the state could procure an indictment if the superior court were proceeding under O.C.G.A. § 15-11-30.2 and, thus, a transfer back to the superior court under those circumstances is pointless since an indictment returned by the grand jury would be void. In the Interest of C.B., 313 Ga. App. 778, 723 S.E.2d 21 (2012).

Although O.C.G.A. § 17-7-50.1 allows the state to request one automatic 90-day extension, this extension cannot be granted after the expiration of the 180 days; the legislature intended to set time limitations for the state to act in those situations in which the juvenile is detained and the superior court is exercising jurisdiction over the matter pursuant to either O.C.G.A. § 15-11-28(b) or O.C.G.A. § 15-11-30.2. In the Interest of C.B., 313 Ga. App. 778, 723 S.E.2d 21 (2012).

Waivers. — Lower appellate court erred when the court affirmed the transfer of the defendant from the superior court to the juvenile court because the court misunderstood O.C.G.A. § 17-7-50.1 when the court concluded that the statute did not permit a detained child to waive presentation within 180 days of the date of detention as the defendant filed an express waiver. State v. Baxter, 300 Ga. 268, 794 S.E.2d 49 (2016).

O.C.G.A. § 17-7-50.1(a) does not say that a charge shall be presented within 180 days but instead, the statute provides that the detained child shall be entitled to have the charge presented within 180 days. State v. Baxter, 300 Ga. 268, 794 S.E.2d 49 (2016).

Superior court had jurisdiction. — Given that the defendant failed to perfect the record by including in the record on appeal the transfer order which was the subject of the complaint, the appellate court assumed that the trial court's finding that a valid transfer order had been filed into the record before the superior court considered the state's motion for extension of time was correct and, thus, the trial court had jurisdiction to grant the state an extension of time to indict the defendant and, further, to accept the defendant's guilty plea. Walker v. State, 330 Ga. App. 872, 769 S.E.2d 602 (2015).

Transfer not dismissal appropriate. — State was not entitled to appeal an order transferring the defendant's case from superior court to juvenile court because the transfer order was entered under O.C.G.A. § 17-7-50.1(b), the provision directed that the juvenile's entire case be transferred to juvenile court, not dismissed, if the 180-day charging deadline was not met. State v. Johnson, 292 Ga. 409, 738 S.E.2d 86 (2013).

Cited in In the Interest of M.D.H., 300 Ga. 46, 793 S.E.2d 49 (2016); State v. Cash, 302 Ga. 587, 807 S.E.2d 405 (2017).

17-7-51. Special presentments treated as indictments; entry upon minutes; prosecutions upon special presentments.

All special presentments by the grand jury charging defendants with violations of the penal laws shall be treated as indictments. It shall not be necessary for the clerk of the court to enter the special presentments in full upon the minutes, but only the statement of the case and finding of the grand jury as in cases of indictments. It shall not be necessary for the district attorney to frame bills of indictment on the special presentments, but he may arraign defendants upon the special presentments and put them on trial in like manner as if the presentments were bills of indictment.

History. — Orig. Code 1863, § 4520; Code 1868, § 4539; Ga. L. 1873, p. 51, § 1; Code 1873, § 4632; Code 1882, § 4632; Penal Code 1895, § 931; Penal Code 1910, § 956; Code 1933, § 27-703.

JUDICIAL DECISIONS

Applicability to accusations in city courts. — Former Code 1933, § 27-701 and 27-702 (see O.C.G.A. §§ 17-7-53, 17-7-54 and 17-7-70) have no applicability to accusations in city courts when, under special legislation establishing the various city courts, it was provided that the accusation must be founded upon the affidavit of the prosecutor, and the affidavit was made a substitute for the formal finding of the grand jury as to the misdemeanors triable in the city courts in question. The affidavit which was the basis for the issuance of a warrant to arrest is not to be confused with the affidavit which forms the basis of the accusation in many of the city courts. Brown v. State, 82 Ga. App. 673, 62 S.E.2d 732 (1950).

Distinction between indictment and special presentment. — Mere technical distinction between indictments and special presentments exists in that the indictments are presented by the prosecutor. Barlow v. State, 127 Ga. 58, 56 S.E. 131 (1906).

In this state the difference between an indictment and a special presentment has been abolished with respect to the requirements of law in regard to trials under them, a mere technical distinction remaining that in an indictment the accusation is presented by a prosecutor, and in a special presentment it is preferred by the grand jury without a prosecutor. Carmichael v. State, 228 Ga. 834, 188 S.E.2d 495 (1972).

Presentments and indictments as to misconduct in public office. — Though in absence of specific statutory authority the grand jury had no right to return a report charging or casting reflections of misconduct in office upon public officials or impugning their character, except by presentment or indictment, the grand jury's presentment may be widely published under former Code 1933, § 59-317 (see O.C.G.A. § 15-12-80), and was treated as an indictment by former Code 1933, § 27-703. Sweeney v. Balkcom, 358 F.2d 415 (5th Cir. 1966).

Cited in Groves v. State, 73 Ga. 205 (1884); Belton v. State, 21 Ga. App. 792, 95 S.E. 299 (1918).

17-7-52. Procedure for indictment or special presentment of peace officer for crime in performance of duties; notification; rights of officer.

(a) Before a bill of indictment or special presentment against a present or former peace officer charging the officer with a crime which is alleged to have occurred while he or she was in the performance of his or her duties is presented to a grand jury, the officer shall be given a copy of the proposed bill of indictment or special presentment and notified in writing of the contemplated action by the prosecuting attorney. Such notice and a copy of the proposed bill of indictment or special presentment shall be provided to such officer not less than 20 days prior to the date upon which a grand jury will begin hearing evidence, and such notice shall inform such officer:

(1) That the grand jury is investigating such officer's conduct to determine if there is probable cause to conclude that he or she has violated one or more laws of this state;

(2) Of the date upon which the grand jury will begin hearing testimony on the proposed bill of indictment or special presentment and the location of the hearing;

(3) That he or she may request, but cannot be compelled, to testify as a witness before the grand jury regarding his or her conduct; and

(4) That, if such officer requests to testify before the grand jury, he or she will be permitted to do so at the conclusion of the presentation of the state's case-in-chief and that he or she may be questioned by the prosecuting attorney or members of the grand jury as are any other witnesses.

(b) If the officer requests to appear as a witness, he or she shall notify the prosecuting attorney any time prior to the date the grand jury will begin hearing testimony in such investigation. The prosecuting attorney shall, after consulting with the grand jury, inform the officer in writing of the date and time when he or she shall be present in order to testify and of the procedure that the grand jury will follow pursuant to subsection (c) of this Code section. The prosecuting attorney shall further advise the grand jury that an officer has the right to appear and testify or not to appear and testify and that, if the officer chooses not to testify, the grand jury shall not consider that in any way in making its decision.

(c) Prior to the introduction of any evidence or the first witness being sworn, the prosecuting attorney shall advise the grand jury of the laws applicable to the conduct of such proceedings, all relevant sections of the Code relating to the crime or crimes alleged in the bill of indictment, and any Code section that excuses or justifies such conduct. In partic-

ular, the grand jury shall be advised of Code Sections 16-3-20, 16-3-21, 16-3-23.1, and 17-4-20.

(d) If the officer requests to testify before the grand jury and appears at the date and time specified, the case shall proceed as in any other criminal case heard by a grand jury, except that the officer shall be permitted to testify at the conclusion of the presentation of the state's case-in-chief and that he or she shall only be present in the grand jury room while he or she is testifying. Such officer may be questioned by the prosecuting attorney or members of the grand jury as are any other witnesses. After the officer has been sworn as a witness and prior to any testimony by the officer, the prosecuting attorney shall advise the officer substantially of the following:

(1) The officer's appearance before the grand jury is voluntary, and he or she cannot be compelled to appear as a witness;

(2) By agreeing to be sworn as a witness on the bill of indictment or special presentment that will be laid before the grand jury, he or she will be asked to testify and answer questions and may be asked to produce records, documents, or other physical evidence;

(3) The officer may refuse to answer any question or to produce records, documents, and other physical evidence if a truthful answer to the question or producing such records, documents, or other physical evidence would tend to incriminate the officer or would tend to bring infamy, disgrace, or public contempt upon the officer;

(4) Any testimony given by the officer may be used against him or her by the grand jury or in a subsequent legal proceeding; and

(5) If the officer is represented by an attorney, the attorney shall have the right to be present in the grand jury room while the officer is testifying, and the officer will be permitted reasonable opportunity to consult with his or her attorney outside the grand jury room.

(e) After being sworn as a witness but prior to being asked any questions by the prosecuting attorney or the grand jurors, the officer may make such sworn statement as he or she shall desire. The officer's attorney shall not propound questions to the officer nor object to questions propounded to the officer on evidentiary grounds.

(f) At the conclusion of the officer's testimony, if any, the prosecuting attorney may present rebuttal evidence and advise the grand jury on matters of law.

(g) At any time during the presentation of evidence or during deliberations, the grand jury may amend the bill of indictment or special presentment or instruct the prosecuting attorney to cause a new bill of indictment or special presentment to be created as in any other

case. When a bill of indictment or special presentment is amended or newly created, the accused peace officer and his or her attorney shall be provided a copy of it.

(h) No individual other than the jurors, and any interpreter needed to assist a hearing impaired or speech impaired juror, shall be present while the grand jury is deliberating or voting.

(i)(1) As used in this subsection, the term "nonserious traffic offense" means any offense in violation of Title 40 which is not prohibited by Article 15 of Chapter 6 of Title 40.

(2) The requirements of this Code section shall apply to all prosecutions, whether for felonies or misdemeanors, other than nonserious traffic offenses, and no such prosecution shall proceed either in state or superior court without a grand jury indictment or special presentment.

History. — Ga. L. 1975, p. 607, § 1; Ga. L. 1997, p. 879, § 1; Ga. L. 2001, p. 487, § 5; Ga. L. 2016, p. 186, § 6/HB 941.

Cross references. — Malpractice, partiality, and conduct unbecoming of office, § 45-11-4.

Editor's notes. — Ga. L. 2001, p. 487, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Corruption Prevention Act.'"

Ga. L. 2001, p. 487, § 6, not codified by the General Assembly, provides: "The provisions of Section 5 of this Act shall apply only to crimes committed on or after the effective date of this Act." The effective date of this Act is April 20, 2001.

Law reviews. — For article, "Georgia Local Government Officials and the Grand Jury," see 26 Ga. St. B.J. 50 (1989). For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001). For survey article on local government law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 353 (2003). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005); 58 Mercer L. Rev. 267 (2006). For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 79 (2016).

JUDICIAL DECISIONS

Intent. — This section is intended to afford to police officers the same procedural protection afforded to other public officials as to accusations arising from the performance or nonperformance of their official duties. Mize v. State, 152 Ga. App. 190, 262 S.E.2d 492 (1979).

Purpose — O.C.G.A. § 45-11-4 furthers the legitimate state interest of protecting certain government officials, vested with the authority to exercise discretion, against possible frivolous indictments pursued by persons aggrieved by the exercise of that discretion because the legislative rationale is that if these officials do not have such protection, the officials' reputation and performance of the officials' duties could be compromised while the officials are defending baseless charges; by enacting O.C.G.A. § 17-7-52, the General Assembly intended to afford peace officers the enhanced protections given to other public officials regarding accusations arising from the performance or nonperformance of the officials' official duties, and thus, the legitimate purpose of O.C.G.A. § 17-7-52, in conjunction with § 45-11-4, is to protect peace officers from harassing or frivolous charges before the grand jury. State v. Smith, 286 Ga. 409, 688 S.E.2d 348 (2010).

Similar provisions. — Former Code 1933, §§ 89-9907 through 89-9910 (see O.C.G.A. §§ 45-11-4 and 45-15-11), which were similar to Ga. L. 1975, p. 607, § 1 (see O.C.G.A. § 17-7-52), but involve pub-

lic officials, were narrowly drawn and relate only to misconduct in public office. Mize v. State, 152 Ga. App. 190, 262 S.E.2d 492 (1979).

Defendant no longer a police officer. — Protections afforded by O.C.G.A. § 17-7-52 did not apply to one who was no longer a police officer when a prosecution against the officer was commenced. Dudley v. State, 242 Ga. App. 53, 527 S.E.2d 912 (2000).

Presence before grand jury. — When a police officer raped a woman in the officer's custody, the officer was properly denied the protection of being permitted to be present and to make a sworn statement when the case was presented to the grand jury since the performance of official duties does not include rape. Gober v. State, 203 Ga. App. 5, 416 S.E.2d 292, cert. denied, 203 Ga. App. 906, 416 S.E.2d 292 (1992).

When the defendant quashed the defendant's indictment due to the state's failure to allow defendant to appear before the grand jury as was the defendant's right as a police officer under O.C.G.A. §§ 17-7-52 and 45-11-4, the state did not appeal as was the state's right under O.C.G.A. § 5-7-1(a)(1), the state instead obtained an accusation against the defendant, and the trial court quashed the accusation due to the state's failure to allow the defendant to appear before the grand jury, the state could not argue, in opposing the defendant's motion to quash the accusation, that the defendant was not performing the defendant's official duties at the time of the alleged criminal conduct; because the trial court had previously decided this issue against the defendant, res judicata under O.C.G.A. § 9-12-40 barred further litigation of the issue. State v. Allen, 262 Ga. App. 724, 586 S.E.2d 378 (2003).

Trial court did not err in finding that the defendant, who was an officer with a college police department, was not entitled to be present and make a statement pursuant to O.C.G.A. §§ 17-7-52(a) and 45-11-4 when the defendant's case was presented to the grand jury because the indictment did not allege that the crimes occurred while the defendant was performing the defendant's duties; the defendant was not on campus as defined by O.C.G.A. § 20-8-1(1), and the record did not show that the defendant's official duties as a campus police officer included the commission of the acts at issue, while the defendant was off duty and engaged in leisure activities outside of the defendant's jurisdiction. Worthy v. State, 307 Ga. App. 297, 704 S.E.2d 808 (2010).

Law enforcement officer defendant's motion to dismiss an indictment charging the defendant with felony murder on the ground that unauthorized persons were present in the grand jury room during the prosecutor's presentation of evidence was properly denied because Georgia's statutory secrecy requirements were not violated. Olsen v. State, 302 Ga. 288, 806 S.E.2d 556 (2017).

Although a deputy charged with sexual battery and false imprisonment was a certified peace officer and the offenses occurred during the deputy's working hours, the deputy had stepped aside from the deputy's official duties when the deputy allegedly restrained women against their will, groped their breasts and buttocks, and exposed the deputy's genitalia; therefore, the deputy was not entitled to the rights to be present and make a sworn statement to the grand jury provided in O.C.G.A. §§ 17-7-52 and 45-11-4. State v. Dorsey, 342 Ga. App. 188, 802 S.E.2d 61 (2017).

Performance of official duties does not include the commission of burglaries. Mize v. State, 152 Ga. App. 190, 262 S.E.2d 492 (1979); Morrill v. State, 216 Ga. App. 468, 454 S.E.2d 796 (1995).

Police officer may be charged with a misdemeanor by accusation in state court. Sanderson v. State, 217 Ga. App. 51, 456 S.E.2d 667 (1995).

Police officer failed to show any violation of statutory rights. — Trial court properly denied the defendant's demurrer and motion to quash based upon the state's alleged violation of the defendant's rights under O.C.G.A. § 45-11-4(g) and (h), with regard to the procedure to be followed when charging a public officer with a crime, as the defendant failed to show that the state violated any of the defendant's rights under the statute. Brandeburg v. State, 292 Ga. App. 191,

663 S.E.2d 844 (2008), cert. denied, No. S08C1796, 2008 Ga. LEXIS 921 (Ga. 2008).

Lack of proper notice to police officer. — With regard to a defendant's conviction on three counts of false statements and writings, the trial court erred by denying the defendant's motion for a new trial as a result of erring by denying the defendant's plea in abatement and motion to dismiss the indictment as the state violated the notice provisions under O.C.G.A. §§ 17-7-52 and 45-11-4, with respect to peace officers and public officials, by failing to notify the defendant when the proposed indictment would be presented to the grand jury. The defendant, a police officer and police chief of two municipalities, was accused of falsifying time records and, as a police officer, was entitled to the notice set forth under the statutes. Smith v. State, 297 Ga. App. 300, 676 S.E.2d 750 (2009), aff'd, 286 Ga. 409, 688 S.E.2d 348 (2010).

Court of appeals did not err in finding that the state failed to notify the defendant when the proposed indictment would be presented and in directing that the defendant's convictions be set aside because notice of the specific time and place of the grand jury presentment was required to be provided to the defendant by the state; timely serving the accused with a copy of the proposed bill of indictment but failing to timely inform the accused of when and where the reckoning with the grand jury will occur is not substantial compliance with the requirements of O.C.G.A. §§ 17-7-52 and 45-11-4 in regard to notification to the accused, and the task of providing the notice to the accused of the date, time, and place of the state's evidentiary showing logically and pragmatically must lie with the state. State v. Smith, 286 Ga. 409, 688 S.E.2d 348 (2010).

Defendant, a K-9 handler, was acting within the scope of the defendant's official duties when the defendant left the dog in the car with inadequate ventilation as the defendant was responsible for the dog's daily care including housing the dog at the defendant's residence and, thus, the defendant was entitled to the protections afforded by O.C.G.A. § 17-7-52, including notice of the grand jury proceeding and a copy of the proposed indictment before the state presented the case to the grand jury. State v. Peabody, 343 Ga. App. 362, 807 S.E.2d 107 (2017), cert. denied, 2018 Ga. LEXIS 428 (Ga. 2018).

Applicability of section. — Protections of O.C.G.A. § 17-7-52 extend to a peace officer charged with criminal misdeeds in office, but who is no longer employed as a peace officer when the criminal proceedings against that individual are commenced. Dudley v. State, 273 Ga. 466, 542 S.E.2d 99 (2001).

Defendant, a police officer, was charged with misdemeanor traffic violations of speeding and failing to reduce speed when approaching an intersection and was entitled to the statutory protections of O.C.G.A. §§ 17-7-52 and 45-11-4 afforded to police officers charged with a crime. State v. Lockett, 259 Ga. App. 179, 576 S.E.2d 582 (2003).

Because the defendant's performance of official duties as a police officer did not include rape or any other sort of sexual assault, and the defendant was not performing official duties while allegedly committing the charged offenses, the defendant was not entitled to the protections afforded by O.C.G.A. §§ 17-7-52 and 45-11-4. State v. Galloway, 270 Ga. App. 184, 606 S.E.2d 273 (2004).

Charge of false writings and statements, in violation of O.C.G.A. § 16-10-20, which arose during the performance of official duties by the defendant, a police officer, should have been dismissed because proper notice pursuant to O.C.G.A. §§ 17-7-52 and 45-11-4 was not given to the defendant; other charges against the defendant were not subject to dismissal as those charges did not arise in the performance of official duties, and the lack of notice did not improperly influence or infect the other convictions. Wiggins v. State, 280 Ga. 268, 626 S.E.2d 118 (2006).

Trial court erred by holding that O.C.G.A. §§ 17-7-52(a) and 45-11-4(g) did not apply as there was substantial evidence that the defendant entered the sheriff's office in furtherance of an investigation while the defendant was arguably on call on the night of the sheriff's death. Yancey v. State, 342 Ga. App. 294, 802 S.E.2d 702 (2017).

Application to corrections officer. — Counts for battery and lying to an agent of the Department of Corrections did not fall within the scope of O.C.G.A. § 17-7-52 because nothing therein indicated that the acts alleged occurred with the defendant's performance of the job duties at the prison as a corrections officer. State v. O'Neal, 352 Ga. App. 228, 834 S.E.2d 317 (2019), cert. denied, No. S20C0418, 2020 Ga. LEXIS 325 (Ga. 2020).

Trial court did not err in granting the motion to quash the count alleging the defendant violated the defendant's oath as a public officer because the language accusing the defendant of abusing inmates while employed as a corrections officer sufficiently characterized the defendant's conduct as within the performance of the defendant's duties such that O.C.G.A. § 17-7-52 applied and the state failed to follow the notice requirements therein. State v. O'Neal, 352 Ga. App. 228, 834 S.E.2d 317 (2019), cert. denied, No. S20C0418, 2020 Ga. LEXIS 325 (Ga. 2020).

Cited in Creamer v. State, 150 Ga. App. 458, 258 S.E.2d 212 (1979); State v. Roulain, 159 Ga. App. 233, 283 S.E.2d 89 (1981); Knowles v. State, 159 Ga. App. 239, 283 S.E.2d 51 (1981); Quillan v. State, 160 Ga. App. 167, 286 S.E.2d 503 (1981); Sauls v. State, 220 Ga. App. 115, 468 S.E.2d 771 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 156 et seq.

C.J.S. — 67 C.J.S., Officers, §§ 249, 250, 251.

17-7-53. Operation of two returns of "no bill" on charge as bar to future prosecution for same charge.

Two returns of "no bill" by grand juries on the same charge or allegation shall be a bar to any future prosecution of a person for the same offense under the same or another name; provided, however, that, if the returns have been procured by the fraudulent conduct of the person charged or there is newly discovered evidence, upon proof, the judge may allow a third bill to be presented, found, and prosecuted.

History. — Laws 1850, Cobb's 1851 Digest, p. 864; Code 1863, § 4591; Code 1868, § 4612; Code 1873, § 4708; Code 1882, § 4708; Penal Code 1895, § 930; Penal Code 1910, § 955; Code 1933, § 27-702.

Cross references. — Multiple jeopardy, U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII.

JUDICIAL DECISIONS

Intent. — This section was passed to protect the people of this state from vexatious prosecution in cases where grand juries may hereafter refuse to find the true bills. Lowry v. Thompson, 53 Ga. App. 71, 184 S.E. 891 (1936).

Effect on rights at common law. — This section has not changed the common law with reference to the fact that the defendant was entitled to be discharged without further answer after a return of the first "no bill." Lowry v. Thompson, 53 Ga. App. 71, 184 S.E. 891 (1936).

Applicability to accusations in city courts. — Former Code 1933, §§ 27-701.1, 27-703, and 27-704 (see O.C.G.A. §§ 17-7-51, 17-7-54, and 17-7-70) have no applicability to accusations in city courts when, under special legislation establishing the various city

courts, it was provided that the accusation must be founded upon the affidavit of the prosecutor, and the affidavit was made a substitute for the formal finding of the grand jury as to the misdemeanors triable in the city courts in question. The affidavit which was the basis for the issuance of a warrant to arrest is not to be confused with the affidavit which formed the basis of the accusation in many of the city courts. Brown v. State, 82 Ga. App. 673, 62 S.E.2d 732 (1950).

Effect of first "no bill." — After the return of a first "no bill", the party against whom the indictment is sought is discharged without further answer, but a fresh bill may afterwards be preferred to a subsequent grand jury. Lowry v. Thompson, 53 Ga. App. 71, 184 S.E. 891 (1936).

After the return of a first "no bill", the party against whom the indictment is sought is discharged without further answer. Curcio v. Sanders, 109 Ga. App. 548, 136 S.E.2d 406 (1964).

Return of a first "no bill" was no bar to the prosecution of the accused under a "true bill" subsequently returned since under this section the return of two "no bills" by grand juries on the same charge or accusation was necessary to constitute a bar to future prosecution for the same offense. Curcio v. Sanders, 109 Ga. App. 548, 136 S.E.2d 406 (1964).

When one has been arrested on a warrant, and has executed an appearance bond with a surety thereon, and a "no bill" is returned by the grand jury as to the charge against the accused, the accused is by operation of law discharged upon the return of the first "no bill", and is released from recognizance along with the surety thereon, subject to being rearrested and new recognizance required upon the initiation of a new bill of indictment. Curcio v. Sanders, 109 Ga. App. 548, 136 S.E.2d 406 (1964).

True bill may not be recalled at same term. — After a grand jury has returned into court a true bill of indictment, and the indictment has been entered on the minutes of the superior court by the court's clerk, the court obtains jurisdiction of the case, and the grand jury is without authority, at the same term of the court, to recall the true bill, erase the entry of "true bill", and make an entry of "no bill" on the indictment. Gibson v. State, 162 Ga. 504, 134 S.E. 326, aff'd, 162 Ga. 504, 134 S.E. 326 (1926).

No right to entry of discharge in minutes of court. — Person discharged is not entitled to an order upon the minutes of the superior court discharging the person from the offense or crime therein contained. Christmas v. State, 53 Ga. 81 (1874).

Proof of return of "no bill". — Entry of "no bill" on the minutes or the original "no bill" is the highest evidence of the action of the grand jury. When it is accounted for, individual grand jurors may testify to the facts. Elliott v. State, 1 Ga. App. 113, 57 S.E. 972 (1907).

Mere statement by the prisoner's attorney to the jailer that the prisoner should be discharged because the grand jury had, upon investigation of the charge made against the prisoner, returned the first "no bill," is not sufficient proof of that return, when the jailer wants further proof and demands the proof, nor would it be such notice as would be conclusive on the sheriff, or jailer, or such notice as the jailer must then act on immediately at the jailer's peril. Even if it charged the jailer with the duty of making further inquiry, the jailer would be entitled to a reasonable time for this purpose before taking further action. Lowry v. Thompson, 53 Ga. 71, 184 S.E. 891 (1936).

Prima facie proof that prosecution has terminated. — Allegation or proof of a return of "no bill" by even one grand jury on an indictment is deemed a sufficient prima facie showing that a prosecution has terminated. Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

Pleading and use in evidence of defense. — Defense granted by this section may be pled in bar or given in evidence under the general issue. Elliott v. State, 1 Ga. App. 113, 57 S.E. 972 (1907).

Cited in Barlow v. State, 127 Ga. 58, 56 S.E. 131 (1906); State v. Griffin, 268 Ga. 540, 491 S.E.2d 340 (1997).

RESEARCH REFERENCES

ALR. — Unlawful arrest as bar to prosecution under subsequent indictment or information, 56 A.L.R. 260.

Power of grand jury to withdraw or alter indictment, or return of "not a true bill", 82 A.L.R. 1057.

Right of prosecution to review of decision quashing or dismissing indictment or information, or sustaining demurrer thereto, 92 A.L.R. 1137.

17-7-53.1. Quashing of second grand jury indictment or presentment bars further prosecution.

If, upon the return of two "true bills" of indictments or presentments by a grand jury on the same offense, charge, or allegation, the indictments or presentments are quashed for the second time, whether by ruling on a motion, demurrer, special plea or exception, or other pleading of the defendant or by the court's own motion, such actions shall be a bar to any future prosecution of such defendant for the offense, charge, or allegation.

History. — Code 1981, § 17-7-53.1, enacted by Ga. L. 1987, p. 529, § 1.

Editor's notes. — Ga. L. 1987, p. 529, § 2, not codified by the General Assembly provided that this Code section applies to indictments and presentments returned on or after July 1, 1987.

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Constitutionality. — Ga. L. 1987, p. 529, § 2, provides that O.C.G.A. § 17-7-53.1 shall apply to indictments or presentments returned on or after July 1, 1987. Because the statute treats all persons indicted on or after July 1, 1987, alike and because the statute presents no equal protection or due process problems, constitutional claims of a defendant concerning equal protection and due process do not provide ground for relief. Isaacs v. State, 257 Ga. 798, 364 S.E.2d 567 (1988).

Double jeopardy implications. — Retrial of a charge of possession of a firearm by a convicted felon would not itself violate double jeopardy or any other constitutional right since the right not to be prosecuted on a count which was quashed for the second time was purely statutory pursuant to O.C.G.A. § 17-7-53.1. Langlands v. State, 282 Ga. 103, 646 S.E.2d 253 (2007).

Provisions of O.C.G.A. § 17-7-53.1 do not explicitly apply to accusations. State v. Roca, 203 Ga. App. 267, 416 S.E.2d 836 (1992).

O.C.G.A. § 17-7-53.1 applies when quashed indictments originate in same county. — O.C.G.A. § 17-7-53.1 applies only when two quashed indictments originate in the grand jury of a single county; thus, the defendant could be prosecuted under a second indictment in a county even though the indictments had previously been quashed in that county and a second county. State v. Griffin, 268 Ga. 540, 491 S.E.2d 340 (1997).

Indictments returned before effective date of section. — Trial court erroneously applied O.C.G.A. § 17-7-53.1 to three indictments returned before the effective date of the statute, even though one of the indictments was returned after the effective date. State v. Smith, 187 Ga. App. 249, 370 S.E.2d 15 (1988).

Section contemplates actual quashing of two prior indictments. — By the statute's terms, O.C.G.A. § 17-7-53.1 contemplates the trial court's actual quashing of two prior indictments, not the trial court's mere denial of two prior special demurrers. Smith v. State, 198 Ga. App. 647, 402 S.E.2d 738 (1991).

When the defendant failed to include a record of the first and second indictments, there was no basis for the appellate court to determine whether those indictments were subject to a motion to quash; if the indictments were not quashed, the protections of the statute were not triggered. Hughes v. State, 266 Ga. App. 652, 598 S.E.2d 43 (2004).

O.C.G.A. § 17-7-53.1 applies when quashed indictments were defective. — When the defendant was indicted for vehicular homicide for the third time following the quashing of two prior indictments which cited the wrong code subsection, the appellate court upheld application of O.C.G.A. § 17-7-53.1, holding that whether the prior indictments were sufficient to withstand demurrer was irrelevant. State v. Dorsey, 251 Ga. App. 788, 555 S.E.2d 141 (2001).

Nolle prossed entries. — Fact that state entered a nolle prosequi as to the second indictment did not preclude prosecution of the defendant under a third indictment for the same offense; the bar under O.C.G.A. § 17-7-53.1 follows actions adverse to the state putting it out of court. Redding v. State, 205 Ga. App. 613, 423 S.E.2d 10, cert. denied, 205 Ga. App. 901, 423 S.E.2d 10 (1992); Gourley v. State, 268 Ga. 235, 486 S.E.2d 342 (1997).

When a trial court entered an order of nolle prosequi on a first indictment after a second indictment had been filed, the court's granting of the defendant's general demurrer on the second indictment was the only action which fell within the dictates of O.C.G.A. § 17-7-53.1, and the trial court correctly held that there was no statutory bar to the defendant's prosecution under a third indictment. Gamble v. State, 235 Ga. App. 777, 510 S.E.2d 69 (1998).

Since the first indictment against the defendant was quashed and the state later initiated a nolle prosequi order regarding a second indictment, which the trial court properly granted in the court's discretion, the entry of the nolle prosequi avoided a quashing of the second indictment such that further prosecution under a third indictment was not barred by O.C.G.A. § 17-7-53.1, which only applied when a trial court quashed two prior indictments; accordingly, the trial court properly denied the defendant's plea of former jeopardy under O.C.G.A. § 17-7-53.1. State v. Lejeune, 276 Ga. 179, 576 S.E.2d 888 (2003).

Despite the order of nolle prosequi entered as to a first indictment, the defendant would still be subject to reindictment, yet, under O.C.G.A. § 17-7-53.1, the defendant was not subject to reindictment because the first and second indictments against the defendant were quashed. State v. Dempsey, 290 Ga. 763, 727 S.E.2d 670 (2012).

Trial court did not abuse the court's discretion by granting the nolle prosequi as to a first indictment nor did the court err in denying the defendant's plea of former jeopardy and motion to dismiss a third indictment because under O.C.G.A. § 17-8-3, the state did not need defendant's consent to obtain an order of nolle prosequi before the case was submitted to a jury and the court had the discretion to order the nolle prosequi, instead of quashing the indictment to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Entries of nolle prosequi do not trigger the bar to prosecution in O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Nothing in O.C.G.A. § 17-7-53.1 evidences an intent by the Georgia General Assembly to include actions initiated by the state in the enumerated matters giving rise to application of the statutory bar to future prosecution. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Indictment quashed orally. — When the trial court orally quashed two previous indictments on the same charge and refused to reduce the order to writing, a third indictment was still barred. Evans v. State, 217 Ga. App. 548, 458 S.E.2d 357 (1995).

Accusation not same as indictment. — When the trial court quashed an indict-

ment and a later accusation, both of which charged the defendant with misdemeanors, due to the state's failure to comply with O.C.G.A. § 17-7-52, O.C.G.A. § 17-7-70.1 did not make a quashed accusation similar or equivalent to an indictment for the purposes of the prosecutory bar under O.C.G.A. § 17-7-53.1. Additionally, § 17-7-70.1 relates primarily to felonies charged by accusation, and the district attorney could not bring the accusation, as was required for § 17-7-70.1, due to the fact that the grand jury heard evidence in the case. State v. Allen, 262 Ga. App. 724, 586 S.E.2d 378 (2003).

Plea in bar properly denied. — Because an order quashing a count of possession of a firearm by a convicted felon for the second time was neither accomplished nor absolutely required, prosecution under a corrected, non-defective indictment was allowed; thus, the trial court did not err in denying a plea in bar as to the charge. Langlands v. State, 282 Ga. 103, 646 S.E.2d 253 (2007).

Ineffective assistance for failure to challenge indictment. — Defense counsel's performance was deficient in failing to challenge the defendant's charge of possession of a firearm by a convicted felon on the basis that the indictment erroneously alleged that the crime was committed on a date after the indictment was issued; since this was the second time the defendant had been indicted for that offense, if trial counsel had timely challenged that count, any future prosecution for that crime would have been barred, and thus prejudice to the defendant was shown. Langlands v. State, 280 Ga. 799, 633 S.E.2d 537 (2006).

Failure to challenge indictment based on grand jury composition not ineffective assistance. — Trial counsel was not ineffective for failing to move to quash the indictment or to arrest judgment because even if a timely motion to quash had been filed, the indictment likely would have been dismissed because a convicted felon served on the grand jury in violation of O.C.G.A. § 15-12-60, however, the state would have been free to obtain the identical indictment from a properly constituted grand jury. Brooks v. State, 332 Ga. App. 396, 772 S.E.2d 838 (2015), cert. denied, No. S15C1548, 2015 Ga. LEXIS 573 (Ga. 2015).

Cited in Smith v. State, 297 Ga. App. 300, 676 S.E.2d 750 (2009); Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377 (2009); Martin v. State, 306 Ga. 747, 833 S.E.2d 122 (2019); State v. Heath, 843 S.E.2d 801, No. S19G0967, 2020 Ga. LEXIS 362 (2020).

17-7-54. Form of indictment by grand jury.

(a) Every indictment of the grand jury which states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct. The form of every indictment shall be substantially as follows:

Georgia, _____ County.

The grand jurors selected, chosen, and sworn for the County of _____, to wit: _____, in the name and behalf of the citizens of Georgia, charge and accuse (name of the accused) of the county and state aforesaid with the offense of _____; for that the said (name of the accused) (state with sufficient certainty the offense and the time and place of committing the same), contrary to the laws of said state, the good order, peace, and dignity thereof.

(b) If there should be more than one count, each additional count shall state:

And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse (name of the accused) with having committed the offense of _____; for that the said (name of the accused) (state with sufficient certainty the offense and the time and place of committing the same) contrary to the laws of said state, the good order, peace, and dignity thereof.

History. — Laws 1833, Cobb's 1851 Digest, p. 833; Code 1863, § 4516; Code 1868, § 4535; Code 1873, § 4628; Code 1882, § 4628; Penal Code 1895, § 929; Penal Code 1910, § 954; Code 1933, § 27-701.

Law reviews. — For article, "The Necessity of Negativing Exceptions in a Criminal Indictment," see 16 Ga. B.J. 25 (1953). For survey article on death penalty law, see 59 Mercer L. Rev. 123 (2007).

For comment on Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959), see 11 Mercer L. Rev. 237 (1959).

JUDICIAL DECISIONS

Analysis

General Consideration
Multiple Counts
Pleading in the Alternative; More than One Way to Commit Offense
Variance
Particular Offenses

General Consideration

This section was not intended to dispense with the substance of good pleading. Braxley v. State, 143 Ga. 658, 85 S.E. 888 (1915).

Indictment must state offense in an understandable manner. — Under this section, an indictment was sufficient if the indictment stated the offense so plainly that a man of rational understanding cannot fail to understand the indictment. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930).

When the offense is stated in such language that the jury can easily understand the nature of the offense charged, the charge measures up to the rule expressed by this section. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930).

True test of the sufficiency of an indictment. — True criterion as to the sufficiency of an indictment is the description of the crime charged rather than the description and number of the statute under the Code or the law. State v. Black, 149 Ga. App. 389, 254 S.E.2d 506 (1979).

Test is not whether the indictment could have been made more definite and certain, but whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what the defendant must be prepared to meet, and, in case any other proceedings are taken against the defendant for a similar offense, whether the record shows with accuracy to what extent the defendant may plead a former acquittal or conviction. State v. Black, 149 Ga. App. 389, 254 S.E.2d 506 (1979); Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444 (1981).

This section required that the indictment should leave nothing to inference; or implication but that its statements should be so plain that a common man may without doubt or difficulty, from the language used, know what is the charge made against the accused. Moore v. State, 54 Ga. App. 218, 187 S.E. 595 (1936).

Sufficiency of indictment. — Trial court erred in overruling the defendant's special demurrer with regard to portions of the indictment that contended that the Medicaid fraud and theft by taking crimes were committed over a range of 38 months because the specific dates were known to the state and the state should have listed those dates due to the number of alleged

acts. Cole v. State, 334 Ga. App. 752, 780 S.E.2d 406 (2015).

Indictment for street gang activity. — Indictment for criminal street gang activity under O.C.G.A. § 16-15-4(a) was sufficient to withstand 12 defendants' general and special demurrers. Although the indictment did not allege a date that the gang came into existence, the indictment sufficiently alleged that the gang existed at the time of each of the enumerated predicate offenses. State v. Hood, 307 Ga. App. 439, 706 S.E.2d 566 (2010).

Charge must be sufficiently explicit to support itself. — No latitude of intention can be allowed to include anything more than is expressed, and no argumentative inferences will supply the want of direct averments of material facts. Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936), aff'd, 184 Ga. 164, 190 S.E. 582 (1937).

Indictment must allow accused to prepare defense and plead judgment as bar. — Accused must be apprised by the indictment, with reasonable certainty of the nature of the accusation against the accused, to the end that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956); State v. Black, 149 Ga. App. 389, 254 S.E.2d 506 (1979).

Good indictment must state the offense charged in detail sufficient to give the defendant ample opportunity to prepare a defense. Morris v. State, 166 Ga. App. 137, 303 S.E.2d 492 (1983).

Indictment not framed with reasonable certainty is defective, although the indictment may follow the language of this section. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956).

Indictment which withstands demurrer and motion in arrest of judgment may yet be insufficient. — Description should be definite so that the judgment may be pleaded in bar of a subsequent prosecution for the same offense. Pharr v. State, 44 Ga. App. 363, 161 S.E. 643 (1931).

Indictment may be good in substance and sufficiently full to withstand a general demurrer or to support a conviction as against a motion in arrest of judgment, and yet be wanting in that degree of detail and definiteness which the accused may demand before going to trial on the merits. Mullen v. State, 51 Ga. App. 385, 180 S.E. 521 (1935).

Accused has the right to know enough of the particular facts constituting the alleged offense to enable the accused to prepare for trial. Lee v. State, 117 Ga. App. 765, 162 S.E.2d 229 (1968).

Requisite of a good indictment, as to form, is that the offense with which the defendant is charged be so stated as to give defendant ample opportunity to prepare a defense. State v. Green, 135 Ga. App. 622, 218 S.E.2d 456 (1975).

As long as the defendant is informed of the charges against the defendant so that the defendant may present a defense at trial and not be surprised by the evidence against the defendant, as well as protect against prosecution for the same offense, the indictment is sufficient. Carter v. State, 155 Ga. App. 49, 270 S.E.2d 233 (1980).

Construction of demurrer to indictment. — Demurrer raising special objections to an indictment should be strictly construed against the pleader. Johnson v. State, 233 Ga. App. 450, 504 S.E.2d 290 (1998).

Indictment is bad if accused is innocent under facts charged. — If all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad. Chelsey v. State, 121 Ga. 340, 49 S.E. 258 (1904).

Indictment is good when guilt follows as legal conclusion. — If, taking the facts alleged in the indictment as premises, the guilt of the accused follows as a legal conclusion, the indictment is good. Chelsey v. State, 121 Ga. 340, 49 S.E. 258 (1904); Kidd v. State, 39 Ga. App. 30, 146 S.E. 35 (1928); Flynn v. State, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

It is immaterial by what language an indictment styles the offense charged, if the indictment in fact charges an offense. Driver v. State, 60 Ga. App. 719, 4 S.E.2d 922 (1939).

Offense charged in an indictment is not determined by the name given it therein, but by the facts set forth in the indictment. Driver v. State, 60 Ga.

General Consideration (Cont'd)

App. 719, 4 S.E.2d 922 (1939).

Description controls offense. — Description and not the name given to a criminal act characterizes the offense. Edwards v. State, 22 Ga. App. 796, 97 S.E. 205 (1918).

Sufficiency of indictment expressed in language of statute. — Indictment which charges the offense defined by a legislative act in the language of the act, when the description of the acts alleged as constituting the offense is full enough to put the defendant on notice of the offense with which the defendant is charged, is sufficiently specific. Lowe v. State, 50 Ga. App. 369, 178 S.E. 203 (1934); Stone v. State, 76 Ga. App. 96, 45 S.E.2d 89 (1947); Gaines v. State, 80 Ga. App. 512, 56 S.E.2d 772 (1949).

Indictment conforming substantially to the requirements of section would be sufficient, but it was not designed to deny to the accused the right to know enough of the particular facts constituting the alleged offense to enable the accused to prepare for trial. Moore v. State, 54 Ga. App. 218, 187 S.E. 595 (1936); Stone v. State, 76 Ga. App. 96, 45 S.E.2d 89 (1947); Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956); Cragg v. State, 117 Ga. App. 133, 159 S.E.2d 717 (1968).

Under general principles of common-law pleading, it is sufficient to frame an indictment in the words of the statute, in all cases when the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense the offender is to be tried for really is. Stone v. State, 76 Ga. App. 96, 45 S.E.2d 89 (1947).

Accusation which alleges the violation of the statute in the language of the statute, together with the other necessary allegations, is sufficient to put the defendant on notice as against what facts and charges defendant must contend as every essential ingredient of the offense charged is set forth in the accusation with sufficient clearness to enable the defendant to clearly understand the nature of the offense, and the accusation is exact enough to protect the defendant from a second jeopardy. Gaines v. State, 80 Ga. App. 512, 56 S.E.2d 772 (1949).

When two counts of an indictment allege the offense charged in the terms and language of this section upon which the indictments are predicated, and the allegations were sufficiently plain for the nature of the offenses to be easily understood by the jury, the indictments were sufficient. Pippin v. State, 205 Ga. 316, 53 S.E.2d 482 (1949).

Indictment substantially in the language of the Code is sufficient in form and substance. Schulman v. State, 94 Ga. App. 489, 95 S.E.2d 343 (1956).

For an indictment to meet the test of this section, the offense shall be described in the language of the statute and with sufficient particularity to enable the defendant to be able to prepare for trial. Ingram v. State, 97 Ga. App. 468, 103 S.E.2d 666 (1958).

When the accusation was framed in the language of this section, the accusation sufficiently alleges and describes the nature of the crime so that the charge may be understood by the jury. Reddish v. State, 101 Ga. App. 759, 115 S.E.2d 736 (1960).

It is ordinarily sufficient to describe the offense in the language of the Code. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

When the charge is in the language of the statute, and the statute is upheld as against a charge of vagueness, the allegations are not insufficient to put the defendants on notice of the crime charged so as to render the indictment subject to dismissal. Flinchum v. State, 141 Ga. App. 59, 232 S.E.2d 396 (1977).

Indictment which charges a defendant with the commission of a crime in the language of a valid statute is sufficient to withstand a demurrer charging that the indictment is insufficient to charge the defendant with any offense under the laws of this state. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980).

Indictment in which the allegations track the language of the applicable Code section is good as against a general demurrer. Bentley v. State, 210 Ga. App. 862, 438 S.E.2d 110 (1993); Thomas v. State, 215 Ga. App. 522, 451 S.E.2d 516 (1994).

Indictment couched in the language of the statute is not subject to general demurrer. Smith v. State, 130 Ga. App. 390, 203 S.E.2d 375 (1973); Dye v. State, 177 Ga. App. 813, 341 S.E.2d 469 (1986), overruled on other grounds, Eason v. State, 260 Ga. 445, 396 S.E.2d 492 (1990), overruled on other grounds, State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Indictment need not state the statute on which indictment is based. State v. Pettus, 133 Ga. App. 622, 212 S.E.2d 9 (1974).

In order to charge statutory offenses, indictments are not constitutionally required to cite or name the statute. Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975).

Indictment need not state statutory aggravators. — Trial court did not err by denying a defendant's motion to quash an indictment, based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), because the face of the indictment did not contain the statutory aggravators for the death penalty; the state was not required to list the statutory aggravators in the indictment. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Indictment which follows statute but lacks definiteness. — Although an indictment followed the statute, and is good in substance, if the indictment is wanting in that degree of detail and definiteness which the accused has a right to demand, a special demurrer thereto should be sustained. Bailey v. State, 65 Ga. 410 (1880); Johnson v. State, 90 Ga. 441, 16 S.E. 92 (1892); Dixon v. Mayor of Savannah, 20 Ga. App. 511, 93 S.E. 274, cert. denied, 20 Ga. App. 511 (1917).

If the indictment does not specify the section under which the indictment is drawn, the omission is immaterial. The offense charged is to be determined by the allegations. Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975).

Indictment need not quote literally the language of the statute. — Indictment drawn under a criminal statute, which defines and describes the acts alleged to constitute the crime, is not subject to demurrer on the ground that the indictment fails to quote literally the exact language of the statute. Farrar v. State, 187 Ga. 401, 200 S.E. 803 (1939).

If the statutory definition of an offense includes generic terms. — While an accusation which states the offense in the terms and language of the Code or so plainly that the nature of the offense charged may be easily understood, is generally sufficient; nevertheless, when the terms used in the Code section are generic, it is not sufficient that an indictment charge the offense in the same general terms as in the definition of the crime, but the indictment must state the particular offense intended to be charged. Ramsey v. State, 85 Ga. App. 245, 69 S.E.2d 98 (1952).

Indictment must state the species of act charged; the indictment must descend to particulars. Lee v. State, 117 Ga. App. 765, 162 S.E.2d 229 (1968).

Many offenses cannot be described in language of Code. — This section was not intended to dispense with the substance of good pleading, and there are many charges where the offense cannot be described in the terms and language of the Code. Such cases are covered by the additional words, "so plainly that the nature of the offense charged may be easily understood by the jury." Moore v. State, 54 Ga. App. 218, 187 S.E. 595 (1936); Mell v. State, 69 Ga. App. 302, 25 S.E.2d 142 (1943).

Many offenses would not be sufficiently charged if stated merely in the language of the Code, such as murder, larceny, perjury, and others. A description of these latter offenses or a description of what the defendant did is necessary to make a legal charge, and to enable the defendant to prepare a defense. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956).

Use of language of Code not always sufficient to withstand demurrer. — Rule set forth in this section that an accusation or indictment substantially in the language of the Code is sufficient to withstand demurrer, has its limitations, is not of universal application, and does not cover all crimes. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956).

Indictment sufficient to withstand demurrer. — Trial court's decision overruling the defendant's special demurrer to

General Consideration (Cont'd)

an indictment charging the defendant with trafficking in methamphetamine and misdemeanor possession of marijuana in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(e) was authorized because the allegations of the indictment were sufficient to be easily understood by the jury, to allow the defendant to prepare the defendant's defense, and to protect the defendant from double jeopardy; the indictment sufficiently set forth the date of the offenses and tracked the material language of the statutes proscribing the charged offenses, and the language set forth in the counts against the codefendants separately designated the drugs upon which those charges were based and made clear that the defendant's drug charges were not based upon the drugs allegedly possessed by those individual codefendants. Fyfe v. State, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

If the indictment is not stated in the language of the Code, the indictment must allege every essential element of the crime charged. Capitol Distrib. Co. v. State, 83 Ga. App. 303, 63 S.E.2d 451 (1951).

Predicate act sufficiently set forth in indictment. — Indictment clearly specified the predicate acts alleged against the defendants by specifying that the pattern of racketeering activity was unlawfully obtaining oxycodone, and it incorporated as predicate acts the remaining counts of the indictment charging the defendants with unlawfully obtaining oxycodone. Kimbrough v. State, 336 Ga. App. 381, 785 S.E.2d 54 (2016).

Distinction between accusations of statutory and common-law offenses. — Distinction is to be drawn between charges which are violations of purely statutory offenses and those cases which were penalized under the common law. Naturally, when the offense is statutory, the language of the accusation must follow more closely the language of the statute and be restricted by it more than when the charge relates to a common-law offense, in which the details must necessarily be amplified in order to cover the definition of the common-law offense. Dalton v. State, 176 Ga. 645, 169 S.E. 198 (1933); Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956).

When the offenses set forth in the indictment are violations of purely statutory offenses and not offenses penalized under the common law, the language of the indictment must follow more closely the language of the statute and be restricted by it more than a common-law offense. State v. Black, 149 Ga. App. 389, 254 S.E.2d 506 (1979).

Right to indictment perfect in form and substance. — While after verdict the defendant will not be heard to complain of technical defects as to the form of the indictment under which the defendant was tried, every defendant in a criminal case is entitled to be tried under an indictment perfect in form and substance. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956).

Waiver of right. — Every defendant has the right to be tried upon an indictment or accusation perfect in form and substance, but this right, like every other, may be waived. Youmans v. State, 51 Ga. App. 373, 180 S.E. 495 (1935).

Unless the defects appearing in an indictment or accusation are so great that the indictment or accusation is absolutely void, the right to a perfect indictment or accusation may be waived, and is waived by going to trial under a defective indictment or accusation without complaint. Moore v. State, 94 Ga. App. 210, 94 S.E.2d 80 (1956).

Effect of waiver. — One who waives one's right to be tried upon an indictment perfect in form as well as substance, and takes one's chances of acquittal, will not be heard, after conviction, to urge defects in the indictment, unless such defects are so great that the indictment is absolutely void. Goldstein v. State, 26 Ga. App. 651, 107 S.E. 176 (1921); Youmans v. State, 51 Ga. App. 373, 180 S.E. 495 (1935); Tanner v. State, 90 Ga. App. 789, 84 S.E.2d 600 (1954).

If the defendant admitted the act as charged in the indictment, it was in the language of the statute, and so plainly stated as to be understood by the defendant and by the jury. Duncan v. State, 172 Ga. 186, 157 S.E. 670 (1931).

Intent must be alleged unless the law presumes intent from the act. Chelsey v. State, 121 Ga. 340, 49 S.E. 258 (1904).

Failure to charge essential element of crime. — There can be no conviction for the commission of a crime an essential element of which is not charged in the indictment. Steele v. State, 154 Ga. App. 59, 267 S.E.2d 500 (1980).

This section was obviously intended to sweep away all technical exceptions to indictments. Duncan v. State, 41 Ga. App. 655, 154 S.E. 197 (1930).

This section was not intended to dispense with the substance of good pleading, nor to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial, nor to deprive the accused of the right to have an indictment perfect as to the essential elements of the crime charged. Pharr v. State, 44 Ga. App. 363, 161 S.E. 643 (1931); Statham v. State, 50 Ga. App. 165, 177 S.E. 522 (1934); Isom v. State, 71 Ga. App. 803, 32 S.E.2d 437 (1944).

Indictments for attempted crimes. — When the indictment charges only an attempt to commit a crime, the indictment must aver some act toward the commission of such crime. However, this rule is not applicable to cases where only the completed offense is charged. Arrington v. State, 48 Ga. App. 70, 171 S.E. 878 (1934).

Allegation in indictment of prior convictions. — It is not necessary for the state to prove that a defendant's prior convictions are valid in order merely to allege the convictions in the indictment. Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978).

State need not set out state's evidence in the indictment. — It is not necessary for the state to spread out in an indictment the evidence on which the state relies for a conviction. Mell v. State, 69 Ga. App. 302, 25 S.E.2d 142 (1943).

Roles played need not be stated. — This section required only that the offense shall be stated, not the roles played by the several actors, for instance, as that of an accessory. Chambers v. State, 194 Ga. 773, 22 S.E.2d 487, answer conformed to, 68 Ga. App. 338, 23 S.E.2d 545 (1942).

Principal in the second degree may be convicted under an indictment charging the person as principal in the first degree. Morris v. State, 26 Ga. App. 60, 105 S.E. 380 (1920). See Hansford v. State, 54 Ga. 55 (1875).

Offense, time, and place must appear in indictment. — This section gave a form for every indictment or accusation, and it was there pointed out that each indictment or accusation must set out the offense and allege the time and place of the offense's commission with sufficient certainty. Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959).

Failure to identify dates of offenses. — Trial court erred in denying the defendant's special demurrer to an indictment for child molestation and rape alleging that the offenses were committed "between the dates of January 1, 1994 and December 31, 1998, the exact date(s) not being known to the Grand Jury and said date not being alleged to be a material allegation of the Indictment" as the indictment did not specify the specific date or time frame in which the offenses occurred. Blackmon v. State, 272 Ga. App. 854, 614 S.E.2d 118 (2005).

Trial court erred in denying the defendant's special demurrer to an indictment as the state did not meet the state's burden to show that the state could not more specifically identify the dates of the offenses as the state failed to present evidence that the victim was a young child who was incapable of adequately articulating exactly when the offenses occurred; the defendant was entitled to an indictment perfect in form and substance as the defendant had filed a timely special demurrer and the indictment failed to allege a specific date on which the crime was committed and was not perfect in form. Blackmon v. State, 272 Ga. App. 854, 614 S.E.2d 118 (2005).

Accusation that alleged contributing to the delinquency of a minor and electronically furnishing obscene material to a minor within a two and a half month time frame was subject to a demurrer because the state gave no explanation as to why an investigating officer was unable to ascertain the dates of the offenses from the victim's computer. State v. Meeks, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

General Consideration (Cont'd)

Trial court erred by overruling the defendant's special demurrer to one count each of incest and child molestation as those counts were subject to a special demurrer since the evidence showed that the state reasonably could narrow the range of dates alleged in those counts of the indictment to a single date only. Herring v. State, 334 Ga. App. 50, 778 S.E.2d 57 (2015).

Trial court did not err in denying the defendant's plea in abatement because the state was unable either to identify a specific date on which an offense of child molestation occurred or to narrow the range of possible dates as the evidence produced during the hearing only concerned the date of the defendant's arrival in the victim's neighborhood, that the molestation began thereafter, and the date upon which the victim disclosed the molestation. Watkins v. State, 336 Ga. App. 145, 784 S.E.2d 11 (2016).

Failure to narrow ranges of dates. — Trial court did not err by denying the defendant's special demurrer to Counts 1 and 2 of the indictment charging incest based on the state failing to have narrowed the ranges of dates because the evidence showed that the defendant had engaged in at least 50 individual acts of incest with an older daughter throughout the two-year time period alleged in the indictment, not just during the months the defendant identified in the defendant's brief. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Alleging place of crime. — Unless the character of the place is an essential element of the offense, an indictment that charges the crime to have been committed in a particular county is sufficiently certain as to place. Gentry v. State, 235 Ga. App. 328, 508 S.E.2d 671 (1998).

When a penal statute or regulation contains an exception or exemption, the rule in regard to the necessity of alleging in the indictment that the defendant does not fall within such exception is a rule of construction. That is, if the first sentence or part of the penal law describes a penal offense applicable to all persons, and the second merely describes a class to which the law shall not apply, or simply limits the operation of the law as defined in the first sentence, then such latter portion is merely a matter of defense, and it is incumbent upon the defendant to prove that the defendant falls within such exemption. However, a contrary rule prevails when the penal offense as defined is not directed against all persons generally, but only against a certain class of persons. Flynn v. State, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

Indictment under an alias dictus. — If the grand jury is uncertain which of the several names is the real name of the person, the grand jury may indict the accused under an alias dictus. Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

When a defendant is indicted under two names, alleged by an alias dictus, it is necessary only that the defendant is commonly known by either of the names. Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

When the accused is known by different names, or the grand jury is uncertain as to which of a number of names is the accused's true name, it is lawful for the indictment to identify the accused by all such names as alias dictus. Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

Variance between name in indictment and name used in testimony. — See Anderson v. State, 196 Ga. 468, 26 S.E.2d 755 (1943).

Lack of evidence that accused was known by names alleged as alias dictus. — See Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

Omission of averment of residence. — Although the form of the indictment prescribed in O.C.G.A. § 17-7-54 contains an averment of residence of the defendant, the omission of such averment in the

indictment will not be grounds for quashing the indictment. Smith v. State, 161 Ga. App. 240, 288 S.E.2d 304 (1982).

Venue. — When an indictment refers to a named county and no other county is mentioned, a subsequent allegation that the crime was committed "in the county aforesaid," sufficiently states the venue. Thomas v. State, 71 Ga. 44 (1883).

Omission of "in the name and behalf of the citizens of Georgia." — Indictment should be "in the name and behalf of the citizens of Georgia." If these words are omitted on exceptions taken at the proper time, the indictment will be quashed. Such exception is not good in arrest of judgment. Horne v. State, 37 Ga. 80, 92 Am. Dec. 49 (1867).

Omission in charge and accusation against the defendant by the grand jurors of the words "in the name and behalf of the citizens of Georgia" was not grounds for demurrer (now motion to dismiss). Deason v. State, 63 Ga. App. 359, 11 S.E.2d 74 (1940).

Failure to include contra pacem clause. — Indictment from which there has been entirely omitted the words prescribed in the form "contrary to the laws of said state, good order, peace and dignity thereof" is defective and subject to a special demurrer. Horne v. State, 37 Ga. 80, 92 Am. Dec. 49 (1867); Hardin v. State, 106 Ga. 384, 32 S.E. 365, 71 Am. St. R. 269 (1899).

Printed words "special presentment" is a sufficient endorsement to show that the grand jury found such special presentment. Barlow v. State, 127 Ga. 58, 56 S.E. 131 (1906).

Failure to state jurors' names on indictment. — When, through inadvertence, the indictment is signed by the foreperson but does not contain the names of the jurors who acted on the true bill, the defect is one of form only and cannot be raised after the verdict. Hopper v. Kemp, 236 Ga. 615, 225 S.E.2d 15 (1976).

Failure to state jurors' names makes indictment defective. — Indictment that failed to show the names of the grand jurors who found the indictment is defective. Willerson v. State, 14 Ga. App. 451, 81 S.E. 391 (1914).

Indictment would have been defective had the indictment failed to show the names of the grand jurors who returned the indictment. Hawkins v. State, 260 Ga. 138, 390 S.E.2d 836 (1990).

Reading of grand jurors' names not error. — Trial court did not err by including the names of the grand jurors when the court read the indictment to the jury; although the trial court was not required by law to read the names of the grand jurors, it was not error to do so when the trial court properly instructed the jury that the indictment did not constitute any evidence of guilt. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Defendant may expressly waive defect in indictment. Williams v. State, 107 Ga. 721, 33 S.E. 648 (1899).

Signing of foreperson's name on bill. — There is no statute in this state requiring the foreperson to sign their name on the back of the bill of indictment or special presentment under the words "true bill," but it is a practice for the foreperson to do so and the practice so adopted is advisable. Johnson v. State, 177 Ga. 881, 171 S.E. 699 (1933).

Foreperson's signature may appear on any part of the indictment. Taylor v. State, 121 Ga. 362, 49 S.E. 317 (1904).

Clerical errors generally. — When the indictment is otherwise good, an obvious clerical error will not vitiate the indictment. Wood v. State, 118 Ga. App. 477, 164 S.E.2d 233 (1968).

Inadvertent use of "accused" for "prosecutor." — When the indictment in a case is otherwise good, the clerical error of writing inadvertently the word "accused" for the word "prosecutor" does not vitiate the indictment. Since the word which is changed does not so obscure the sense that a juror or person of ordinary intelligence cannot with certainty ascertain the meaning, the defendant will not be permitted after the verdict to take advantage of this mere clerical error which is corrected by the necessary intendment of the indictment. Lewis v. State, 55 Ga. App. 743, 191 S.E. 278 (1937).

Clerk's failure to file accusation. — When the defendant is tried on an accusation which charges the defendant with the commission of a misdemeanor, and

General Consideration (Cont'd)

before the trial the defendant waives formal arraignment, a copy of the accusation, and a list of the witnesses, and enters a formal plea of not guilty, the defendant is held to have waived the irregularity of the clerk's failure to file the accusation in the office of the clerk of the trial court. Youmans v. State, 51 Ga. App. 373, 180 S.E. 495 (1935).

Sufficiency of substantial conformity with statute. — Indictment conforming substantially to the requirements of this section would be sufficient, but it was not designed to deny to the accused the right to know enough of the particular facts constituting the alleged offense to enable the accused to prepare for trial. Moore v. State, 54 Ga. App. 218, 187 S.E. 595 (1936); Stone v. State, 76 Ga. App. 96, 45 S.E.2d 89 (1947); Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956); Cragg v. State, 117 Ga. App. 133, 159 S.E.2d 717 (1968).

Sufficiency of indictment. — If each count in an indictment contained the elements of the offense charged and the defendants could not claim the charges were so insufficient that the defendants were surprised by evidence introduced at trial or were unable to prepare a defense, the indictment was sufficient even though each count was not specifically individualized to each person named in the count. Jordan v. State, 220 Ga. App. 627, 470 S.E.2d 242 (1996).

Indictment sufficient. — Indictment charged the defendant with child molestation using the language found in the relevant statute and described the acts constituting the offense sufficiently to put the defendant on notice of the offense with which the defendant was charged; accordingly, the defendant's claim that the indictment was invalid was without merit. Golden v. State, 299 Ga. App. 407, 683 S.E.2d 618 (2009), cert. denied, No. S09C1904, 2010 Ga. LEXIS 56 (Ga.), cert. denied, 560 U.S. 941, 130 S. Ct. 3358, 176 L. Ed. 2d 1250 (2010), overruled on other grounds by Collier v. State, 834 S.E.2d 769, 2019 Ga. LEXIS 708 (Ga. 2019).

Trial counsel was not ineffective for failing to challenge the validity of an indictment because pursuant to O.C.G.A. § 17-7-54 the indictment showed that it was a "True Bill," was signed by the grand jury foreperson, and was filed with the clerk's office with the clerk of the court's name prior to the defendant's arraignment, since the defendant and counsel signed the indictment; there is no express requirement that the indictment contain a written statement that the indictment was received in "open court," or that the indictment be signed. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Trial court properly denied the defendant's motion for a demurrer after finding that the indictment was completely accurate to give the defendant notice of the charges. Andemical v. State, 336 Ga. App. 661, 786 S.E.2d 238 (2016).

How defects or irregularities to be complained of. — Defects or irregularities in an indictment or accusation cannot be complained of in a ground of a motion for a new trial, but the objections to the indictment or accusation must be made by demurrer or motion in arrest of judgment. Youmans v. State, 51 Ga. App. 373, 180 S.E. 495 (1935).

Defendant's motions for a new trial and in arrest of judgment challenging the wording of the indictment charging the defendant with aggravated assault, O.C.G.A. § 16-5-21, were properly denied because the defendant could not have admitted the allegations of the indictment without admitting that the defendant was guilty of a crime and, under O.C.G.A. § 17-7-110, having failed to file a timely special demurrer, the defendant waived the right to a perfect indictment. McDaniel v. State, 298 Ga. App. 558, 680 S.E.2d 593 (2009).

Failure to preserve lab sample evidence did not warrant dismissal of indictment. — Trial court's order dismissing an indictment charging the defendant with rape, incest, aggravated child molestation, and child molestation on grounds that the state improperly failed to preserve lab samples taken from the victim was reversed because the defendant failed to show that the failure was the result of bad faith on the part of the state or the police, and the value of the sample to the defendant was only poten-

tially exculpatory. State v. Brady, 287 Ga. App. 626, 653 S.E.2d 72 (2007).

When objection to indictment must be in writing. — When an indictment is not on the indictment's face so defective that a motion in arrest of judgment would lie, an objection to the indictment must be in writing. An oral objection, being ineffective for its purpose, is the equivalent of none at all and if no other action be taken, a waiver results. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

Exceptions for form, special demurrers, and pleas generally. — All exceptions to the indictment for form, or for matters that may arise by special demurrer, or by plea in abatement or in bar, must be made in writing preliminary to the trial, and if not made at the proper time are to be held as waived in contemplation of law. Youmans v. State, 51 Ga. App. 373, 180 S.E. 495 (1935).

Defendant waived all exceptions to the mere form of an indictment by failing to urge the exceptions in a timely, written, pretrial special demurrer. Bentley v. State, 210 Ga. App. 862, 438 S.E.2d 110 (1993).

For distinction between exceptions to the indictment before trial, and motion after verdict in arrest of judgment, see Lampkin v. State, 87 Ga. 516, 13 S.E. 523 (1891); Phillips v. State, 95 Ga. 478, 20 S.E. 270 (1894).

Sufficiency to withstand demurrer. — When every essential ingredient of the offense charged is set forth with sufficient clearness to enable the defendant to prepare a defense and the jury clearly to understand the nature of the offense, the accusation is not demurrable. De Vere v. State, 45 Ga. App. 330, 164 S.E. 485 (1932).

When every essential ingredient of the offense charged is set forth with sufficient clearness to enable the defendant to prepare a defense and the jury clearly to understand the nature of the offense, and the indictment is exact enough to protect the defendant from a second jeopardy, the indictment is not demurrable. Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409 (1940).

True test of the sufficiency of an indictment to withstand a general demurrer is that if all the facts which the indictment charges can be admitted, and still the accused is innocent, the indictment is bad, but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good. Gower v. State, 71 Ga. App. 127, 30 S.E.2d 298 (1944).

Indictment which sets out the essential elements of the crime charged with such particularity as will fully apprise the accused of the exact nature of the offense and the manner in which the offense was committed is sufficient to withstand a general demurrer. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1937); Flynn v. State, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

Demurrer strictly construed against pleader. — Demurrer raising special objections to an indictment should be strictly construed against the pleader. De Vere v. State, 45 Ga. App. 330, 164 S.E. 485 (1932).

When trial has been had before the appellate court reviews the merits of a special demurrer, based upon alleged failure to comply with the form of indictment set out by this section and when no prejudice to defendant has occurred, reversal is a mere windfall to the defendant and contributes nothing to the administration of justice. Bill v. State, 153 Ga. App. 131, 264 S.E.2d 582 (1980).

Effect of motion to quash made after issue joined. — Oral motion to quash an indictment which is made after the issue has been joined raises only the question of whether the indictment is so defective that a motion in arrest of judgment would lie. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

Applicability to accusations in city courts. — This section did not apply to accusations in city courts. Flanders v. State, 9 Ga. App. 820, 72 S.E. 286 (1910).

Former Code 1933, §§ 27-701.1, 27-703 and 27-704 (see O.C.G.A. §§ 17-7-51, 17-7-54, and 17-7-70) have no applicability to accusations in city courts when, under special legislation establishing the various city courts, it was provided that the accusation must be founded upon the affidavit of the prosecutor, and the affidavit was made a substitute for the formal finding of the grand jury as to the misde-

General Consideration (Cont'd)

meanors triable in the city courts in question. The affidavit which was the basis for the issuance of a warrant to arrest is not to be confused with the affidavit which formed the basis of the accusation in many of the city courts. Brown v. State, 82 Ga. App. 673, 62 S.E.2d 732 (1950).

Probate judge who is solicitor pro tem may prepare and sign the indictment. Williams v. State, 69 Ga. 11 (1882).

Cited in Martin v. State, 95 Ga. 478, 20 S.E. 271 (1894); Gibson v. State, 118 Ga. 29, 44 S.E. 811 (1903); Herring v. State, 119 Ga. 709, 46 S.E. 876 (1904); Snell v. State, 13 Ga. App. 158, 79 S.E. 71 (1913); Baker v. State, 19 Ga. App. 84, 90 S.E. 983 (1916); Cook v. State, 22 Ga. App. 770, 97 S.E. 264 (1918); Barnes v. State, 24 Ga. App. 372, 100 S.E. 788 (1919); Davis v. State, 25 Ga. App. 532, 103 S.E. 819 (1920); DeWitt v. State, 27 Ga. App. 644, 109 S.E. 681 (1921); Moore v. State, 27 Ga. App. 781, 110 S.E. 55 (1921); Slicer v. State, 172 Ga. 445, 157 S.E. 664 (1931); Norman v. State, 44 Ga. App. 92, 160 S.E. 522 (1931); Carr v. State, 176 Ga. 747, 169 S.E. 201 (1933); Hall v. State, 47 Ga. App. 833, 171 S.E. 727 (1933); Rutherford v. State, 183 Ga. 301, 188 S.E. 442 (1936); Darden v. State, 55 Ga. App. 699, 191 S.E. 176 (1937); Wilson v. State, 190 Ga. 824, 10 S.E.2d 861 (1940); Harris v. State, 191 Ga. 243, 12 S.E.2d 64 (1941); Watson v. State, 192 Ga. 679, 16 S.E.2d 426 (1941); Price v. State, 76 Ga. App. 105, 45 S.E.2d 96 (1947); Manry v. State, 77 Ga. App. 43, 47 S.E.2d 817 (1948); Wellborn v. State, 78 Ga. App. 520, 51 S.E.2d 588 (1949); Kitchens v. State, 78 Ga. App. 795, 52 S.E.2d 564 (1949); Brusnighan v. State, 86 Ga. App. 340, 71 S.E.2d 698 (1952); Ramsey v. State, 212 Ga. 381, 92 S.E.2d 866 (1956); Hodges v. State, 98 Ga. App. 97, 104 S.E.2d 704 (1958); Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868 (1959); Pasley v. State, 215 Ga. 768, 113 S.E.2d 454 (1960); Wallace v. State, 216 Ga. 180, 115 S.E.2d 338 (1960); Freeman v. State, 106 Ga. App. 640, 127 S.E.2d 823 (1962); Pitts v. State, 219 Ga. 222, 132 S.E.2d 649 (1963); Nix v. State, 108 Ga. App. 704, 134 S.E.2d 551 (1963); Anderson v. State, 113 Ga. App. 670, 149 S.E.2d 398 (1966); Dye v. State, 114 Ga. App. 299, 151 S.E.2d 164 (1966); Jones v. State, 114 Ga. App. 448, 151 S.E.2d 839 (1966); Bell v. State, 118 Ga. App. 291, 163 S.E.2d 323 (1968); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971); Davis v. State, 129 Ga. App. 796, 201 S.E.2d 345 (1973); Richardson v. State, 231 Ga. 295, 201 S.E.2d 398 (1973); Welborn v. State, 132 Ga. App. 207, 207 S.E.2d 688 (1974); Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Mealor v. State, 135 Ga. App. 682, 218 S.E.2d 683 (1975); Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975); Barnes v. State, 136 Ga. App. 626, 222 S.E.2d 143 (1975); Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976); Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977); Hampton v. State, 141 Ga. App. 866, 234 S.E.2d 698 (1977); State v. Holmes, 142 Ga. App. 847, 237 S.E.2d 406 (1977); State v. Jackson, 143 Ga. App. 88, 237 S.E.2d 533 (1977); Megar v. State, 144 Ga. App. 564, 241 S.E.2d 447 (1978); McDonald v. State, 241 Ga. 112, 243 S.E.2d 53 (1978); Haisman v. State, 242 Ga. 896, 252 S.E.2d 397 (1979); Mahomet v. State, 151 Ga. App. 462, 260 S.E.2d 363 (1979); Rollins v. State, 154 Ga. App. 585, 269 S.E.2d 81 (1980); Knowles v. State, 159 Ga. App. 239, 283 S.E.2d 51 (1981); Arrington v. State, 160 Ga. App. 645, 288 S.E.2d 97 (1981); Dotson v. State, 160 Ga. App. 898, 288 S.E.2d 608 (1982); Rentz v. State, 162 Ga. App. 357, 291 S.E.2d 434 (1982); Mobley v. State, 164 Ga. App. 154, 296 S.E.2d 617 (1982); Staton v. State, 165 Ga. App. 572, 302 S.E.2d 126 (1983); Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983); Simmons v. State, 174 Ga. App. 171, 329 S.E.2d 312 (1985); Cook v. State, 255 Ga. 565, 340 S.E.2d 843 (1986); Watson v. State, 178 Ga. App. 778, 344 S.E.2d 667 (1986); Sullivan v. State, 178 Ga. App. 769, 344 S.E.2d 737 (1986); Anderson v. State, 258 Ga. 70, 365 S.E.2d 421 (1988); Murphy v. State, 195 Ga. App. 878, 395 S.E.2d 76 (1990); Allen v. State, 197 Ga. App. 3, 397 S.E.2d 472 (1990); State v. Stamey, 211 Ga. App. 837, 440 S.E.2d 725 (1994); State v. Schuman, 212 Ga. App. 231, 441 S.E.2d 466 (1994); Burgeson v. State, 267 Ga. 102, 475 S.E.2d

580 (1996); Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001); Williams v. State, 257 Ga. App. 206, 570 S.E.2d 645 (2002); State v. Godfrey, 309 Ga. App. 234, 709 S.E.2d 572 (2011).

Multiple Counts

Joinder of charges as separate counts generally. — Kindred offenses may be charged in separate counts of the same indictment. Sewell v. State, 23 Ga. App. 765, 99 S.E. 320 (1919).

Different counts charging offenses of the same nature may be joined in one indictment. Gaulden v. State, 41 Ga. App. 635, 154 S.E. 209 (1930).

Two or more counts, charging the defendant with the same species of felony, may be joined in the same indictment. Webb v. State, 177 Ga. 414, 170 S.E. 252, answer conformed to, 47 Ga. App. 505, 170 S.E. 827 (1933).

Two or more felonies may properly be charged in separate counts in one indictment, though the offenses are committed at different times and places, and involve transactions with different persons, when the crimes charged, though differing in degree and varying in the punishment to be inflicted for their perpetration, are of the same general nature, and the mode of trial is the same. Webb v. State, 47 Ga. App. 505, 170 S.E. 827 (1933); Ivester v. State, 75 Ga. App. 600, 44 S.E.2d 61 (1947).

Felonies of the same general nature, when the mode of trial is the same, may be joined in separate counts of the same indictment. Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279 (1980).

Joinder of offenses in same indictment not prohibited by statute. — There is no statute in this state which prohibits the joinder of several offenses of the same class or species in different counts of the same indictment. Patterson v. State, 181 Ga. 698, 184 S.E. 309 (1935).

If all of the offenses charged in an indictment are of the same species, it is unnecessary to allege that the separate offenses had a continuity of purpose or intent so as to make the offenses a part of a general plan or scheme. Webb v. State, 177 Ga. 414, 170 S.E. 252, answer conformed to, 47 Ga. App. 505, 170 S.E. 827 (1933).

Each count must be complete within itself. — It is fundamental that when an indictment is in more than one count, each count must be complete within itself and plainly, fully, and distinctly set out the crime alleged. Lee v. State, 81 Ga. App. 829, 60 S.E.2d 177 (1950).

Essential allegations. — Rule of law that each count must be complete within itself and must contain every essential allegation to constitute a crime applies to the offense rather than to the form. Shuman v. State, 82 Ga. App. 294, 60 S.E.2d 517 (1950).

Express reference from one count to another is allowable. Lee v. State, 81 Ga. App. 829, 60 S.E.2d 177 (1950).

One count may refer to another to prevent repetition. Braxley v. State, 143 Ga. 658, 85 S.E. 888, rev'd on other grounds, 17 Ga. App. 196, 86 S.E. 425 (1915); Durden v. State, 29 Ga. App. 548, 116 S.E. 41, aff'd, 31 Ga. App. 295, 121 S.E. 840 (1923).

Counts need not be numbered. — In stating the form of an indictment which shall be sufficiently technical and correct, this section did not require that the counts shall be numbered, and while it was preferable to consecutively number the counts, failure to do so would not render the indictment demurrable. Wright v. State, 53 Ga. App. 371, 186 S.E. 149 (1936).

Charging of several offenses in one count. — While a defendant cannot be charged with separate and distinct offenses in one count of an indictment, offenses of the same nature and differing only in degree may be joined in one count of the same indictment. Offenses not of the same nature, but blended together by concurrent acts so that the offenses constitute but one transaction, may likewise be so joined. The test is whether the acts charged in the indictment relate to but one transaction. Bennings v. State, 53 Ga. App. 218, 185 S.E. 370 (1936).

Failure to repeat contra pacem clause after each count. — If the phrase "contrary to the laws of said state, the good order, peace and dignity thereof"

Multiple Counts (Cont'd)

is a necessary part of an indictment at all, the requirement is met when the indictment consists of more than one count and, although the phrase does not appear at the conclusion of each count, it does appear at the conclusion of the indictment. Lee v. State, 81 Ga. App. 829, 60 S.E.2d 177 (1950).

It is true that every count of an indictment must be complete within itself and plainly, fully, and distinctly set out the offense charged. However, when there is an indictment in three counts, the first two counts of which do not contain the contra pacem clause, such a defect is one of technical formality only, and, is not such as to vitiate the proceedings. Shuman v. State, 82 Ga. App. 294, 60 S.E.2d 517 (1950).

Indictment was not fatally defective but was in substantial compliance with the provisions of this section, when the contra pacem clause "contrary to the laws of said state, the good order, peace, and dignity thereof" follows the last and second count thereof, although immediately following the first count there was no such clause. Shuman v. State, 82 Ga. App. 297, 60 S.E.2d 519 (1950).

Requirement that district attorney elect count on which district attorney will proceed. — It is within the sound discretion of the court to require, or not to require, the solicitor general (now district attorney) to elect upon which count the solicitor general will proceed. Webb v. State, 47 Ga. App. 505, 170 S.E. 827 (1933); Ivester v. State, 75 Ga. App. 600, 44 S.E.2d 61 (1947).

Effect of reading only one count to jurors on voir dire. — When an indictment containing several counts is read to the jury in the indictment's entirety by the judge, and the solicitor general (now district attorney) states that the solicitor general is trying defendant on all counts, the fact that the solicitor read only one count to the jurors when qualifying the jurors on the jurors' voir dire does not constitute sufficient grounds on which to bar the admission of evidence on the other counts and to charge the jury to disregard all other counts. Patterson v. State, 181 Ga. 698, 184 S.E. 309 (1935).

Verdict need not specify the count upon which the verdict is founded. Dohme v. State, 68 Ga. 339 (1882).

General verdict of guilty when several counts of same felony charged. — When an indictment contains several counts, all charging the commission of the same felony, but in different ways, a general verdict of guilty is not contrary to the evidence if any one of the counts be supported by proof. Bowen v. State, 47 Ga. App. 9, 170 S.E. 104 (1933).

Conviction on some counts, acquittal on others. — When distinct offenses are charged in separate counts there may be an acquittal on some counts and a conviction or disagreement on others. O'Brien v. State, 22 Ga. App. 249, 95 S.E. 938 (1918).

Punishment when indictment charges several distinct offenses. — Unless otherwise provided by statute, a defendant convicted under an indictment charging two or more distinct offenses may be punished for both or all, if each offense requires proof of some fact or element not required to establish the other offense. Playmate Cinema, Inc. v. State, 154 Ga. App. 871, 269 S.E.2d 883 (1980).

Demurrer for improper joinder or dissimilar offenses. — When a demurrer is based upon improper joinder or dissimilar offenses, these must be pointed out. Boatwright v. State, 26 Ga. App. 67, 105 S.E. 381 (1920).

Indictment charging two or more felonies in separate counts is not subject to general demurrer. Webb v. State, 47 Ga. App. 505, 170 S.E. 827 (1933).

Sufficiency of the indictment involving two property offenses. — Trial court erred in quashing an indictment for counts of residential mortgage fraud, in violation of O.C.G.A. § 16-8-102, and counts of felony theft by deception, in violation of O.C.G.A. § 16-8-3, because: (1) certain allegations between counts in the indictment were mere surplusage and did not invalidate the indictment; (2) the indictment was not duplicitous under O.C.G.A. § 16-1-7(a)(2); (3) the indictment was sufficient pursuant to the requirements of O.C.G.A. § 17-7-54(a) to withstand general and special demurrers

as each count sufficiently stated the offense; and (4) each count was sufficient to charge each of the named defendants as either the actual perpetrator or as a party to the crime pursuant to O.C.G.A. §§ 16-2-20(a) and 16-2-21. State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

Misjoinder of offenses is not ground for a motion in arrest of judgment. Lampkin v. State, 87 Ga. 516, 13 S.E. 523 (1891).

Pleading in the Alternative; More than One Way to Commit Offense

Indictment must not state any essential of the offense in the alternative, for pleadings which are in the alternative are defective in form, and this defect must be taken advantage of by special demurrer. Isom v. State, 71 Ga. App. 803, 32 S.E.2d 437 (1944).

Single count may charge the commission of the offense in different ways. Cody v. State, 118 Ga. 784, 45 S.E. 622 (1903), aff'd, 119 Ga. 418, 46 S.E. 647 (1904).

In an indictment charging a crime capable of being committed in more than one way, failure to charge the manner in which the crime was committed subjects the indictment to a proper special demurrer, but not to an oral motion to quash in the nature of a general demurrer when the indictment has charged the crime in the substantial language of former Code 1933, § 27-910 (see O.C.G.A. § 17-7-54). Barton v. State, 79 Ga. App. 380, 53 S.E.2d 707 (1949).

Charges must be expressed in conjunctive when statute provides means of commission. — When a defendant is charged with the violation of a penal statute containing disjunctively several ways or methods a crime may be committed, proof of any one of which is sufficient to constitute the crime, the indictment, in order to be good as against a special demurrer, must charge such ways or methods conjunctively if the indictment charges more than one of them. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947); Vann v. State, 153 Ga. App. 710, 266 S.E.2d 349 (1980).

Proof of any one charge establishes prima facie case. — On the trial of a defendant under an indictment so charging, it is not incumbent upon the state to prove all of such separate ways or methods alleged in the indictment, but the state makes a prima facie case upon its establishment by proof of any one of them. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947).

Upon which conviction may be had. — When under a penal statute an offense may be committed by the doing of any one of several forbidden acts, a conviction may be had upon an indictment which in a single count charges the accused with the commission of two or more of the acts, if there is satisfactory proof that the accused committed at least one of the acts therein specified. Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360, cert. denied, 449 U.S. 1011, 101 S. Ct. 567, 66 L. Ed. 2d 469 (1980).

Subject to special demurrer when expressed disjunctively. — Notwithstanding this section, an indictment or accusation charging a crime in the alternative when the offense may be committed in more than one way is subject to special demurrer. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947).

Variance

Basis for rule that allegations and proof must correspond. — General rule that allegations and proof must correspond is based upon the obvious requirements: (1) that the accused shall be definitely informed as to the charges against the accused, so that the accused may be enabled to present a defense and not be taken by surprise by the evidence offered at the trial; and (2) that the accused may be protected against another prosecution for the same offense. McHugh v. State, 136 Ga. App. 57, 220 S.E.2d 69 (1975); Caldwell v. State, 139 Ga. App. 279, 228 S.E.2d 219 (1976); Hunter v. State, 155 Ga. App. 561, 271 S.E.2d 694 (1980).

When variance is fatal generally. — Variance is fatal if the variance fails to definitely inform the defendant of the charges against the defendant or leaves the defendant open to a subsequent prosecution for that offense. Lewis v. State,

Variance (Cont'd)

149 Ga. App. 181, 254 S.E.2d 142 (1979).

Technical or trivial variance nonfatal. — If the variation is technical or trivial, or if the allegations and the proof substantially correspond, so that it cannot be said that the defendant was misled or prejudiced, the variance will not be fatal. Lewis v. State, 149 Ga. App. 181, 254 S.E.2d 142 (1979).

Allegation in an indictment that is wholly unnecessary to constitute the offense charged is mere surplusage. Smith v. State, 130 Ga. App. 390, 203 S.E.2d 375 (1973).

Mere surplusage will not vitiate an indictment, and need not be established in proof. The material facts which constitute the offense charged must be stated, and it must be proved in evidence, but allegations not essential to such purpose, which might be entirely omitted without affecting the charge and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. Robinson v. State, 76 Ga. App. 313, 45 S.E.2d 717 (1947).

No allegation descriptive of essential elements is surplusage. — No allegation in an indictment, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage. Robinson v. State, 76 Ga. App. 313, 45 S.E.2d 717 (1947).

Unnecessarily minute description of a necessary fact must be proved as charged. Simmons v. State, 98 Ga. App. 159, 105 S.E.2d 356 (1958); McHugh v. State, 136 Ga. App. 57, 220 S.E.2d 69 (1975).

Proof must satisfy description. — If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance. When there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other. Youngblood v. State, 40 Ga. App. 514, 150 S.E. 457 (1929).

Unnecessarily minute description of an unnecessary fact alleged in an indictment need not be proved. Simmons v. State, 98 Ga. App. 159, 105 S.E.2d 356 (1958); McHugh v. State, 136 Ga. App. 57, 220 S.E.2d 69 (1975).

Different day from that laid may generally be proved. — In proving the time of the commission of an offense the state is not, as a general rule, restricted to proof of the date alleged in the indictment, but is permitted to prove its commission on any date within the statute of limitations. Grayson v. State, 39 Ga. App. 673, 148 S.E. 309 (1929).

Though a day and year must be alleged in every indictment, time is not material, and a different day from the one laid may generally be proved, provided it is within the period prescribed by the statute of limitations. Nelson v. State, 51 Ga. App. 207, 180 S.E. 16 (1935).

Failure to allege date on which offense committed. — Indictment or accusation which fails to allege some specific date on which the offense was committed is defective as to form and, therefore, subject to a timely interposed special demurrer pointing out such defect. Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959).

Exact location and time of day not required. — This section did not require the exact time of day or the specific location in the county to be given. It is sufficient to state the date the alleged offense was committed and the county within the state in which the same allegedly occurred. Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974).

Time immaterial unless an essential element of the offense charged. — Unless time is an essential element of the offense charged, the time of the commission of the offense alleged in the indictment, presentment, accusation, information, or affidavit is immaterial. Proof of the commission of the offense at any time prior to the finding of the indictment or presentment, the filing of the accusation or information, or the swearing of the affidavit which made the foundation of the accusation, will sustain a conviction if the proof also establishes the commission of the offense within the statute of limitations. Brown v. State, 82 Ga. App. 673, 62

S.E.2d 732 (1950); Learmont v. State, 89 Ga. App. 648, 80 S.E.2d 716 (1954).

Variance as to date when alibi defense interposed. — Alleging one date in the indictment and proving another at trial when a defense of alibi as to the date alleged is relied upon violates the requirement that the accused shall be definitely informed as to the charges against the accused, so that the accused may be enabled to present a defense and not be taken by surprise by the evidence offered at the trial. Caldwell v. State, 139 Ga. App. 279, 228 S.E.2d 219 (1976).

Defendant's motion for continuance upon surprise by time variance in an alibi case. — If defendant, relying upon an alibi defense for the time alleged in the indictment, is surprised and prejudiced by a time variance, upon defendant's motion therefor the defendant will be afforded sufficient time to prepare a defense to meet the new date. Caldwell v. State, 139 Ga. App. 279, 228 S.E.2d 219 (1976).

Defendant must make a motion for continuance, postponement, or recess if the defendant is surprised by a time variance in an alibi case. Caldwell v. State, 139 Ga. App. 279, 228 S.E.2d 219 (1976).

Charge that state has burden of proving defendant's presence at time of offense. — When the date of the offense alleged in the indictment coincides with both the date proved by the state and the date proved by the defense in support of the alibi, and the trial court properly charges the jury that the state has the burden of proving the accused's presence at the scene at the time of the commission of the offense, such a charge does not constitute reversible error. The better practice would be to refrain from giving such a charge unless: (1) the defendant has not developed an alibi defense in reliance upon the date alleged in the indictment; and (2) the evidence would authorize the jury to conclude that the offense was actually committed on a date different from that alleged in the indictment. Thomas v. State, 158 Ga. App. 97, 279 S.E.2d 335 (1981).

Particular Offenses

It is not necessary to allege the location of a theft within the county. State v. Ramos, 145 Ga. App. 301, 243 S.E.2d 693 (1978).

Variance as to kind of weapon charged in the indictment. — No fatal variance between the pleading and the proof exists when one weapon is charged in the indictment and a weapon of a similar nature capable of inflicting the same character of injury is shown by the evidence, but this rule does not apply when the evidence shows the deceased met death at the hands of the defendant in a manner vastly different from that alleged in the indictment. Habersham v. State, 79 Ga. App. 244, 53 S.E.2d 578 (1949).

For sufficiency of indictment charging assault and battery, see Wood v. State, 69 Ga. App. 450, 26 S.E.2d 140 (1943).

Surplusage in indictment for assault and battery. — When the facts in an indictment set forth the offense of assault and battery, the language in part of the indictment which charged an attempt to commit an injury was mere surplusage. Wood v. State, 69 Ga. App. 450, 26 S.E.2d 140 (1943).

Sufficiency of indictment charging aggravated assault by dentist. — Count nine in an indictment charging a defendant, allegedly an oral surgeon, with aggravated assault under O.C.G.A. § 16-5-21(a)(2) was sufficient under O.C.G.A. § 17-7-54(a) because the general intent required under § 16-5-21(a)(2) did not need to be expressly alleged and the use of the phrase "serious bodily harm" was substantially the same as the statutory language; additional pleading was not required simply because the case involved a doctor and a patient. State v. Austin, 297 Ga. App. 478, 677 S.E.2d 706 (2009).

Sufficiency of indictment for bribery. — Indictment for bribery which fails to set out in what respect the official behavior of the accused was to be influ-

Particular Offenses (Cont'd)

enced by the payment of the money alleged to have been given the accused, and what official act was to be performed or not to be performed by the accused as a result of the payment of that sum, is not fatally defective. Saunders v. State, 43 Ga. App. 59, 158 S.E. 433 (1931).

Indictment for bribery is not defective as regards statute of limitations for failure to allege to whom the offense was unknown until after a given date. Saunders v. State, 43 Ga. App. 59, 158 S.E. 433 (1931).

Sufficiency of indictment alleging RICO violations. — Indictment, which described a scheme of fraudulent borrowing from the parishioners of one defendant, a pastor, to benefit the pastor and the other defendant, a banker, sufficiently described the RICO crimes and predicate acts under O.C.G.A. § 16-14-4(a) and (c) so as to inform the defendants of the charges against the defendants and protect the defendants against another prosecution for the same offense. State v. Pittman, 302 Ga. App. 531, 690 S.E.2d 661 (2010).

Indictment insufficient in RICO action. — Indictment charging the defendants with violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. § 16-14-1 et seq., did not give the defendants enough information about the RICO charge to prepare their defense intelligently because the sparse allegations in the indictment, which said nothing about the nature of the connection between the enterprise and the pattern of racketeering activity, were insufficient to enable the defendants to prepare for trial; and the nature of that connection was not apparent from the identification of the enterprise, the general description of the racketeering activity in Count 1, or the subsequent counts charging more particularly the predicate acts of racketeering. Kimbrough v. State, 300 Ga. 878, 799 S.E.2d 229 (2017).

Burglary indictment must allege location and ownership of premises. — When the defendant is charged with burglary, the indictment must specify the location of the burglary, and contain some allegation regarding ownership of the burglarized premises. Morris v. State, 166 Ga. App. 137, 303 S.E.2d 492 (1983).

It is sufficient to allege legal control of the premises in an indictment for burglary rather than "ownership" as that term is used in property law. Morris v. State, 166 Ga. App. 137, 303 S.E.2d 492 (1983).

For case in which allegations and proof of burglary were fatally variant, see Hunter v. State, 155 Ga. App. 561, 271 S.E.2d 694 (1980).

Variance in time of commission of burglary and carrying pistol without license. — Offenses of burglary and of carrying a pistol without a license come within the general rule that the state is not restricted to the date alleged in the indictment in proving the case as laid, but may prove the alleged offense to have been committed at any time within the statute of limitations applicable to the case. Taylor v. State, 44 Ga. App. 821, 163 S.E. 271 (1931).

Joinder of charges of burglary and receipt of goods stolen in the burglary. — Indictment alleging a felony count of burglary and a felony count of receiving stolen goods is not subject to demurrer on the grounds of misjoinder of the offenses of burglary and receiving stolen goods knowing the goods to be the fruit of the burglary from the person committing the burglary. Ivester v. State, 75 Ga. App. 600, 44 S.E.2d 61 (1947).

Allegations in burglary indictment as to goods stolen. — If an indictment for burglary alleged, as the purpose of the breaking, the intent to commit a larceny, and if the indictment further alleged, for the purpose of illustrating the intent to steal at the time of the breaking and entering, an actual stealing after the breaking and entering, no description, value, or ownership of any goods intended to be stolen, or actually stolen after the breaking and entering, had to be alleged. Harris v. State, 46 Ga. App. 319, 167 S.E. 609 (1933).

Indictment sufficient for attempted burglary. — Trial court did not err by denying the defendant's motion for a new trial on the ground that the indictment

was defective for failing to allege the essential element of intent to commit a theft because the indictment clearly charged that the defendant attempted to commit a burglary, not that the defendant completed the crime. Coleman v. State, 318 Ga. App. 478, 735 S.E.2d 788 (2012), recons. denied; overruled on other grounds by State v. Heath, 2020 Ga. LEXIS 362 (Ga. 2020).

Sufficiency of indictment for breaking into railroad car. — See Whitener v. State, 34 Ga. App. 697, 131 S.E. 301 (1925).

Indictment for attempted child molestation was sufficient without alleging the specific intent of child molestation under O.C.G.A. § 16-6-4. Livery v. State, 233 Ga. App. 332, 503 S.E.2d 914 (1998).

Indictment for attempted child molestation alleging that the defendant took a substantial step toward commission of the crime of child molestation by: (1) engaging in sexually explicit conversations over the Internet; and (2) driving to an arranged meeting place was not fatally defective in that the indictment failed to allege the commission of a crime. Dennard v. State, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Joinder of child molestation charges. — Because sufficient similarities between two indicted charges of child molestation were presented to show a common motive, plan, scheme, or bent of mind pattern, and, the number of offenses charged or the complexity of the evidence offered did not render the factfinder unable to parse the evidence to apply the law fairly and intelligently to each charge, both offenses were properly joined for trial. Milton v. State, 280 Ga. App. 179, 633 S.E.2d 606 (2006).

Indictment for attempted statutory rape initiated via computer. — Indictment alleging that the defendant attempted to commit the crime of statutory rape by taking the substantial step of discussing engaging in sexual intercourse via computer and driving to an arranged meeting place for the purpose of engaging in sexual intercourse was not fatally defective for failure to allege the commission of a crime. Dennard v. State, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Indictment for attempt to entice child for immoral purposes. — Although an indictment for attempting to commit the offense of enticing a child for indecent purposes did not allege actual asportation, the indictment did allege that the defendant arranged to meet the victim for the purpose of committing indecent acts and, accordingly, did not fail to allege the taking of a substantial step toward the commission of the crime. Dennard v. State, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Indictment for attempted sexual exploitation. — Indictment charging the defendant with attempted sexual exploitation of children properly alleged that the defendant took a substantial step toward the commission of the crime by making arrangements to meet the victim for the purpose of violating the statute and by proceeding to the meeting place. Dennard v. State, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

For sufficiency of indictment for false swearing, see Darnell v. State, 63 Ga. App. 582, 11 S.E.2d 692 (1940).

One count of indictment charging witness intimidation insufficient. — Trial court properly granted a defendant's special demurrer as to one count of a two count indictment charging the defendant with influencing a witness as the use of the term "intimidation," without specifying the way the defendant allegedly did so, was generic and did not adequately inform the defendant of the facts constituting the offense. State v. Delaby, 298 Ga. App. 723, 681 S.E.2d 645 (2009).

For sufficiency of indictment for murder, see Green v. State, 172 Ga. 635, 158 S.E. 285 (1931); Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959); Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980).

Fatal variance in murder indictment, etc. see Habersham v. State, 79 Ga. App. 244, 53 S.E.2d 578 (1949).

Trial counsel was not ineffective in failing to challenge the sufficiency of the indictment charging malice murder and felony murder as unconstitutionally vague because the defendant's counsel reviewed the indictment and believed that the indictment was not vague, overbroad, or subject to dismissal; each of the murder counts tracked the language of the applicable statute and alleged the essential

Particular Offenses (Cont'd)

elements of the offense charged; and the indictment provided the date and county of the offense and the identity of the victim, and, in terms clear enough to be easily understood by the jury and by the accused, charged the defendant with acting in concert with the co-defendant to kill the victim by beating and stabbing the victim to death. Smith v. State, 303 Ga. 643, 814 S.E.2d 411 (2018).

Demurrer to indictment containing alternative charges of assault with intent to murder. — See Isom v. State, 71 Ga. App. 803, 32 S.E.2d 437 (1944).

Demurrer to indictment for aggravated assault and felony murder based on aggravated assault. — There was no basis to grant the defendant a special demurrer on the counts for aggravated assault and felony murder based on assault as the indictment informed the defendant that the state intended to prove that on a day when the defendant admitted the victim was in the defendant's custody, the defendant used an object that was likely to result in serious bodily injury to fatally injure the victim by causing damage to the victim's brain, which was sufficient notice for the defendant to prepare a defense. State v. Wyatt, 295 Ga. 257, 759 S.E.2d 500 (2014).

In larceny (now theft) cases, ownership of the property should be alleged, and may not be inferred. Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936), aff'd, 184 Ga. 164, 190 S.E. 582 (1937).

Description of stolen property in indictment for larceny (now theft). — In indictment for larceny, description of stolen property should be set forth such as will affirmatively show the accused to be guilty, will reasonably inform the accused of transaction charged, and will put the accused in a position to make the needful preparations for the accused's defense. The marks, quality, or kind of property must be incorporated in the description, or the transaction in some way individualized. Pharr v. State, 44 Ga. App. 363, 161 S.E. 643 (1931).

For sufficiency of indictment charging larceny (now theft), see Ellis v. State, 67 Ga. App. 821, 21 S.E.2d 316 (1942); Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956).

Sufficiency of indictment charging theft by deception. — See Johnson v. State, 233 Ga. App. 450, 504 S.E.2d 290 (1998).

Indictment for theft by taking sufficient. — Trial court did not err in denying a defendant's general and special demurrers to an indictment charging the defendant with theft by taking in violation of O.C.G.A. § 16-8-2 because the indictment tracked the language of theft by taking and sufficiently placed the defendant on notice of the charges against the defendant, and the indictment also provided some factual detail to support the crimes alleged; in each count of theft by taking, the indictment alleged that the defendant took U.S. currency in excess of $500 from a grocery store owner with the intention of depriving the owner of those funds on a specific date, and if the defendant admitted the conduct alleged in the indictment, the defendant would not be innocent of the crime. Falagian v. State, 300 Ga. App. 187, 684 S.E.2d 340 (2009), overruled on other grounds, McNair v. State, 293 Ga. 282 (2013).

Accusation that alleged that the defendant took "drugs the property of Dr. Bob Lanier having a value of less than $500 with the intention of depriving said owner of said property" was sufficient to allege theft by taking under O.C.G.A. § 16-8-2. State v. Meeks, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

For sufficiency of indictment for robbery, see Lacey v. State, 44 Ga. App. 791, 163 S.E. 292 (1931).

Ownership of property in indictment for robbery. — In an indictment for robbery, the ownership of the personal property stolen may be laid in the person having actual lawful possession of such property, although the person may be holding the property merely as the agent or bailee of another. It is not necessary to set forth in the indictment the fact that the person in whom the ownership is laid is holding the property merely as the agent or bailee of the real owner. Jones v. State, 42 Ga. App. 290, 155 S.E. 797 (1931); Estes v. State, 44 Ga. App. 239, 161 S.E. 165 (1931).

"Fraudulently," when used in an indictment for robbery, implies an intent to steal. Lacey v. State, 44 Ga. App. 791, 163 S.E. 292 (1931).

When the gist of the offense is the fraudulent conversion of money, a special demurrer to the indictment on the grounds that the terms of the contract on account of which the payment is alleged to have been made are not set forth, and also the amount of money to be received under the contract is not set forth, is without merit. Ramer v. State, 76 Ga. App. 678, 47 S.E.2d 174 (1948).

Indictments under § 16-8-3. — While, in an indictment under former Code 1933, § 26-1803 (see O.C.G.A. § 16-8-3), it was necessary to allege the ownership of the moneys obtained, yet if, from the allegations of the indictment as a whole, it was clearly inferable to whom the money belonged, the absence of an express allegation to that effect was no reason for quashing the indictment. Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936), aff'd, 184 Ga. 164, 190 S.E. 582 (1937).

Indictment for cheating and swindling. — Essential elements of an indictment for the offense of cheating and swindling by false representations are that the representations were made; that the representations were knowingly and designedly false; that the representations were made with the intent to deceive and defraud; that the representations did deceive and defraud; that the representations related to an existing fact or past event; that the party to whom the false statements were made, relying upon their truth, was thereby induced to part with that person's property. Fischer v. State, 46 Ga. App. 207, 167 S.E. 200 (1933).

If an indictment for cheating and swindling and not a presentment is being considered, it is not necessary that the very words of the pretense be set out. It is sufficient to state the effect of the pretense correctly. Hence, the indictment need not allege whether the pretense was spoken or written. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936).

In a case of cheating and swindling it is essential to the legality of a conviction that the person alleged to have been defrauded sustained some pecuniary loss. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936).

If the allegation is that a corporation was defrauded, or attempted to be defrauded, it is sufficient to set out the name of such corporation, without designating any particular individual, officer, or agent of such corporation to whom the representations or false pretenses were made. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936).

Indictment for insurance fraud. — There was not a fatal variance in the evidence because the evidence adduced at trial was sufficient to sustain the defendant's conviction for insurance fraud and was consistent with the allegations in the indictment as the evidence showed that the defendant, an attorney, assisted the client in making an affirmative fraudulent representation when the client signed the sworn proof of loss statement claiming that the client suffered a loss, when in fact the client had not. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014), cert. denied, 136 S. Ct. 199, 193 L. Ed. 2d 128 (U.S. 2015).

Sufficiency of indictment charging conspiracy to defraud county. — See Clinkscales v. State, 102 Ga. App. 670, 117 S.E.2d 229 (1960).

Sufficiency and duplicity of indictment for conspiracy to defraud state. — See Rollins v. State, 215 Ga. 437, 111 S.E.2d 63 (1959).

Sufficiency of indictment for criminal racketeering. — Indictment for criminal racketeering alleged the offense with sufficient specificity as it set forth specific timber transactions involving specific persons, places, acreage, deals, and owners. Grant v. State, 227 Ga. App. 88, 488 S.E.2d 79 (1997); Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Fatal variance in paternity warrant, see Simmons v. State, 98 Ga. App. 159, 105 S.E.2d 356 (1958).

Variance in dates in indictment under section regarding hindrance of levy on encumbered property. — See Nelson v. State, 51 Ga. App. 207, 180 S.E. 16 (1935) (see O.C.G.A. § 44-14-8).

Sufficiency of indictment for operation of a lottery. — See Roberts v. State,

Particular Offenses (Cont'd)

54 Ga. App. 704, 188 S.E. 844 (1936).

Sufficiency of indictment for violation of county zoning act. — See Flynn v. State, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

Sufficiency of indictment under section for charging excessive interest. — See Crowe v. State, 44 Ga. App. 719, 162 S.E. 849 (1931), overruled on other grounds, Fleet Fin., Inc. v. Jones, 263 Ga. 228, 430 S.E.2d 352 (1993) (see O.C.G.A. § 7-4-18).

Sufficiency of indictment under section relating to driving while intoxicated. — See Hooks v. State, 97 Ga. App. 897, 104 S.E.2d 623 (1958) (see O.C.G.A. § 40-6-391).

Sufficiency of indictment charging vehicle homicide. — See State v. Black, 149 Ga. App. 389, 254 S.E.2d 506 (1979).

Indictment for serious injury by vehicle. — General demurrer to charges of serious injury by vehicle against the defendant was properly denied because whether broken bones constituted serious disfigurement under O.C.G.A. § 40-6-394 depended on the facts of the case; further, the indictment tracked the language of the statute and sufficiently advised defendant of the charges against him. Harris v. State, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

Sufficiency of allegations of time of child molestation. — Allegations in the indictment for child molestation that the defendant molested one child from January 1, 1995, to June 5, 1995, and another child from January 1, 1991, until June 5, 1995, sufficiently informed the defendant of the time of the charges against the defendant. Gentry v. State, 235 Ga. App. 328, 508 S.E.2d 671 (1998).

Accusation for abandonment of dependent child, pursuant to former Code 1933, § 74-9902 (see O.C.G.A. § 19-10-1), which failed to allege the abandonment of a "minor" child was sufficient. Heard v. State, 79 Ga. App. 601, 54 S.E.2d 495 (1949).

Failure to name person solicited in indictment for soliciting for prostitution. — Objection raised by demurrer to an accusation returned for soliciting for purposes of prostitution, that the accusation does not name the person allegedly solicited and did not put the defendant on notice of any particular charge sufficiently to enable the defendant to prepare a defense, is insufficient. Bennefield v. State, 86 Ga. App. 285, 71 S.E.2d 760 (1952).

Surplusage in indictment for prostitution under former Code 1933, § 26-2012 (see O.C.G.A. § 16-6-9). — See Anderson v. State, 149 Ga. App. 460, 254 S.E.2d 459 (1979); Hicks v. State, 149 Ga. App. 459, 254 S.E.2d 461 (1979).

Sufficiency of indictment charging unlawful sale of intoxicating liquors. — See Capitol Distrib. Co. v. State, 83 Ga. App. 303, 63 S.E.2d 451 (1951).

Trial court properly denied the defendant's motion to dismiss the indictment accusing the defendant of criminal attempt to traffic in cocaine in violation of O.C.G.A. §§ 16-4-1 and 16-13-31(a)(1); purity did not have to be alleged in an attempt case, particularly since there was no cocaine involved in the instant case, the indictment satisfied O.C.G.A. § 17-7-54(a) by tracking the applicable statutes in a manner that was easily understood and by apprising the defendant of both the crime and the manner in which the crime was alleged to have been committed, and if the defendant admitted the allegations precisely as set forth in the indictment, the defendant would have been guilty of criminal attempt to traffic in cocaine. Davis v. State, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, No. S07C0408, 2007 Ga. LEXIS 151 (Ga. 2007).

RESEARCH REFERENCES

ALR. — Variance between name in bail bond and in judgment of forfeiture, 20 A.L.R. 411.

Necessity of naming owner of building in indictment or information for burglary, 20 A.L.R. 510; 169 A.L.R. 887.

Description in indictment for perjury of proceeding in which perjury was committed, 24 A.L.R. 1137.

Power of court to pass on competency, legality, or sufficiency of evidence on which indictment is based, 31 A.L.R. 1479.

Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567.

Statutes regarding form or substance of indictment as violation of constitutional requirement of "indictment," 69 A.L.R. 1392.

Sufficiency of general averment in indictment or information for perjury that the false statement was material, 80 A.L.R. 1443.

Necessity in indictment charging violation of statute regarding wages, or hours, of naming particular employees, 81 A.L.R. 76.

Joinder in same indictment of defendant charged singly with one offense and codefendant charged jointly with him with another offense, 82 A.L.R. 484.

Necessity of alleging specific facts or means in indictment or information charging one as accessory before or after the fact, 116 A.L.R. 1104.

Error in naming the offense covered by allegations of specific facts in complaint, indictment, or information, 121 A.L.R. 1088.

Necessity of alleging in information or indictment that act was "unlawful," 169 A.L.R. 166.

Necessity and materiality of statement of place of death in indictment or information charging homicide, 59 A.L.R.2d 901.

Sufficiency of description of stolen property in indictment or information for receiving it, 99 A.L.R.2d 813.

Power of court to make or permit amendment of indictment with respect to allegations as to time, 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations as to place, 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations, 14 A.L.R.3d 1358.

Sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein, 15 A.L.R.3d 968.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money, 15 A.L.R.3d 1357.

Power of court to make or permit amendment of indictment, 17 A.L.R.3d 1181.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions, 17 A.L.R.3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances, 17 A.L.R.3d 1285.

Grand jury: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 A.L.R.3d 612.

Necessity of alleging in indictment or information limitation-tolling facts, 52 A.L.R.3d 922.

Use of abbreviation in indictment or information, 92 A.L.R.3d 494.

17-7-55. Empaneling concurrent grand juries.

In any term of court when the public interest requires it, the court may empanel one or more concurrent grand juries in accordance with Part 1 of Article 4 of Chapter 12 of Title 15.

History. — Code 1981, § 17-7-55, enacted by Ga. L. 2003, p. 154, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur.2d, Grand jury, § 7 et seq.

C.J.S. — 38A C.J.S., Grand juries, § 13 et seq.

ARTICLE 4

ACCUSATIONS

JUDICIAL DECISIONS

Offense must be shown to have been committed before accusation sued out. — It is essential, to sustain a conviction of a criminal offense, that it be distinctly shown that the alleged offense was committed prior to the suing out of the accusation. Rivers v. State, 55 Ga. App. 290, 189 S.E. 923 (1937).

Burden of proving timing of accusation on state. — Burden is as much upon the state to prove affirmatively that the accusation was subsequent in time to the commission of the alleged offense, as it is to show that the offense did not so far antedate the accusation as to be barred by the statute of limitations, the failure to prove either being fatal to the state's cause. Rivers v. State, 55 Ga. App. 290, 189 S.E. 923 (1937).

RESEARCH REFERENCES

ALR. — Joinder of counts for theft of property, or receiving stolen property, belonging to different persons, 18 A.L.R. 1077.

Unlawful arrest as bar to prosecution under subsequent indictment or information, 56 A.L.R. 260.

Mistaken belief as to constitutionality or unconstitutionality of statute as affecting criminal responsibility, 61 A.L.R. 1153.

Substitution by mistake of name of person other than defendant for defendant's name in indictment, information, or other criminal accusation, 79 A.L.R. 219.

Effect of unauthorized amendment of criminal information or indictment, 101 A.L.R. 1254.

Indictment or information which has been dismissed by prosecuting attorney as susceptible of reinstatement, 112 A.L.R. 386.

Failure or refusal of grand jury upon investigation to find indictment as affecting right to file information, 120 A.L.R. 713.

Error in naming the offense covered by allegations of specific facts in complaint, indictment, or information, 121 A.L.R. 1088.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial, 133 A.L.R. 934.

Right of accused to attack indictment or information after reversal or setting aside of conviction, 145 A.L.R. 493.

Habeas corpus as remedy where one is convicted, upon plea of guilty or after trial, of offense other than one charged in indictment or information, 154 A.L.R. 1135.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses, 80 A.L.R.2d 1196.

Power of court to make or permit amendment of indictment with respect to allegations as to time, 14 A.L.R.3d 1297.

Necessity of alleging in indictment or information limitation-tolling facts, 52 A.L.R.3d 922.

Use of abbreviation in indictment or information, 92 A.L.R.3d 494.

17-7-70. Trial upon accusations in felony cases; trial upon accusations of felony and misdemeanor cases in which guilty plea entered and indictment waived.

(a) In all felony cases, other than cases involving capital felonies, in which defendants have been bound over to the superior court, are confined in jail or released on bond pending a commitment hearing, or are in jail having waived a commitment hearing, the district attorney shall have authority to prefer accusations, and such defendants shall be tried on such accusations, provided that defendants going to trial under such accusations shall, in writing, waive indictment by a grand jury.

(b) Judges of the superior court may open their courts at any time without the presence of either a grand jury or a trial jury to receive and act upon pleas of guilty in misdemeanor cases and in felony cases, except those punishable by death or life imprisonment, when the judge and the defendant consent thereto. The judge may try the issues in such cases without a jury upon an accusation filed by the district attorney where the defendant has waived indictment and consented thereto in writing and counsel is present in court representing the defendant either by virtue of his employment or by appointment by the court.

History. — Ga. L. 1915, p. 32, § 1; Code 1933, § 27-704; Ga. L. 1935, p. 116, § 1; Ga. L. 1972, p. 386, § 1; Ga. L. 1972, p. 623, § 1; Ga. L. 1980, p. 452, § 1.

U.S. Code. — Indictment and information, Federal Rules of Criminal Procedure, Rule 7.

JUDICIAL DECISIONS

Accusation equivalent to old common-law information. — Accusation provided for in this section as the basis for the trial of misdemeanor cases in the superior courts was comparable to, or the equivalent of, the old common-law information. Brown v. State, 82 Ga. App. 673, 62 S.E.2d 732 (1950).

Scope of jurisdiction. — Court has jurisdiction to try, or accept a plea of guilty, of one charged with a felony before the grand jury has returned an indictment in felony cases, but does not have such jurisdiction as to those felonies punishable by death or life imprisonment. Webb v. Henlery, 209 Ga. 447, 74 S.E.2d 7 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S.E.2d 276 (1979).

Since the accusation to which the defendant pled guilty did not charge the defendant with a felony punishable by death, the trial court had jurisdiction to take the plea following the defendant's waiver of the indictment, and to sentence the defendant thereon, and the trial court did not err when the court denied the defendant's motion to void the conviction. Orr v. State, 276 Ga. 91, 575 S.E.2d 444 (2003).

Applicability to accusations in city courts. — Former Code 1933, §§ 27-701.1, 27-703, and 27-704 (see O.C.G.A. §§ 17-7-51, 17-7-54 and 17-7-70) have no applicability to accusations in city courts when, under special legislation establishing the various city courts, it was provided that the accusation must be founded upon the affidavit of the prosecutor, and the affidavit was made a substitute for the formal finding of the grand jury as to the misdemeanors triable in the city courts in question. The affidavit which was the basis for the issuance of a warrant to arrest is not to be confused with the affidavit which formed the basis of the accusation in many of the city

courts. Brown v. State, 82 Ga. App. 673, 62 S.E.2d 732 (1950).

Defendant does not choose between indictment or accusation. — O.C.G.A. § 17-7-70(a) did not give the right to choose whether to be tried by indictment or accusation; the district attorney had the authority to prefer accusations. Webb v. State, 278 Ga. App. 9, 627 S.E.2d 925 (2006).

Offense must have been committed before making of affidavit. — If trial is had upon accusation founded on affidavit there can be no conviction, unless it appears that the offense was committed before the making of the affidavit charging its commission. Dixon v. State, 155 Ga. App. 17, 270 S.E.2d 192 (1980).

Affidavit must be sworn to and signed. — Affidavit upon which an accusation is based is void, unless the purported affidavit was in fact sworn to and the jurat signed at the time the affidavit was made. Dixon v. State, 155 Ga. App. 17, 270 S.E.2d 192 (1980).

Proper administration of oath must appear of record. — In a criminal case the accusation is void, unless the oath is properly administered and this appears from the record, and the whole proceeding is a nullity. Dixon v. State, 155 Ga. App. 17, 270 S.E.2d 192 (1980).

Whole trial a nullity if affidavit void. — Affidavit is essential, and if the instrument treated by the court and the parties as an affidavit is void, there is no foundation for the proceeding. The whole trial is a nullity. Bickley v. State, 150 Ga. App. 669, 258 S.E.2d 306 (1979).

Accusation cannot be broader than the affidavit, but, as the greater includes the lesser, if the affidavit is general, the accusation can be specific. McCann v. State, 158 Ga. App. 202, 279 S.E.2d 499 (1981).

Accusations are amendable to the time that issue is joined. Guess v. State, 155 Ga. App. 14, 270 S.E.2d 255 (1980).

That an indictment of a defendant was later necessary under O.C.G.A. § 17-7-70(a), O.C.G.A. § 40-13-3 did not destroy the validity of a formerly issued uniform traffic citation; the citation for felony vehicular homicide was not void, but expired and was superseded. State v. Perkins, 276 Ga. 621, 580 S.E.2d 523 (2003).

Purpose for allowing waiver. — Purpose of this section, permitting persons charged with felony to waive indictment by grand jury, was to give a person who had been charged with a felony the right, with the concurrence of the prosecuting officer and the judge, to have the person's case disposed of without having to await the action of the grand jury, but that section expressly withholds such right when one is charged with a crime punishable by death or life imprisonment. Webb v. Henlery, 209 Ga. 447, 74 S.E.2d 7 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S.E.2d 276 (1979).

Grand jury waived. — Defendant charged with the sale of cocaine, which is not a felony punishable by death, could waive indictment by the grand jury and enter a guilty plea on the accusation. Smith v. Wilson, 268 Ga. 38, 485 S.E.2d 197 (1997).

Waiver and consent in writing is jurisdictional requirement. — Waiver and consent in writing by the accused being a necessary prerequisite to jurisdiction to try a person charged with a felony other than a capital felony upon an accusation, the sentences imposed based upon trials had upon accusations, without any waiver and consent in writing by the accused, are void, since the judgment of the court without jurisdiction is void. Roberson v. Balkcom, 212 Ga. 603, 94 S.E.2d 720 (1956).

Charge of felony obstruction of an officer by accusation instead of by grand jury indictment was not authorized because of the state's failure to obtain the defendant's waiver of the indictment in writing as required by O.C.G.A. § 17-7-70. Brackins v. State, 249 Ga. App. 788, 549 S.E.2d 775 (2001).

Defendant was initially charged by accusation with terroristic threats and aggravated stalking, which were not properly prosecuted without an indictment or a written waiver thereof pursuant to O.C.G.A. §§ 17-7-70.1 and 17-7-70(a), the dismissal of the accusation after the jury was sworn and the indictment of the same charges was proper and there was no

former jeopardy bar under O.C.G.A. § 16-1-8(d)(1), as the former prosecution under the indictment was void and of no effect. Armstrong v. State, 281 Ga. App. 297, 635 S.E.2d 880 (2006).

Defendant's conviction for aggravated assault was void for lack of jurisdiction and had to be reversed because the evidence showed that the defendant verbally waived the defendant's right to a grand jury indictment at the start of trial and a written waiver was required by O.C.G.A. § 17-7-70(a). Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

Waiver may be signed by attorney for accused. — This section, insofar as it provides for waiver of indictment by a person charged with a crime, was satisfied by a waiver in writing signed by the attorney for the accused. Cook v. Wier, 185 Ga. 418, 195 S.E. 740 (1938).

Guilty plea waives written waiver requirement. — In the case of a plea of guilty, such plea would waive any defense known and unknown, and this would include any deficiency in the written waiver required by this section. Balkcom v. McDaniel, 234 Ga. 470, 216 S.E.2d 328 (1975).

Contention that a specific written waiver of indictment was required by this section of one pleading guilty to a noncapital felony was without basis in the text of that section. Walker v. Hopper, 234 Ga. 123, 214 S.E.2d 553 (1975); Balkcom v. McDaniel, 234 Ga. 470, 216 S.E.2d 328 (1975).

Even though the defendant did not waive the right to be indicted on the charged offenses of aggravated assault and false imprisonment in writing, such was not required for a trial court to act upon the defendant's guilty plea because neither of the felonies charged carried a penalty of life imprisonment or death and the defendant consented to the trial judge's acting on the defendant's plea. Sanchez v. State, 259 Ga. App. 400, 577 S.E.2d 80 (2003).

Assent of accused not on record. — When one count of the accusation filed by the district attorney recited that it was charged under O.C.G.A. § 16-13-30, which is a felony which may not be brought by accusation pursuant to O.C.G.A. § 17-7-70 without the assent of the accused, not on record in the case, nor was it one of those felonies listed in O.C.G.A. § 17-7-70.1 which, under circumstances not present in the case, may be pursued by accusation, the count was considered by the court to be brought under O.C.G.A. § 16-13-2(b), misdemeanor possession of less than an ounce of marijuana. Chadwick v. State, 236 Ga. App. 199, 511 S.E.2d 286 (1999).

This section related to guilty pleas upon accusations as well as after indictment. Garmon v. Johnson, 243 Ga. 855, 257 S.E.2d 276 (1979).

Absent waiver, only grand jury may subject defendant to felony trial. — Grand jury is the only body authorized to subject the defendant to trial for a felony, unless the defendant waives indictment. Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Indictment required for capital felony. — Because the defendant was charged on an accusation for malice murder without an indictment, the trial court had no jurisdiction to accept the defendant's plea and sentence the defendant. Weatherbed v. State, 271 Ga. 736, 524 S.E.2d 452 (1999).

Indictment was required to confer subject matter jurisdiction on a trial court in a capital case, and a malice murder conviction was reversed after the trial proceeded on an accusation and not an indictment, despite the fact that the defendant had stipulated to proceeding under an accusation. Defendant's aggravated assault and possession of a firearm during the commission of a crime convictions were not capital felonies, and could, therefore, properly proceed under an accusation with the defendant's consent. Mayo v. State, 277 Ga. 645, 594 S.E.2d 333 (2004).

No distinction between "capital felonies" and felonies "punishable by death or life imprisonment." — For the purposes of superior court jurisdiction under O.C.G.A. § 17-7-70, there is no distinction between "capital felonies" and felonies "punishable by death or life imprisonment"; each has the same meaning. Weatherbed v. State, 271 Ga. 736, 524 S.E.2d 452 (1999).

Failure to seek death penalty. — Fact that the state did not seek the death penalty against the defendant did not take the case outside the ambit of O.C.G.A. § 17-7-70. Weatherbed v. State, 271 Ga. 736, 524 S.E.2d 452 (1999).

Variance between caption and contents of Ga. L. 1972, p. 623. — Fact that the caption contained in Ga. L. 1972, p. 623 "that indictment by a grand jury shall not be required in certain cases" did not contain the word "felony" does not effect a fatal variance between the caption and the body of the Act, pursuant to Ga. Const. 1983, Art. III, Sec. V, Para. III. Keener v. MacDougall, 235 Ga. 288, 219 S.E.2d 377 (1975).

Good faith is presumed when state law obligates official to perform a ministerial duty, absent express evidence on the record of bad motive. Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), cert. denied, 456 U.S. 918, 102 S. Ct. 1775, 72 L. Ed. 2d 178, 456 U.S. 919, 102 S. Ct. 1777, 72 L. Ed. 2d 180 (1982).

Sheriff liability for false arrest where acting under instructions from district attorney. — Sheriff could not be liable under civil rights statute, 42 U.S.C. § 1983, for false arrest and malicious prosecution because of the sheriff's action in swearing out the accusations for the trespass and firearms offenses for which the plaintiff had been arrested, since the sheriff was required by state law to issue accusations upon receipt of instructions from the district attorney. Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), cert. denied, 456 U.S. 918, 102 S. Ct. 1775, 72 L. Ed. 2d 178, 456 U.S. 919, 102 S. Ct. 1777, 72 L. Ed. 2d 180 (1982).

Motion for acquittal properly denied. — After weighing the factors considered in determining whether the defendant's right to a speedy trial was violated, the appeals court upheld the denial of the defendant's plea in bar and demand for an acquittal as the defendant failed to show that any prejudice resulted from the delay in bringing the case to trial. Lackey v. State, 283 Ga. App. 139, 640 S.E.2d 717 (2006).

Trial court properly denied a defendant's motion for discharge and acquittal on statutory speedy trial grounds pursuant to O.C.G.A. § 17-7-170(a) because the defendant's speedy trial demand was premature and a nullity since the "complaint" was filed after the defendant's arrest, was not an accusation pursuant to O.C.G.A. §§ 17-7-70 and 17-7-70.1, and the prosecution did not proceed on the "complaint." Campbell v. State, 294 Ga. App. 166, 669 S.E.2d 190 (2008).

Cited in Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936); Pope v. State, 92 Ga. App. 661, 89 S.E.2d 530 (1955); Crosby v. State, 100 Ga. App. 49, 110 S.E.2d 94 (1959); Cadle v. State, 101 Ga. App. 175, 113 S.E.2d 180 (1960); Mobley v. State, 101 Ga. App. 317, 113 S.E.2d 654 (1960); Day v. Kelley, 218 Ga. 688, 130 S.E.2d 206 (1963); Sweeney v. Balkcom, 358 F.2d 415 (5th Cir. 1966); Wiggins v. Smith, 228 Ga. 164, 184 S.E.2d 469 (1971); Jenkins v. Georgia, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974); Brown v. Caldwell, 231 Ga. 677, 203 S.E.2d 542 (1974); Keener v. MacDougall, 232 Ga. 273, 206 S.E.2d 519 (1974); Nelms v. State, 132 Ga. App. 689, 209 S.E.2d 110 (1974); Keener v. MacDougall, 233 Ga. 881, 213 S.E.2d 835 (1975); Gibson v. Giles, 242 Ga. 720, 251 S.E.2d 231 (1978); Bickley v. State, 243 Ga. 488, 255 S.E.2d 31 (1979); Holland v. State, 151 Ga. App. 189, 259 S.E.2d 187 (1979); Ivory v. State, 160 Ga. App. 193, 286 S.E.2d 435 (1981); Smith v. State, 218 Ga. App. 392, 461 S.E.2d 561 (1995); Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007); Steillman v. State, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Only indictments are feasible for corporations. — Only feasible method for charging corporations with crimes is through the return of an indictment by a grand jury. 1970 Op. Att'y Gen. No. 70-155.

Proceedings against persons imprisoned on other charges. — Al-

though the detainer procedure may be invoked by an accusation without a waiver of indictment by the grand jury, this procedure will not authorize the Board of Offender Rehabilitation to hold a prisoner after the prisoner's present sentence has expired. The district attorney can arrest the prisoner upon the prisoner's release and proceed against the prisoner as the prisoner would proceed against any other criminal defendant. 1969 Op. Att'y Gen. No. 69-410.

Discretion of district attorney. — Decision as to whether to present an indictment to the grand jury lies within the discretion of the district attorney. There is misconduct only if the decision concerning prosecution is based upon some constitutionally impermissible reason such as race, religion, or the exercise of constitutional rights. 1988 Op. Att'y Gen. No. U88-25.

Motion to nolle prosequi. — Once an indictment or accusation has been filed, a district attorney's motion to nolle prosequi or dead docket requires consent of the court. If the trial court refuses to grant the district attorney's motion to nolle prosequi or dead docket the case, the district attorney is not thereby disqualified. 1988 Op. Att'y Gen. No. U88-25.

Effect of pretrial diversion program. — If an indictment or accusation has been filed against a person who successfully completes a pretrial diversion program, consent of the court is required before the criminal charge can be dismissed. If the person completes the pretrial diversion program prior to the filing of an indictment or accusation, consent of the court is not required. 1988 Op. Att'y Gen. No. U88-25.

RESEARCH REFERENCES

ALR. — Power of court to amend indictment, 7 A.L.R. 1516; 68 A.L.R. 928.

Right to waive indictment, information, or other formal accusation, 56 A.L.R.2d 837.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Scope and extent and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

17-7-70.1. Trial upon accusations in certain felony and misdemeanor cases; trial upon plea of guilty or nolo contendere.

(a)(1) In felony cases involving violations of the following:

(A) Code Sections 16-8-2, 16-8-14, 16-8-18, 16-9-1, 16-9-20, 16-9-31, 16-9-33, 16-9-37, 16-10-52, and 40-5-58;

(B) Article 1 of Chapter 8 of Title 16, relating to theft;

(C) Chapter 9 of Title 16, relating to forgery and fraudulent practices;

(D) Article 3 of Chapter 10 of Title 16, relating to escape and other offenses related to confinement; or

(E) Code Section 16-11-131, relating to possession of a firearm by a convicted felon or first offender probationer,

in which defendants have either been bound over to the superior court based on a finding of probable cause pursuant to a commitment

hearing under Article 2 of this chapter or have expressly or by operation of law waived a commitment hearing, the district attorney shall have authority to prefer accusations, and the defendants shall be tried on such accusations according to the same rules of substantive and procedural laws relating to defendants who have been indicted by a grand jury.

(2) All laws relating to rights and responsibilities attendant to indicted cases shall be applicable to cases brought by accusations signed by the district attorney.

(3) The accusation need not be supported by an affidavit except in those cases in which the defendant has not been previously arrested in conjunction with the transaction charged in the accusation.

(a.1) The provisions of subsection (a) of this Code section shall apply to violations of Code Section 16-13-30 whenever there has been a finding of probable cause pursuant to a commitment hearing under Article 2 of this chapter or the accused has waived either expressly or by operation of law the right to this hearing.

(b) Judges of the superior court may open their courts at any time without the presence of either a grand jury or a trial jury to receive and act upon pleas of guilty or nolo contendere in felony and misdemeanor cases. The judge of the superior court may try the issues in such cases without a jury upon an indictment or upon an accusation filed by the district attorney where the defendant has waived trial by jury.

(c) An accusation substantially complying with the form provided in subsections (d) and (e) of Code Section 17-7-71 shall in all cases be sufficient.

(d) The district attorney may not bring an accusation pursuant to this Code section in those cases where the grand jury has heard evidence or conducted an investigation or in which a no bill has been returned.

(e) Notwithstanding subsections (a) through (d) of this Code section, nothing in this Code section shall affect the rights of public officials to appear before a grand jury as provided in Code Sections 45-11-4 and 45-15-11 or peace officers to appear before a grand jury as provided in Code Section 17-7-52.

History. — Code 1981, § 17-7-70.1, enacted by Ga. L. 1992, p. 1808, § 1; Ga. L. 1996, p. 678, § 1; Ga. L. 1998, p. 208, § 1; Ga. L. 2012, p. 899, § 8-9/HB 1176; Ga. L. 2016, p. 186, § 7/HB 941.

Editor's notes. — Ga. L. 1996, p. 678, § 2, not codified by the General Assembly, provides that the amendment by that Act is applicable to violations occurring on or after July 1, 1996.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012,

shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For review of 1998 legislation relating to criminal procedure, see 15 Ga. St. U.L. Rev. 96 (1998). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 79 (2016).

For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

JUDICIAL DECISIONS

Constitutionality. — Substitution of accusation for indictment for the specific felonies enumerated in O.C.G.A. § 17-7-70.1 does not violate due process since statutory procedures exist to safeguard against criminal prosecution without probable cause, and to further protect all defendants equally, whether indicted or formally accused. Lamberson v. State, 265 Ga. 764, 462 S.E.2d 706 (1995).

O.C.G.A. § 17-7-70.1 was not an ex post facto law with respect to defendant charged with forgery when the defendant entered a plea of not guilty on the accusation without having first entered a written objection to the proceeding and when the defendant was arrested after the effective date of the section. Crowder v. State, 218 Ga. App. 630, 462 S.E.2d 754 (1995).

Trial on accusation preferred by district attorney. — Felony charge of driving after having been declared a habitual violator may be tried on an accusation preferred by a district attorney rather than on an indictment returned by a grand jury. State v. Gilstrap, 230 Ga. App. 281, 495 S.E.2d 885 (1998).

Defendant charged with possession of cocaine with intent to distribute could be tried by accusation because the defendant waived the right to a grand jury indictment when the defendant posted bond following arrest. McNair v. State, 240 Ga. App. 324, 523 S.E.2d 392 (1999).

Because the defendant waived the right to a commitment hearing when the defendant posted bond, the state was authorized to proceed to trial on the accusation charging theft by taking despite the defendant's objection. Pruitt v. State, 245 Ga. App. 801, 538 S.E.2d 874 (2000).

Accusation not same as indictment. — After the trial court quashed an indictment and a later accusation, both of which charged the defendant with misdemeanors, due to the state's failure to comply with O.C.G.A. § 17-7-52, O.C.G.A. § 17-7-70.1 did not make a quashed accusation similar or equivalent to an indictment for the purposes of the prosecutory bar under O.C.G.A. § 17-7-53.1. Additionally, § 17-7-70.1 relates primarily to felonies charged by accusation, and the district attorney could not bring the accusation, as was required for § 17-7-70.1, due to the fact that the grand jury heard evidence in the case. State v. Allen, 262 Ga. App. 724, 586 S.E.2d 378 (2003).

Accusation was a proper charging document in a theft by receiving case, and the defendant's appellate argument that a trial court should have instructed the jury that the indictment was not evidence proving guilt failed because there was no indictment in the case, only an accusation. Brown v. State, 265 Ga. App. 613, 594 S.E.2d 770 (2004).

Waiver of indictment. — Trial court had jurisdiction to try the defendant for the offense of theft by receiving stolen property as the criminal code permitted that offense to be tried upon accusation even when the defendant had not waived the indictment. Gerrard v. State, 252 Ga. App. 767, 556 S.E.2d 131 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1960, 152 L. Ed. 2d 1021 (2002).

Defendant waived the right to a commitment hearing when defendant posted bond; thus, the state was authorized to try the charge of forgery in

the first degree by accusation. Watson v. State, 264 Ga. App. 41, 589 S.E.2d 867 (2003).

Indictment required. — Defendant was initially charged by accusation with terroristic threats and aggravated stalking, which were not properly prosecuted without an indictment or a written waiver thereof pursuant to O.C.G.A. §§ 17-7-70.1 and 17-7-70(a), the dismissal of the accusation after the jury was sworn and the indictment of the same charges was proper and there was no former jeopardy bar under O.C.G.A. § 16-1-8(d)(1), as the former prosecution under the indictment was void and of no effect. Armstrong v. State, 281 Ga. App. 297, 635 S.E.2d 880 (2006).

Cocaine possession. — State was authorized to try a cocaine possession charge by accusation when there was a commitment hearing and a finding of probable cause. Brackins v. State, 249 Ga. App. 788, 549 S.E.2d 775 (2001).

Felony obstruction of officer. — Charge of felony obstruction of an officer by accusation instead of by grand jury indictment was not authorized because of the state's failure to obtain the defendant's waiver of an indictment in writing as required by O.C.G.A. § 17-7-70. Brackins v. State, 249 Ga. App. 788, 549 S.E.2d 775 (2001).

Sentence not impacted by use or accusation rather than indictment. — When the defendant was charged and convicted of felony theft by shoplifting, the trial court was not required to sentence the defendant as a misdemeanant simply because the state utilized an accusation rather than an indictment. Hood v. State, 223 Ga. App. 573, 479 S.E.2d 400 (1996).

When felony not one listed in statute. — When one count of the accusation filed by the district attorney recited that it was charged under O.C.G.A. § 16-13-30, which is a felony which may not be brought by accusation pursuant to O.C.G.A. § 17-7-70 without the assent of the accused, not on record in the case, nor was it one of those felonies listed in O.C.G.A. § 17-7-70.1 which, under circumstances not present in the case, may be pursued by accusation, the count was considered by the court to be brought under O.C.G.A. § 16-13-2(b), misdemeanor possession of less than an ounce of marijuana. Chadwick v. State, 236 Ga. App. 199, 511 S.E.2d 286 (1999).

Pretrial amendment of accusation did not start new prosecution. — Pretrial amendment of accusation did not start a new prosecution as the previous arraignment of the defendant was sufficient and jeopardy attached before the nolle prosequi was entered over the defendant's objection; consequently, a later prosecution of the offenses charged in the accusation was barred by former jeopardy. Smith v. State, 279 Ga. 396, 614 S.E.2d 79 (2005).

No accusation found. — Trial court properly denied a defendant's motion for discharge and acquittal on statutory speedy trial grounds pursuant to O.C.G.A. § 17-7-170(a) because the defendant's speedy trial demand was premature and a nullity since the "complaint" was filed after the defendant's arrest, was not an accusation pursuant to O.C.G.A. §§ 17-7-70 and 17-7-70.1, and the prosecution did not proceed on the "complaint." Campbell v. State, 294 Ga. App. 166, 669 S.E.2d 190 (2008).

Cited in McBride v. State, 213 Ga. App. 857, 446 S.E.2d 193 (1994); Sanderson v. State, 217 Ga. App. 51, 456 S.E.2d 667 (1995); Ingram v. State, 224 Ga. App. 271, 480 S.E.2d 302 (1997); Singleton v. State, 240 Ga. App. 240, 522 S.E.2d 734 (1999).

17-7-71. Trials of misdemeanors; trial of misdemeanor motor vehicle violations; form and contents of accusations; amendment of accusation; service of amendment upon defendant; continuances.

(a) In all misdemeanor cases, the defendant may be tried upon an accusation framed and signed by the prosecuting attorney of the court. The accusation need not be supported by an affidavit except in those

cases where the defendant has not been previously arrested in conjunction with the transaction charged in the accusation and where the accusation is to be used as the basis for the issuance of a warrant for the arrest of the defendant.

(b)(1) In all misdemeanor cases arising out of violations of the laws of this state, relating to (A) the operation and licensing of motor vehicles and operators; (B) the width, height, and length of vehicles and loads; (C) motor common carriers and motor contract carriers; or (D) road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48, the defendant may be tried upon the uniform traffic citation and complaint provided for in Article 1 of Chapter 13 of Title 40.

(2) In all misdemeanor cases arising out of violations of the laws of this state relating to game, fish, or boating, the defendant may be tried upon the summons provided for in Code Section 27-1-35.

(c) Every accusation which states the offense in the terms and language of the law or so plainly that the nature of the offense charged may be easily understood by the jury shall be deemed sufficiently technical and correct.

(d) An accusation substantially complying with the following form shall in all cases be sufficient:

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

On behalf of the people of the State of Georgia, the undersigned, as prosecuting attorney for the county and state aforesaid, does hereby charge and accuse (name of accused) with the offense of _____; for that the said (name of accused) (state with sufficient certainty the offense and the time and place it occurred) contrary to the laws of this state, the good order, peace, and dignity thereof.

/s/_____
(District attorney)
(Solicitor-general)

(e) If there should be more than one count, each additional count shall state:

The undersigned, as prosecuting attorney, does further charge and accuse the said (name of accused) with the offense of _____ (the offense as before); for that the said (name of accused) (state with sufficient certainty the offense and the time and place it occurred), contrary to the laws of this state, the good order, peace, and dignity thereof.

(f) Prior to trial, the prosecuting attorney may amend the accusation, summons, or any citation to allege or to change the allegations

regarding any offense arising out of the same conduct of the defendant which gave rise to any offense alleged or attempted to be alleged in the original accusation, summons, or citation. A copy of any such amendment shall be served upon the defendant or his or her counsel and the original filed with the clerk of the court. On motion, the court shall grant the defendant a continuance which is reasonably necessitated by an amendment. If any additional charges against the defendant are made the judge shall advise the defendant that he or she has an automatic right to a continuance.

History. — Code 1933, § 27-705, enacted by Ga. L. 1980, p. 452, § 2; Ga. L. 1981, p. 828, § 1; Ga. L. 1982, p. 3, § 17; Ga. L. 1996, p. 748, § 14; Ga. L. 2002, p. 627, § 2.

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30(b), not codified by the General Assembly, provides: "The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

JUDICIAL DECISIONS

Analysis

General Consideration
Amendment

General Consideration

Affidavit not required when defendant previously arrested. — Accusation need not be supported by an affidavit when the defendant has been previously arrested in conjunction with the transaction charged in the accusation. Manning v. State, 175 Ga. App. 738, 334 S.E.2d 338 (1985); Military Circle Pet Ctr. No. 94, Inc. v. State, 181 Ga. App. 657, 353 S.E.2d 555, rev'd on other grounds, 257 Ga. 388, 360 S.E.2d 248, vacated in part on other grounds, 184 Ga. App. 805, 363 S.E.2d 360 (1987).

Affidavit not required for peripheral accusation. — When an accusation of telephone call harassment was not used as the basis for an arrest warrant issu-

ance, an affidavit was not required for it. Williams v. State, 206 Ga. App. 533, 426 S.E.2d 32 (1992).

Affidavit not required when appellant was not arrested. — No affidavit supporting an accusation filed against an appellant was required under O.C.G.A. § 17-7-71(a) when the appellant was not arrested for the charged offenses, and the accusation was not intended or used as the basis for the issuance of a warrant for the appellant's arrest. Blankenship v. State, 208 Ga. App. 710, 431 S.E.2d 481 (1993).

No affidavit required. — Trial court did not err in denying the defendant's request to charge the jury on the solicitor's duty to file an affidavit in support of the accusation because O.C.G.A. § 17-7-71(a) clearly stated that an affidavit to support the accusation was required only when the accusation was to be used as the basis for the issuance of an arrest warrant and the record reflected no evidence that a warrant was issued for the defendant's arrest; thus, the requested instruction was not applicable or required. King v. State, 300 Ga. 180, 794 S.E.2d 110 (2016).

Filing date of supporting affidavit not determinative of timeliness of prosecution. — Prosecution against the defendant for simple battery was timely filed within two years, pursuant to O.C.G.A. § 17-3-1(d), since the accusation was filed within the time period, which was deemed to be the commencement of the matter pursuant to O.C.G.A. § 16-1-3(14); the fact that the supporting affidavit was filed six days after the limitations period ran did not affect the timeliness of the action pursuant to O.C.G.A. § 17-7-71(a) because that document was for the issuance of an arrest warrant. Cochran v. State, 259 Ga. App. 130, 575 S.E.2d 901 (2003).

Right improperly invoked. — Trial court properly denied the defendant's motion for discharge and acquittal based on speedy trial grounds because the defendant did not properly assert the statutory right since the demand did not meet the minimum acceptable standard as neither the indictment number or the charges against the defendant were included. Bonakies v. State, 263 Ga. App. 812, 589 S.E.2d 573 (2003).

Omission of some of statutory language. — Accusation charging driving under the influence and reciting the proper statute, but omitting "less safe driver" language in the statute, was sufficient. Broski v. State, 196 Ga. App. 116, 395 S.E.2d 317 (1990).

Accusation referring to a "masturbation for hire" and referencing O.C.G.A. § 17-7-71 sufficiently charged the defendant. Pak v. State, 206 Ga. App. 78, 424 S.E.2d 292 (1992).

Accusation that omitted certain statutory language but that apprised the defendant that the defendant was being charged with driving with an unlawful alcohol concentration of 0.10 grams or more within three hours of operating a vehicle was sufficient. Lewis v. State, 215 Ga. App. 486, 451 S.E.2d 116 (1994).

Accusation charging reckless driving was sufficient, notwithstanding the contention that the accusation did not include the essential element of disregard for the safety of persons or property, since it was so plain that the nature of the offense was easily understood when the accusation charged that the defendant unlawfully drove a motor vehicle on a public road in a reckless manner. Freeman v. State, 234 Ga. App. 110, 505 S.E.2d 836 (1998).

Superseding indictment not barred. — Timely accusation charging the defendant with misdemeanors, which was later followed by an indictment that included the misdemeanor charges and a felony charge filed more than two years after the commission of the crimes, was not barred by the statute of limitations because the indictment merely duplicated the original misdemeanor charges and the felony indictment was within the applicable statute of limitation period of four years. Wooten v. State, 240 Ga. App. 725, 524 S.E.2d 776 (1999).

Accusation based on arrest warrant or supported by affidavit not required. — Simple battery accusation was not invalid, although an arrest warrant on the same charge had been dismissed and the accusation was not supported by an affidavit. State v. Litz, 210 Ga. App. 200, 435 S.E.2d 724 (1993).

General Consideration (Cont'd)

Uniform traffic citation. — Oath and attestation upon the uniform traffic citation issued under O.C.G.A. § 40-13-1 is apparently an "affidavit," developed by the commissioner of public safety for the prosecution of traffic offense cases; this "ticket" alone suffices to prosecute a traffic violation. But when the arresting officer neglects to sign, under oath and before an authorized magistrate, the "arresting officer's certification" on the citation attesting that the officer reasonably believed the defendant committed the offense, prosecution by formal accusation, pursuant to O.C.G.A. § 17-7-71, is the correct procedure. Evans v. State, 168 Ga. App. 716, 310 S.E.2d 3 (1983).

Prosecution does not need to proceed upon the uniform traffic citation form that has initially been issued and the prosecuting attorney has authority to file a subsequent formal accusation. State v. Doyal, 184 Ga. App. 126, 361 S.E.2d 17 (1987).

Defendant's argument that the state was not entitled to amend a uniform traffic citation to allege an accusation not contained in the original citation was inapplicable to the defendant's case as the state's original uniform traffic citation did not have to be amended since the citation did not improperly allege multiple offenses; rather, the state's reference to the statute violated, which contained multiple subsections, did not refer to multiple offenses, but referred to one offense and multiple ways to prove the offenses. Additionally, the uniform traffic citation issued to the defendant was not required to follow any sort of "mandatory" accusation as statutory law did not require the citation to be mandatory as to form. Slinkard v. State, 259 Ga. App. 755, 577 S.E.2d 825 (2003).

Trial court did not err in denying a defendant's motion to dismiss because even though a uniform traffic citation (UTC) did not list the defendant's name in the correct order and did not contain a date for the defendant's initial court appearance, the defendant was not prejudiced; the defendant was aware of the charge against the defendant and appeared at all scheduled court dates. Regardless of whether O.C.G.A. § 17-7-71(b)(1) allowed amendment to portions of a UTC other than the allegation, the state's accusation was sufficient to allow prosecution of the defendant for violating O.C.G.A. § 40-6-98 because O.C.G.A. § 17-7-71(b)(1) allowed misdemeanor cases to proceed upon an accusation framed and signed by the prosecuting attorney. Switlick v. State, 295 Ga. App. 849, 673 S.E.2d 323 (2009).

Improper charge of defendants under uniform traffic citation. — Appellate court reversed the trial court's judgment convicting defendants of violating O.C.G.A. § 4-3-3 by allowing livestock to roam at large because § 4-3-3 was not a penal statute and the defendants were improperly charged by use of a uniform traffic citation in violation of O.C.G.A. § 17-7-71. Cotton v. State, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

Indictment for misdemeanor battery sufficient. — Trial court correctly denied the defendant's motion to quash a count alleging misdemeanor battery because the allegations of the count were not too vague, uncertain, or unclear as contended by the defendant since the allegations met the language of the statute and were sufficiently technical and correct; further, the specific bodily harm did not have to be alleged. State v. Tate, 262 Ga. App. 311, 585 S.E.2d 224 (2003).

Accusation for battery, family violence, and criminal trespass that alleged that the defendant injured the victim by striking the victim, causing a visibly bloody lip, and that the defendant knocked a hole in the victim's closet door, was sufficient under O.C.G.A. § 17-7-71(c). There was no requirement that the accusation state the instrumentality used by the defendant because the instrumentality was not an element of any of the charged crimes. State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Accusation misstated defendant's age. — Accusation that charged the defendant, age 19, with being a minor under 18 while driving with an alcohol concentration of .02 or more, met the requirements of O.C.G.A. § 17-7-71(c) because the accusation cited O.C.G.A. § 40-6-391, the correct statute under which the defen-

dant was charged, and the defendant could not be surprised with proof of the defendant's age. Mills v. State, 271 Ga. App. 506, 610 S.E.2d 80 (2004).

Double jeopardy did not bar prosecution on new accusation. — Prosecution of the 2015 charge against the defendant was not barred on the ground of double jeopardy or failure to prosecute timely because the defendant made no showing that the 2015 charge arose from the illegal storage of the rubbish and no additional items were at issue in the 2010 charge. King v. State, 300 Ga. 180, 794 S.E.2d 110 (2016).

There was no error in trial court's denial of motion for directed verdict of acquittal based upon the assertion that the probata did not conform to the allegata, in that the original accusation charged that the defendant received money from a prostitute without lawful consideration on February 23, 1983, but the evidence at trial showed that the offense occurred on February 2, 1983, because time is not a material element of the offense of pimping and the state proved that the offense occurred within the statute of limitation prior to the return of the indictment. Angevine v. State, 171 Ga. App. 658, 320 S.E.2d 578 (1984).

State failed to prove a tolling of the statute of limitation by means of an amendment to an earlier accusation since there was no showing that the crimes charged in the earlier accusation arose out of the same conduct which gave rise to the offenses alleged in the subsequent accusation. Tarver v. State, 198 Ga. App. 634, 402 S.E.2d 365 (1991).

Traffic violation pending, which tolled limitations period. — Summary judgment in favor of the defendant was reversed because the plaintiff met the plaintiff's burden of producing evidence that the two year limitation period applicable to the plaintiff's tort suit had not run because the limiation period was tolled as the plaintiff established that the prosecution of the defendant for the traffic violation remained pending in municipal court until November 18, 2014, which was less than two years before the lawsuit was filed. Williams v. Durden, 347 Ga. App. 363, 819 S.E.2d 524 (2018).

Charging instrument defective. — Trial court's denial of a defendant's general demurrer to a charge against the defendant of violation of a family violence order, in violation of O.C.G.A. § 16-5-95(a), was error as the accusation failed to state any specific acts that violated any specific terms of a family violence order, such that the accusation failed to set out the essential elements of the crime or to apprise the defendant properly of the charge pursuant to O.C.G.A. § 17-7-71(c). Newsome v. State, 296 Ga. App. 490, 675 S.E.2d 229 (2009).

Charging instrument not defective. — Accusation was not fatally defective because the accusation informed the defendants of the charges against the defendants and protected the defendants against another prosecution for the same offense, and the defendants could not admit that the defendants passed in an area defined by markings as a no-passing zone without being guilty of the crime charged. Moreover, to the extent that the defendants' attack on the accusation could be read as a special demurrer, seeking greater specificity, it was waived by the defendants' failure to raise the issue within ten days after the defendants pled to the accusation. Haynes-Turner v. State, 289 Ga. App. 652, 658 S.E.2d 203 (2008).

Accusation charging a defendant with causing the unjustifiable physical pain or suffering of a dog by failing to provide adequate food or water or medical care was sufficient to charge the defendant with cruelty to animals pursuant to O.C.G.A. § 16-12-4. Ford v. State, 306 Ga. App. 606, 703 S.E.2d 71 (2010).

Harmless error analysis. — Even if the failure to name the specific drug involved was error, applying the harmless error standard on appeal, as the defendant was a less than safe driver because the defendant was under the influence of drugs, the defendant was in the best position to know which drug or drugs the defendant ingested, therefore the defendant was not prejudiced or misled and there was no violation of O.C.G.A. § 17-7-71(c). Gantt v. State, 263 Ga. App. 102, 587 S.E.2d 255 (2003).

Cited in Wehunt v. State, 168 Ga. App. 353, 309 S.E.2d 143 (1983); Mash v. State,

General Consideration (Cont'd)

168 Ga. App. 491, 309 S.E.2d 673 (1983); Daniel v. State, 169 Ga. App. 722, 314 S.E.2d 737 (1984); Fuller v. State, 169 Ga. App. 468, 313 S.E.2d 745 (1984); Russell v. State, 174 Ga. App. 1, 329 S.E.2d 168 (1985); King v. State, 176 Ga. App. 137, 335 S.E.2d 439 (1985); Weaver v. State, 179 Ga. App. 641, 347 S.E.2d 295 (1986); Miller v. State, 179 Ga. App. 217, 345 S.E.2d 909 (1986); State v. Horne, 181 Ga. App. 207, 351 S.E.2d 730 (1986); State v. Military Circle Pet Ctr. No. 94, Inc., 257 Ga. 388, 360 S.E.2d 248 (1987); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Abelman v. State, 185 Ga. App. 278, 363 S.E.2d 764 (1987); Gibson v. State, 187 Ga. App. 769, 371 S.E.2d 413 (1988); Manley v. State, 187 Ga. App. 773, 371 S.E.2d 438 (1988); Ward v. State, 188 Ga. App. 372, 373 S.E.2d 65 (1988); Burks v. State, 195 Ga. App. 516, 394 S.E.2d 136 (1990); Martin v. State, 195 Ga. App. 548, 394 S.E.2d 551 (1990); Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577 (1990); State v. Scoggins, 196 Ga. App. 781, 397 S.E.2d 50 (1990); Reed v. State, 205 Ga. App. 209, 422 S.E.2d 15 (1992); State v. Rustin, 208 Ga. App. 431, 430 S.E.2d 765 (1993); Morgan v. State, 212 Ga. App. 394, 442 S.E.2d 257 (1994); Hassell v. State, 212 Ga. App. 432, 442 S.E.2d 261 (1994); Sanderson v. State, 217 Ga. App. 51, 456 S.E.2d 667 (1995); Wade v. State, 223 Ga. App. 222, 477 S.E.2d 328 (1996); Smith v. State, 239 Ga. App. 515, 521 S.E.2d 450 (1999); Wrigley v. State, 248 Ga. App. 387, 546 S.E.2d 794 (2001); Brown v. State, 246 Ga. App. 517, 541 S.E.2d 112 (2000); Beaman v. City of Peachtree City, 256 Ga. App. 62, 567 S.E.2d 715 (2002); Kall v. State, 257 Ga. App. 527, 571 S.E.2d 520 (2002); Allman v. State, 258 Ga. App. 792, 575 S.E.2d 710 (2002); Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

Amendment

Amendment of accusation. — In a prosecution for driving under the influence of alcohol, the state was entitled, under O.C.G.A. § 17-7-71 (f), to amend the accusation after the defendant entered the defendant's plea but before jury selection commenced in order to charge the correct date of the offense. Melton v. State, 174 Ga. App. 461, 330 S.E.2d 398 (1985).

Trial court did not err in denying the motion for a continuance when no showing was made to suggest that the defendant's ability to present a defense was in any way impeded by a change of the date of the alleged offense by one day. Melton v. State, 174 Ga. App. 461, 330 S.E.2d 398 (1985).

Trial court did not err in refusing to dismiss uniform traffic citations issued within two years of the date the offenses occurred, but later amended by the state, on the ground that the statute of limitation expired; the amended accusations did not constitute the commencement of a new prosecution and there had been no final disposition of the previously filed accusations. Prindle v. State, 240 Ga. App. 461, 523 S.E.2d 44 (1999).

Defendant could not complain that the defendant was required to answer to a charge that had been amended from the original charge filed against the defendant as the defendant was notified of the change, defendant was given a continuance to prepare for the amended charge, the amended charge arose out of the same conduct as the original charge, the defendant did not object but acquiesced in going forward on the amended accusation with the jury that had been impaneled, and the defendant's earlier jury trial had not started because the jury had been impaneled, but had not been sworn. Lunsford v. State, 262 Ga. App. 635, 585 S.E.2d 923 (2003).

Pretrial amendment of an accusation did not start a new prosecution, the previous arraignment of the defendant was sufficient, and jeopardy attached before the nolle prosequi was entered over the defendant's objection; consequently, a later prosecution of the offenses charged in the accusation was barred by former jeopardy. Smith v. State, 279 Ga. 396, 614 S.E.2d 79 (2005).

Because the state amended the state's accusation against the defendant before trial to include an additional charge of disorderly conduct, in violation of O.C.G.A. § 16-11-39, O.C.G.A. § 17-7-71(f) required the trial court to

grant the defendant's request for a continuance, and erred when the court failed to do so; moreover, the defendant had no pretrial notice of the need to defend against a tumultuous act that did not physically harm the spouse. Martin v. State, 278 Ga. App. 465, 629 S.E.2d 134 (2006).

Amendment of an accusation to clarify that the defendant made contact with the victim's breast, as opposed to the victim's "intimate body parts", was timely under O.C.G.A. § 17-7-71(f) when the state filed the amendment several days before trial, the amendment was served on defense counsel, and the trial court read the amended accusation in open court before trial commenced. Furthermore, the defendant was not surprised by the amendment, and the defendant did not show that the amendment impeded the defendant's ability to present a defense. Romo v. State, 288 Ga. App. 237, 653 S.E.2d 832 (2007).

When the defendant was prosecuted for serving alcohol to a minor, under O.C.G.A. § 3-3-23(a)(1), the defendant did not show the accusation was improperly amended in violation of O.C.G.A. § 17-7-71(f) because: (1) it was not shown that the accusation was amended after trial commenced; and (2) while it was unknown if the amended accusation was served on the defendant, the amendment, deleting the name of an undercover officer to whom alcohol was allegedly served, did not surprise the defendant, given extensive testimony that had been given about the undercover operation resulting in the charge against the defendant. Butler v. State, 298 Ga. App. 129, 679 S.E.2d 361 (2009).

State was not barred from filing a formal accusation charging new violations even though the defendant was issued Uniform Traffic Citations (UTCs) at a traffic stop following a collision because the differences between the charges made in the UTCs and the charges set forth in the accusation did not affect the accusation's validity. Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333, cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Amendment to correct typographical error. — Even if the correction of a typographical error in the original accusation was considered an amendment, such a change was authorized by O.C.G.A. § 17-7-71. Anderson v. State, 211 Ga. App. 2, 438 S.E.2d 376 (1993).

Amended accusation, by correcting a typographical error with respect to the offense date, did not charge an offense beyond the two year statute of limitation for prosecuting misdemeanors because the offense date was not a material element of the offense charged. Thomas v. State, 233 Ga. App. 224, 504 S.E.2d 59 (1998).

Amendment filed after two-year period in § 17-3-1(d). — If an original accusation was timely filed and valid within the meaning of O.C.G.A. § 17-7-71(c) and was subsequently amended after the two-year period of limitations set forth in O.C.G.A. § 17-3-1(d), the amendment did not negate the prior valid commencement of the prosecution which occurred before the expiration of the operative statute of limitations. Freeman v. State, 194 Ga. App. 905, 392 S.E.2d 330 (1990).

Right to continuance after amendment. — Trial court was not required to warn defendant that the defendant was entitled to a continuance based on the state's filing of an amended information as that right only applied if a defendant was pursuing a right to a trial and the defendant waived that right and entered guilty pleas to the charges. Payne v. State, 276 Ga. App. 577, 623 S.E.2d 668 (2005).

OPINIONS OF THE ATTORNEY GENERAL

Uniform traffic citation. — O.C.G.A. § 17-7-71(b) specifically permits use of an uniform traffic citation in all misdemeanor cases involving vehicle dimensions and laws concerning motor common carriers and motor contract carriers, which would include violations of former § 46-7-61 to the extent that such violations were misdemeanors. 1981 Op. Att'y Gen. No. U81-17.

Nontraffic misdemeanor offenses are not properly chargeable on uniform traffic citation and complaint form but instead should be charged on an accusation. 1982 Op. Att'y Gen. No. U82-26.

Discretion of district attorney. — Decision as to whether to present an indictment to the grand jury lies within the discretion of the district attorney. There is misconduct only if the decision concerning prosecution is based upon some constitutionally impermissible reason such as race, religion, or the exercise of constitutional rights. 1988 Op. Att'y Gen. No. U88-25.

Motion to nolle prosequi. — Once an indictment or accusation has been filed, a district attorney's motion to nolle prosequi or dead docket requires the consent of the court. If the trial court refuses to grant the district attorney's motion to nolle prosequi or dead docket the case, the district attorney is not thereby disqualified. 1988 Op. Att'y Gen. No. U88-25.

Effect of pretrial diversion program. — If an indictment or accusation has been filed against a person who successfully completes a pretrial diversion program, consent of the court is required before the criminal charge can be dismissed. If the person completes the pretrial diversion program prior to the filing of an indictment or accusation, consent of the court is not required. 1988 Op. Att'y Gen. No. U88-25.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Indictments and Informations, § 1 et seq.

C.J.S. — 42 C.J.S., Indictments and Informations, § 1 et seq.

17-7-72. Jurisdiction of probate courts to try certain drug and alcohol offenses.

In probate courts which have jurisdiction over misdemeanor possession of marijuana in accordance with Code Sections 16-13-2 and 16-13-30 and certain misdemeanor violations of Code Section 3-3-23 pursuant to Code Section 15-9-30.6, the following offenses may be tried upon a summons or citation without an accusation:

(1) Possession of one ounce or less of marijuana, in accordance with Code Sections 16-13-2 and 16-13-30; and

(2) Any violation of paragraph (2) of subsection (a) of Code Section 3-3-23 which is punishable as a misdemeanor, but not violations punishable as high and aggravated misdemeanors.

History. — Code 1981, § 17-7-72, enacted by Ga. L. 1996, p. 1298, § 2.

17-7-73. Trial of litter offenses upon summons or citation without accusation.

In probate, magistrate, and municipal courts that have jurisdiction over violations of Part 2, Part 3, or Part 3A of Article 2 of Chapter 7 of Title 16 or Code Section 32-6-51 or 40-6-248.1 that are punishable as misdemeanors in accordance with Code Section 15-9-30.7, 15-10-2.1, or

36-32-10.3 such offenses may be tried upon a summons or citation with or without an accusation.

History. — Code 1981, § 17-7-73, enacted by Ga. L. 2006, p. 275, § 3-8/HB 1320.

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

ARTICLE 5

ARRAIGNMENT AND PLEAS GENERALLY

Cross references. — Pleading by defendant, Uniform Superior Court Rules, Rule 33. Arraignment hearings in Juvenile Court, Uniform Rules for the Juvenile Courts of Georgia, Rules 10.1 — 10.4.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 556 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, § 237 et seq. 16B C.J.S., Constitutional Law, § 1327 et seq. 16C C.J.S., Constitutional Law, § 1644 et seq. 22 C.J.S., Criminal Procedure and Rights of the Accused, § 188 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 697 et seq.

ALR. — Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof, 97 A.L.R.2d 549.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 A.L.R.3d 864.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Right of prosecutor to withdraw from plea bargain prior to entry of plea, 16 A.L.R.4th 1089.

Admissibility, in prosecution in another state's jurisdiction, of confession or admission made pursuant to plea bargain with state authorities, 90 A.L.R.4th 1133.

17-7-90. Issuance of bench warrant; execution; receiving bail, fixing bond, and approving sureties.

(a) A bench warrant may be issued by a judge for the arrest of a person:

(1) Accused of a crime by a grand jury;

(2) Except as otherwise provided in Code Section 17-6-11, charged with a crime who has failed to appear in court after:

(A) Actual notice of the time and place to appear to the person in open court;

(B) Notice of the time and place to appear to the person by mailing a notice to such person's last known address; or

(C) The person has otherwise been notified of the time and place to appear personally, in writing, by a court official or officer of the court;

(3) Charged with a crime upon the filing by the prosecutor of an accusation supported by affidavit; or

(4) Who failed to dispose of his or her charges or waive arraignment and plead not guilty after the expiration of the 30 day period set forth in subsection (b) of Code Section 17-6-11.

(b) Every officer is bound to execute a bench warrant within his or her jurisdiction, and every person so arrested shall be committed to jail until bail is tendered. Any judicial officer or the sheriff of the county where the charge was returned may receive the bail, fix the amount of the bond, and approve the sureties unless it is a case that is bailable only before some particular judicial officer.

History. — Orig. Code 1863, § 4608; Code 1868, § 4630; Code 1873, § 4727; Code 1882, § 4727; Penal Code 1895, § 932; Penal Code 1910, § 957; Code 1933, § 27-801; Ga. L. 1989, p. 623, § 2; Ga. L. 2004, p. 631, § 17; Ga. L. 2017, p. 608, § 2/SB 176.

JUDICIAL DECISIONS

"Any judicial officer" defined. — "Any judicial officer" means an officer of the county where the accusation is found. An officer of another county cannot admit a person to bail. Weatherly v. Beavers, 139 Ga. 122, 76 S.E. 853 (1912).

Description of the crime in the bench warrant may be general. Brady v. Davis, 9 Ga. 73 (1850).

When arrest may be made. — Arrest may be made either before or after an accusation is made or an indictment found by a grand jury. Rogers v. State, 133 Ga. App. 513, 211 S.E.2d 373 (1974).

Agreement by a sheriff to protect sureties after taking the sureties' bond will not prevent forfeiture. McClure v. Smith, 56 Ga. 439 (1876).

Court clerks protected from suit on arrest warrant by judicial and quasi-judicial immunity. — Appellant's suit against clerks of a city municipal court was properly dismissed because the clerks' failure to perform their duties to withdraw a canceled arrest warrant from the state's criminal database, which led to the appellant's arrest and detention, were actions protected by quasi-judicial immunity as to the appellant's claims of wrongful arrest. Spann v. Davis, No. A20A0202, 2020 Ga. App. LEXIS 368 (June 22, 2020).

Cited in Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822, 9 Ann. Cas. 617 (1906); Newsome v. Scott, 151 Ga. 639, 107 S.E. 854 (1921); Harris v. Whittle, 190 Ga. 850, 10 S.E.2d 926 (1940); Howington v. Wilson, 213 Ga. 664, 100 S.E.2d 726 (1957); Goodine v. Griffin, 309 F. Supp. 590 (S.D. Ga. 1970); Kametches v. State, 242 Ga. 721, 251 S.E.2d 232 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Power of judge of probate court to issue arrest warrant. — Judge of the probate court does not have authority to issue a bench warrant, but the judge does have authority to issue an arrest warrant for a person who does not appear to answer a traffic violation citation issued to the person, regardless of whether the person resides in the county. 1975 Op. Att'y Gen. No. U75-65.

Service of warrants which do not fit definition of "bench warrant." — Any warrant issued by the court itself resulting from a case of criminal contempt or when a misdemeanor case is proceeding upon an accusation or to bring in a witness who has not obeyed a subpoena issued in a criminal case can properly be served by members of the Department of Public Safety, even though such a warrant would not be a bench warrant under the narrow definition given by this section. 1963-65 Op. Att'y Gen. p. 42.

Warrant for arrest of traffic law violator. — Named probate court may issue a warrant ordering apprehension of an individual charged with violating traffic laws of this state who fails to appear in court on the date and at the time specified in the citation upon which he or she was arrested. 1980 Op. Att'y Gen. No. U80-58.

Professional bondsman may not make an arrest pursuant to a bench warrant. 1970 Op. Att'y Gen. No. U70-83.

Approval of sureties. — Former Code 1933, §§ 27-801 and 27-902 (see O.C.G.A. §§ 17-7-90, 17-6-1 and 17-6-2) provided for the approval of sureties by sheriffs or judicial officers. Qualifications, such as solvency and reliability, may be inquired into before approval. 1970 Op. Att'y Gen. No. U70-83.

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, §§ 1 et seq., 121 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, § 70 et seq. 22 C.J.S., Criminal Procedure and Rights of the Accused, § 185 et seq.

ALR. — Bail: imposition of life sentence as affecting capital character of offense, 3 A.L.R. 970.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

17-7-91. Date of arraignment; notice; service of notice and fee therefor; notice to surety on bond; arraignment; receipt and entering of plea; establishment of time for trial; effect of appearance and plea on notice requirement.

(a) In all criminal cases the court shall fix a date on which the defendant shall be arraigned. The clerk of the court, at least five days prior to the date set therefor, shall mail to the accused and his attorney of record, if known, notice of the date which has been fixed for arraignment. For such first service of notice, the clerk shall receive the fee prescribed in Code Section 15-6-77. This notice may be served by the sheriff of the county in which the court is situated or his lawful deputies. If the defendant has posted a bond or recognizance, a copy of the notice shall be mailed to each surety on the bond.

(b) On the date fixed by the court the accused shall be arraigned. The court shall receive the plea of the accused and enter the plea as provided for in this chapter. In those cases in which a plea of not guilty

is entered, the court shall set the case down for trial at such time as shall be determined by the court.

(c) The appearance and entering of a plea by the accused shall be a waiver of the notice required in this Code section.

History. — Code 1933, § 27-1401, enacted by Ga. L. 1966, p. 430, § 2; Ga. L. 1977, p. 1098, § 5; Ga. L. 1982, p. 1224, § 3; Ga. L. 1989, p. 223, § 1; Ga. L. 1990, p. 8, § 17.

JUDICIAL DECISIONS

Right to arraignment generally. — Generally, a person indicted for or charged with an offense is entitled as a matter of right to be arraigned before pleading to the indictment. Hiatt v. State, 144 Ga. App. 298, 240 S.E.2d 894 (1977).

When the record showed that a defendant waived a formal arraignment and pled guilty, a reading of the indictment was not required at the guilty plea hearing and there was no merit to the defendant's claim that the trial court should have granted the defendant's motion for an out-of-time appeal because the defendant was not formally arraigned pursuant to O.C.G.A. § 17-7-91, or because the trial court did not read the indictment to the defendant pursuant to O.C.G.A. § 17-7-93. Johnson v. State, 287 Ga. App. 759, 652 S.E.2d 836 (2007).

Necessary steps in arraignment. — Purpose of an arraignment being to put the defendant on notice as to the charge against which the defendant must defend, the only formal arraignment necessary is reading the indictment to the accused and the entering of the defendant's plea of not guilty. Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976).

Three days' notice does not mean 72 hours' notice. — This section required at least three days' notice of arraignment. However, it does require a full 72 hours since the statute was couched in the number of days and not the number of hours. Smith v. State, 235 Ga. 620, 221 S.E.2d 41 (1975).

Giving notice to bondsman. — While it is true that the notice of arraignment as required by O.C.G.A. § 17-7-91(a) was not given to the bondsman, this did not void the bond or release the bondsman's obligations under the bond because at the time of giving notice of arraignment, there was no bondsman to be notified. Osborne Bonding Co. v. Harris, 183 Ga. App. 764, 360 S.E.2d 32, cert. denied, 183 Ga. App. 906, 360 S.E.2d 32 (1987).

Actual notice of arraignment. — Failure to mail notice of arraignments to the surety could not be used as a basis for avoidance of the bond obligation since the surety had actual notice of the arraignment in time to assure the defendant's presence. Jam Bonding Co. v. State, 182 Ga. App. 608, 356 S.E.2d 551 (1987).

No fixed period of time for arraignment. — There is no provision of law requiring that an accused be arraigned within any fixed period of time. Brand v. Wofford, 230 Ga. 750, 199 S.E.2d 231 (1973).

Arraignment may be rescheduled. — Dismissal of charges against a defendant arising out of a road rage incident was not required on the ground that the defendant's arraignment was postponed on three separate occasions; O.C.G.A. § 17-7-91 did not mandate that an arraignment date be permanently fixed and not subject to rescheduling and the defendant failed to show that the notices of arraignment for any of the rescheduled dates were defective. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Mere call of the case is not a formal arraignment. Birt v. State, 127 Ga. App. 532, 194 S.E.2d 335 (1972).

Arraignment or waiver as prerequisites to further proceedings. — Until arraignment or a waiver thereof, there can be no jury impaneled and no placing of the defendant in jeopardy. Hardwick v. State, 231 Ga. 181, 200 S.E.2d 728 (1973).

Power to have plea entered when defendant stands mute. — Trial court does not err by ordering a plea of not guilty to be entered when the defendant stands mute upon the defendant's arraignment. Hardwick v. State, 231 Ga. 181, 200 S.E.2d 728 (1973).

Waiver of arraignment and plea generally. — Defendant may waive arraignment and plea by failure to call the attention of the court to this defect in the proceedings at the proper time, and when it does not appear that the defendant made any mention of the fact until after the verdict, the defendant is conclusively presumed to have waived the arraignment and plea. Bunn v. State, 150 Ga. App. 294, 257 S.E.2d 364 (1979); Moore v. State, 153 Ga. App. 511, 265 S.E.2d 821 (1980).

Defendant was not denied due process by an arraignment without proper notice since the defendant's own appellate brief established that the defendant waived any valid objection to the sufficiency of notice by appearing at arraignment and entering a not guilty plea. Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

Because the defendant voiced no objection at trial to the alleged lack of arraignment or notice, any error in the lack of arraignment was waived by the defendant's failure to raise the issue prior to verdict; even if there had been no waiver, the defendant failed to show, or even assert harm. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Waiver of defendant's presence at arraignment. — Presence of the defendant at the arraignment is waived by failure of the defendant's counsel to object to proceeding in the client's absence at the arraignment. Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975).

When formal indictment deemed waived. — After the jury is impaneled to try the case, and after the state and the defendant introduce evidence, and the defendant makes a statement, but before any argument of counsel, and before the jury was charged by the court, the defendant will be deemed to have waived formal arraignment. Gravitt v. State, 53 Ga. App. 353, 185 S.E. 594 (1936).

Whenever the defendant presents an issue of law without demanding a formal arraignment, this amounts to a waiver of arraignment as to issues of law or fact. Hiatt v. State, 144 Ga. App. 298, 240 S.E.2d 894 (1977).

Formal prerequisites to arraignment met. — If the defendant is aware of the indictment, waives formal arraignment, and pleads not guilty, the formal prerequisites to arraignment are met. Moore v. State, 153 Ga. App. 511, 265 S.E.2d 821 (1980).

Cited in Haden v. State, 176 Ga. 304, 168 S.E. 272 (1933); Fowler v. State, 196 Ga. 748, 27 S.E.2d 557 (1943); Jones v. State, 224 Ga. 283, 161 S.E.2d 302 (1968); Dixon v. State, 224 Ga. 636, 163 S.E.2d 737 (1968); Smith v. Greek, 226 Ga. 312, 175 S.E.2d 1 (1970); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975); McKenzey v. State, 138 Ga. App. 88, 225 S.E.2d 512 (1976); Hicks v. State, 145 Ga. App. 669, 244 S.E.2d 597 (1978); Hicks v. State, 147 Ga. App. 814, 250 S.E.2d 558 (1978); Simpson v. State, 150 Ga. App. 814, 258 S.E.2d 634 (1979); Presnell v. State, 159 Ga. App. 598, 284 S.E.2d 106 (1981); Teague v. State, 163 Ga. App. 453, 294 S.E.2d 690 (1982); Biddy v. State, 253 Ga. 289, 319 S.E.2d 842 (1984); Jam Bonding Co. v. State, 179 Ga. App. 82, 345 S.E.2d 87 (1986); Huff v. State, 197 Ga. App. 233, 398 S.E.2d 258 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Purpose of section is to set a time limit in which the clerk is to give notice to the defendant and the defendant's counsel in order to make timely appearance before the court, impliedly after the defendant's indictment. 1968 Op. Att'y Gen. No. 68-13.

Construction with § 17-6-8. — In view of Ga. L. 1962, p. 530, § 2 (see O.C.G.A. § 17-6-8), a notice of arraignment is necessary only if the court decides to require the defendant to face trial. 1965-66 Op. Att'y Gen. No. 66-216.

When notice of arraignment to be given. — Unless a true bill has been returned or an accusation preferred, it is premature to give the accused notice of an arraignment at the time of arrest. 1973 Op. Att'y Gen. No. U73-26.

Sufficiency of notice. — Notice of arraignment to appear on the first day of the next court, which was attached to a copy of the bond in a criminal case, was not sufficient notice to the defendant to satisfy the statute. 1968 Op. Att'y Gen. No. 68-13.

Clerk's fee for notice. — Notice of arraignment required by former Code 1933, § 27-401 (see O.C.G.A. § 17-7-91) to be sent to all defendants in criminal cases was to be treated as a summons rather than as a subpoena in determining the correct fee to be charged by the clerk of court pursuant to former Code 1933, § 24-2727 (see O.C.G.A. § 15-6-77). 1967 Op. Att'y Gen. No. 67-42.

Applicability to traffic cases. — Since the notice is made applicable to "all criminal cases," the notice is meant to apply to traffic cases as well as all other criminal cases. 1965-66 Op. Att'y Gen. No. 66-216.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 24, 556 et seq., 570 et seq., 584.

ALR. — Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

17-7-92. Service of notice of filing of indictment, special presentment, or accusation against corporation; return of service; failure of corporation to appear or enter plea; judgment and execution against corporate property.

Whenever an indictment, special presentment, or accusation against a corporation doing business in this state is returned or filed in any court having jurisdiction over the offense, the clerk of the court shall issue an original and copy notice to the defendant corporation of the filing of the indictment, special presentment, or accusation, which copy notice shall be served by a sheriff upon any officer of the corporation who is found in his county; or, if there is no such officer in his county, then service shall be upon any agent of the corporation. The sheriff serving the copy notice shall make an entry of such service on the original notice and return the same to the court from which it issued. Such service shall be deemed service upon the corporation. Upon the return of the notice, executed as provided for in this Code section, the indictment, special presentment, or accusation shall stand for trial. At the trial, if the defendant corporation fails to appear, or appearing, fails to plead, the judge shall cause a plea of not guilty to be entered, and the trial shall proceed as though the defendant had appeared and pleaded. Upon the conviction of any corporation in any such trial, there shall be rendered against it a judgment for the fine imposed, together with the costs of the prosecution. Upon judgment, an execution shall issue against the property of the defendant.

History. — Ga. L. 1889, p. 120, §§ 1, 2; Penal Code 1895, § 938; Penal Code 1910, § 963; Code 1933, § 27-1001.

Cross references. — Criminal responsibility of corporations generally, § 16-2-22.

JUDICIAL DECISIONS

This section provided an exception to the general law that the defendants charged with a crime were not served with process. Wells v. Terrell, 121 Ga. 368, 49 S.E. 319 (1904).

Method of service is exclusive, unless service be waived by the corporation. Progress Club v. State, 12 Ga. App. 174, 76 S.E. 1029 (1913).

Accusation is not sufficient. Central Ga. Power Co. v. State, 12 Ga. App. 260, 77 S.E. 107 (1913).

In the absence of waiver of indictment, a corporation can be tried for a crime only upon an indictment or presentment of a grand jury. Progress Club v. State, 12 Ga. App. 174, 76 S.E. 1029 (1913).

Appearance by attorney is waiver. — Appearance of the corporation voluntarily by the corporation's attorney demurring to an indictment is a waiver. Reeves v. Southern R.R., 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 513, 2 Ann. Cas. 207 (1905).

Service on agent, see Central Ga. Power Co. v. Parnell, 11 Ga. App. 779, 76 S.E. 157 (1912).

Applicability to foreign corporations. — Foreign corporations doing business in this state come within the scope of this section. Reeves v. Southern Ry., 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 513, 2 Ann. Cas. 207 (1905).

Solicitor general's reliance upon O.C.G.A. § 17-7-92 in the service of an accusation against a foreign corporation which published an allegedly obscene magazine distributed within the state was not clearly unconstitutional and, thus, did not constitute bad faith so as to justify federal interference in the state proceedings. Penthouse Int'l, Ltd. v. Webb, 594 F. Supp. 1186 (N.D. Ga. 1984).

Evidence of who are the officers or directors of a corporation. — Highest and best evidence of who are officers or board of directors of a corporation is to be found in the minutes of the corporation. Before parol evidence thereof can be introduced over timely and proper objection, the minutes must be produced or accounted for, or some proper foundation laid for the introduction of secondary evidence, when the identity of the officers or board of directors of the corporation is a material and vital fact to be proved in the case. South Ga. Trust Co. v. Crandall, 47 Ga. App. 328, 170 S.E. 333 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1139 et seq., 1426 et seq.

ALR. — Who is "managing agent" of domestic corporation within statute providing for service of summons or process thereon, 71 A.L.R.2d 178.

17-7-93. Reading of indictment or accusation; answer of accused to charge; recordation of "guilty" plea and pronouncement of judgment; withdrawn guilty pleas; pleas by immigrants.

(a) Upon the arraignment of a person accused of committing a crime, the indictment or accusation shall be read to him and he shall be required to answer whether he is guilty or not guilty of the offense charged, which answer or plea shall be made orally by the accused person or his counsel.

(b) If the person pleads "guilty," the plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce the judgment of the law upon the person in the same manner as if he or she had been convicted of the offense by the verdict of a jury. At any time before judgment is pronounced, the accused person may withdraw the plea of "guilty" and plead "not guilty."

(c) In addition to any other inquiry by the court prior to acceptance of a plea of guilty, the court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to acceptance of any plea of guilty to any state offense in any court of this state or any political subdivision of this state.

History. — Laws 1833, Cobb's 1851 Digest, p. 834; Code 1863, § 4524; Code 1868, § 4543; Code 1873, § 4636; Code 1882, § 4636; Penal Code 1895, § 946; Penal Code 1910, § 971; Code 1933, § 27-1404; Ga. L. 2000, p. 808, § 1; Ga. L. 2011, p. 99, § 31/HB 24.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

U.S. Code. — For provisions of Federal Rules of Criminal Procedure, Rules 10 and 11, arraignment and plea, and annotations pertaining thereto, see 18 U.S.C.

Law reviews. — For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957). For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979). For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981). For article, "No Second Chances: Immigration Consequences of Criminal Charges," see 13 Ga. St. B.J. 26 (2007). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on death penalty law, see 59 Mercer L. Rev. 123 (2007). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For note, "Padilla v. Kentucky: The Criminal Defense Attorney's Obligation to Warn of Immigration Consequences of Criminal Conviction," see 29 Ga. St. U.L. Rev. 891 (2012).

For comment on Boyett v. State, 81 Ga. App. 49, 57 S.E.2d 831 (1950), see 2 Mercer L. Rev. 433 (1951). For comment on Ware v. State, 128 Ga. App. 407, 196 S.E.2d 896 (1973), discussing the right of an accused to retract guilty plea prior to judgment, see 10 Ga. St. B.J. 469 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Guilty Pleas
Withdrawal of Pleas

General Consideration

Legislative intent must be followed. — Intent of the General Assembly in establishing this section must be closely adhered to. Williams v. State, 148 Ga. App. 521, 251 S.E.2d 601 (1978), overruled on other grounds, State v. Germany, 246 Ga. 455, 271 S.E.2d 851 (1980).

What constitutes arraignment. — Arraignment of a prisoner is nothing more than reading the indictment to the prisoner, and asking the prisoner in open court whether the prisoner is guilty or not guilty. Cogswell v. State, 49 Ga. 103 (1873); Fears v. State, 125 Ga. 739, 54 S.E. 667 (1906); Harris v. State, 11 Ga. App. 137, 74 S.E. 895 (1912); Horne v. State, 27 Ga. App. 587, 109 S.E. 699 (1921).

Formal opportunity to plead. — Arraignment gives the prisoner a formal opportunity to plead to the indictment. Tarver v. State, 95 Ga. 222, 21 S.E. 381 (1894).

Formal opportunity to object to the indictment before trial. Lampkin v. State, 87 Ga. 516, 13 S.E. 523 (1891).

Formal opportunity to object to the indictment before pleading to the merits. Smith v. State, 17 Ga. App. 612, 87 S.E. 846 (1916).

Indictment did not need to be read into record. — Sufficient factual basis was established for a defendant's guilty plea to armed robbery, kidnapping, and possession of a firearm during the commission of a crime when the prosecutor stated that the defendant and an accomplice entered the victims' apartment, forced the victims into rooms at gunpoint, tied the victims up, and stole some items; the prosecutor also noted that much of the crime had been recorded by a 9-1-1 operator; defense counsel stated that counsel had discussed the facts with the defendant; and the defendant conceded guilt. Therefore, it was not necessary that the indictment be read into the record. Leary v. State, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

Arraignment states the terms for the issue. — There can be no plea or issue before arraignment or waiver thereof. Bryans v. State, 34 Ga. 323 (1866).

Arraignment enables the court to identify the prisoner as the proper party to proceed against. Wells v. Terrell, 121 Ga. 368, 49 S.E. 319 (1904).

Prisoner must be present at the arraignment, whether the charge be a felony or a misdemeanor. Tarver v. State, 95 Ga. 222, 21 S.E. 381 (1894).

All of the persons charged in an indictment may be arraigned at one time. Rawlins v. State, 124 Ga. 31, 52 S.E. 1 (1905), aff'd, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906).

On a new trial, a prisoner need not be rearraigned. Cogswell v. State, 49 Ga. 103 (1873); Hayes v. State, 58 Ga. 35 (1877); Atkins v. State, 69 Ga. 595 (1882).

What constitutes pronouncement. — Judgment was "pronounced," within the purview of this section, whenever the accused was officially informed by the court of the sentence to be entered against the accused. Griffin v. State, 12 Ga. App. 615, 77 S.E. 1080 (1913).

Pronouncement of judgment as provided in this section meant the signing of the written sentence by the presiding judge and the judgment's delivery to the clerk for the record. Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947); Burkett v. State, 131 Ga. App. 177, 205 S.E.2d 496 (1974); Carney v. State, 131 Ga. App. 209, 205 S.E.2d 518 (1974).

"Pronouncement" means the signing of the written sentence by the judge. Farmer v. State, 128 Ga. App. 416, 196 S.E.2d 893 (1973).

Oral announcement is a pronouncement. — Term "pronounced" as employed by the legislature in this section meant "orally announced" and that, therefore, a defendant does not have an absolute statutory right to withdraw a guilty plea after the trial court's oral announcement. State v. Germany, 246 Ga. 455, 271 S.E.2d 851 (1980).

Orally announcing the sentence constitutes a "pronouncement" under O.C.G.A. § 17-7-93(b) which grants the defendant an absolute right to withdraw a guilty plea "before judgment is pronounced." Anderson v. State, 194 Ga. App. 395, 390 S.E.2d 637 (1990).

"Judgment" in the context of this section meant "sentence" and obviously referred to a valid one. Mullins v. State, 134 Ga. App. 243, 214 S.E.2d 1 (1975).

Entry of a guilty plea was not a judgment of conviction until sentence was imposed; therefore, a defendant who walked away from the courthouse after a plea entry but before sentencing was not guilty of felony escape, but could be convicted only of misdemeanor escape. Dorsey v. State, 259 Ga.

General Consideration (Cont'd)

App. 254, 576 S.E.2d 637 (2003).

Section was inapplicable to pleas which result in first offender treatment, because to do so would frustrate the purpose of Ga. L. 1968, p. 324 (see O.C.G.A. Art. 3, Ch. 8, T. 42). Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Defendant's right to be present for sentencing. — Defendant on trial must be present when the court takes any action materially affecting the case. Thus, unless there is only one possible sentence that can be imposed, or unless the defendant has voluntarily absented oneself from the proceedings, a defendant has the right to be present in court for the defendant's sentencing. Williams v. State, 148 Ga. App. 521, 251 S.E.2d 601 (1978), overruled on other grounds, 246 Ga. 455, 271 S.E.2d 851 (1980).

Right to be present for sentencing would be meaningless if it did not include a concomitant right to be informed of the sentence, and thus to have some opportunity to address the court, prior to its final pronouncement. Williams v. State, 148 Ga. App. 521, 251 S.E.2d 601 (1978), overruled on other grounds, 246 Ga. 455, 271 S.E.2d 851 (1980).

Advising prisoner of consequences of plea. — It is good practice and in the interest of fairness to admonish the prisoner of the consequences before receiving the prisoner's plea, even though there is no statute requiring it. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

If the prisoner is misled, or is induced to enter a plea by fraud, or even by mistake, the prisoner ought to be allowed to withdraw the plea. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Statute applies to defendants pleading nolo contendere. — See McLeod v. State, 251 Ga. App. 371, 554 S.E.2d 507 (2001).

Mental competency. — When the defendant, who had an IQ of 49, was determined by the court to be mentally incompetent to waive a plea of not guilty, the trial court erred in not ordering a hearing on the defendant's competence to stand trial. Holloway v. State, 257 Ga. 620, 361 S.E.2d 794 (1987).

Good faith reliance on advice of counsel. — Person cannot avoid the legal consequences of the person's plea even if based on good faith reliance on the advice of counsel. Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

Plea may be made by the defendant or by defendant's attorney, and when by the latter, the defendant being present and interposing no objection, it will be binding upon the defendant as though made by the defendant personally. Bearden v. State, 13 Ga. App. 264, 79 S.E. 79 (1913).

Denial by defendant that counsel had authority to act on defendant's behalf. — This section provided express legislative recognition of the authority of an attorney at law to speak for the client in open court and for the court to act thereon. It would be trifling with the court to allow the client, after keeping silent in the presence of the court while the defendant's attorney entered a plea of guilty in the defendant's behalf and the court acting thereon imposed the sentence, to deny thereafter the authority of the defendant's attorney to enter the plea or to deny the defendant's approval of such action by the defendant's attorney. If the defendant had any objection, the defendant should have made the objection known at the time and before the court acted thereon. Archer v. Clark, 202 Ga. 229, 42 S.E.2d 924 (1947).

Waiver of trial requires affirmative action by prisoner. — Affirmative action on the part of the prisoner is required before the prisoner will be held to have waived the right of trial created for the prisoner's benefit. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Consideration by jury of indictment, plea, and withdrawal of plea. — When the indictment with the plea of guilty and the withdrawal of the plea of guilty are out with the jury during the jury's deliberation, without objection, such is not reversible error. Smith v. State, 85 Ga. App. 459, 69 S.E.2d 281 (1952).

Prisoner may waive formal arraignment. Tarver v. State, 95 Ga. 222, 21 S.E. 381 (1894); Hudson v. State, 117 Ga. 704, 45 S.E. 66 (1903); Harris v. State,

11 Ga. App. 137, 74 S.E. 895 (1912).

Unless waived, the prisoner is entitled to arraignment as a matter of right. Kincade v. State, 14 Ga. App. 544, 81 S.E. 910 (1914).

Waiver may be express or implied from silent acquiescence in going to trial without pleading to the indictment. Hudson v. State, 117 Ga. 704, 45 S.E. 66 (1903).

Waiver amounts to a plea in forming the issue. Tarver v. State, 95 Ga. 222, 21 S.E. 381 (1894).

Waiver on a first trial renders formal arraignment unnecessary on a new trial. Parker v. State, 17 Ga. App. 252, 87 S.E. 705 (1915).

Wavier of arraignment. — Because the defendant voiced no objection at trial to the alleged lack of arraignment or notice, any error in the lack of arraignment was waived by the defendant's failure to raise the issue prior to verdict; even if there had been no waiver, the defendant failed to show, or even assert harm. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Failure to arraign. — Reversal was required because the state acknowledged that the state could not show that the defendant was formerly arraigned and aware of the charges, and that because the defendant objected to the lack of a formal arraignment, the trial court should have arraigned the defendant. Sapp v. State, 338 Ga. App. 628, 791 S.E.2d 201 (2016).

Cited in Waller v. State, 2 Ga. App. 636, 58 S.E. 1106 (1907); Smith v. State, 41 Ga. App. 341, 152 S.E. 916 (1930); Blake v. State, 109 Ga. App. 636, 137 S.E.2d 49 (1964); Thigpen v. Ault, 231 Ga. 796, 204 S.E.2d 147 (1974); Barksdale v. Ricketts, 233 Ga. 60, 209 S.E.2d 631 (1974); Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975); Petty v. State, 136 Ga. App. 930, 222 S.E.2d 658 (1975); Mathis v. State, 145 Ga. App. 754, 245 S.E.2d 41 (1978); Heath v. State, 148 Ga. App. 559, 252 S.E.2d 4 (1978); Jones v. Lee, 244 Ga. 837, 262 S.E.2d 130 (1979); Germany v. State, 154 Ga. App. 579, 269 S.E.2d 75 (1980); Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429 (1981); Thomas v. State, 248 Ga. 247, 282 S.E.2d 316 (1981); German v. State, 159 Ga. App. 638, 284 S.E.2d 654 (1981); Harden v. State, 160 Ga. App. 514, 287 S.E.2d 329 (1981); Vanvelsor v. State, 162 Ga. App. 467, 291 S.E.2d 772 (1982); Stephens v. State, 162 Ga. App. 578, 292 S.E.2d 420 (1982); Groves v. Groves, 250 Ga. 459, 298 S.E.2d 506 (1983); Hill v. State, 167 Ga. App. 746, 307 S.E.2d 537 (1983); Goforth v. Wigley, 178 Ga. App. 558, 343 S.E.2d 788 (1986); Sanders v. State, 179 Ga. App. 168, 345 S.E.2d 677 (1986); Kimbril v. State, 197 Ga. App. 341, 398 S.E.2d 416 (1990); Hope v. State, 239 Ga. App. 331, 521 S.E.2d 372 (1999); Parks v. McClung, 271 Ga. 795, 524 S.E.2d 718 (1999); Pike v. State, 245 Ga. App. 518, 538 S.E.2d 172 (2000); Rooks v. State, 245 Ga. App. 655, 538 S.E.2d 555 (2000); Green v. State, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

Guilty Pleas

Plea of guilty is but a confession in open court. Griffin v. State, 12 Ga. App. 615, 77 S.E. 1080 (1913); Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945); Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Plea should be carefully scanned and cautiously received. — Like a confession out of court, a plea should be scanned with care and received with caution. Griffin v. State, 12 Ga. App. 615, 77 S.E. 1080 (1913).

Trial on merits favored. — Law favors a trial on the merits and the law does not encourage confessions of guilt, either in or out of court. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

No right to guilty plea. — Trial court properly rejected a defendant's tendered guilty plea to charges of felony murder and armed robbery, and entered a nolle prosequi without the defendant's consent as to those charges as O.C.G.A. § 17-7-93 did not confer on the defendant a right to enter a guilty plea. Sanders v. State, 280 Ga. 780, 631 S.E.2d 344 (2006).

Acceptance of guilty pleas generally. — Plea of guilty ought never be received, unless the plea is freely and voluntarily made. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Like a confession out of court, a guilty

Guilty Pleas (Cont'd)

plea ought to be scanned with care and received with caution. The judge is not bound to receive such a plea at all, and in capital cases frequently declines to do so. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Voluntariness of a guilty plea must be guarded with the same degree of carefulness in the plea's reception as a confession out of court. If the reason of the plea of guilty is influenced by the slightest hope of benefit or the remotest fear of injury, the plea should not be allowed to stand. Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945).

Plea of guilty should be scanned with care and received with caution. Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967).

Effect of guilty plea generally. — In a criminal proceeding, a confession of the offense by the party charged by means of a plea of guilty is the highest kind of conviction of which the case admits, and subjects the party precisely to the same punishment as if the party were tried and found guilty by verdict. Jackson v. Lowry, 171 Ga. 349, 155 S.E. 466 (1930).

Evidence of prior guilty plea inadmissible. — Telling a jury that a defendant initially pled guilty to an offense for which the defendant was being tried is clearly harmful to the defendant, and for that reason, the General Assembly included in O.C.G.A. § 17-7-93(b) a prohibition against admitting evidence of a defendant's prior guilty plea. Dixon v. State, 268 Ga. App. 215, 601 S.E.2d 748 (2004), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Trial court is without jurisdiction to accept a plea of guilty executed by another, and impose sentence in a misdemeanor case, in the absence of the defendant. Chastain v. State, 75 Ga. App. 880, 45 S.E.2d 81 (1947).

Guilty plea hearing. — Reading of the indictment was not required at the guilty plea hearing. Thompson v. State, 240 Ga. App. 539, 524 S.E.2d 239 (1999).

Requirement that judge personally inquire into the guilty plea. — So long as the substantive requirements of Fed. R. Crim. P. 11, as interpreted in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), concerning the defendant's guilty plea are met, there is no procedural requirement that the judge personally make all the inquiries, provided that the inquiries are made in the defendant's presence. State v. Germany, 245 Ga. 326, 265 S.E.2d 13 (1980).

Duties under Fed. R. Crim. P. 11 in accepting plea of guilty. — It is clear that a state trial judge, in accepting a plea of guilty, now has the same duty in this respect that a federal trial judge has under Fed. R. Crim. P. 11. Weathers v. State, 149 Ga. App. 617, 255 S.E.2d 90 (1979).

Duty to ascertain whether plea agreement was reached. — When a guilty plea is offered, the trial court is required to ascertain if any plea agreement was reached by the state and the defendant. Anderson v. State, 194 Ga. App. 395, 390 S.E.2d 637 (1990).

Court not required to inform defendant of all possible consequences. — While it is unquestioned that a guilty plea or a nolo contendere plea must be knowingly and voluntarily made after proper advice and with a full understanding of the consequences, the trial court is not required to inform a defendant of all the possible collateral consequences of the defendant's plea, including those at the hands of a different sovereign. Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

O.C.G.A. § 17-7-93(c) required the trial court to determine that the defendant was entering the plea with an understanding that if the defendant was not a citizen of the United States, then the plea could have an impact on the defendant's immigration status. McLeod v. State, 251 Ga. App. 371, 554 S.E.2d 507 (2001).

Failure to recite range of punishment does not invalidate guilty plea. — Defendant's otherwise voluntary guilty plea is not invalidated merely because the range of punishment on the plea was never recited to the defendant, when the defendant makes no claim that the defendant was disadvantaged by the omission or even that the defendant was in fact unaware of the possible sentence which could be imposed. Hill v. Hopper, 233 Ga.

633, 212 S.E.2d 810 (1975).

Failure to notify defendant of ineligibility for parole. — Although the trial court did not tell the defendant that the defendant would be ineligible for parole, this was not grounds for overturning the defendant's guilty plea, and the fact that the trial court allegedly misinformed the defendant about eligibility for sentence review did not change the result as such eligibility was also a collateral consequence of pleading guilty. Furthermore, because the defendant did not timely seek sentence review, the defendant could not show harm. Leary v. State, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

Defendant's desire to reduce penalty. — Otherwise valid plea of guilty is not involuntary because the plea was induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there had been a jury trial. Thomason v. Caldwell, 229 Ga. 637, 194 S.E.2d 112 (1972).

Plea of guilty must be voluntarily made. — To waive an individual's fundamental rights, including the right to trial by jury, the privilege against self-incrimination, and the right to confront one's accusers, by a plea of guilty, the accused must make an informed, knowledgeable, and voluntary decision; the accused must be aware of the relevant circumstances and likely consequences of the accused's decision. McBryar v. McElroy, 510 F. Supp. 706 (N.D. Ga. 1981).

Use of former guilty pleas to enhance sentence. — When the defendant's sentence for aggravated assault was enhanced by the use of prior convictions based on guilty pleas during which the defendant was not asked required questions to determine the voluntariness of the pleas, defendant's sentence had to be vacated and the matter remanded for resentencing, at which time the state would have the burden of proving the voluntariness of the guilty pleas before the state could use the prior convictions to enhance the defendant's sentence. Carswell v. State, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

Accused need not correctly assess every relevant factor for plea to be valid. — Rule that a plea must be intelligently made to be valid does not suggest that a plea is vulnerable to later attack if the accused did not correctly assess every relevant factor entering into the accused's decision. Kight v. State, 158 Ga. App. 698, 282 S.E.2d 176 (1981).

Threshold right to assistance of counsel is no less momentous to accused who must decide whether to plead guilty than to accused who stands trial. McBryar v. McElroy, 510 F. Supp. 706 (N.D. Ga. 1981).

If petitioner did not receive effective assistance of counsel, petitioner's plea of guilty was consequently not intelligent and voluntary. McBryar v. McElroy, 510 F. Supp. 706 (N.D. Ga. 1981).

When guilty plea considered made without duress or influence. — If the evidence indicates that the trial judge advised the defendants of the sentences the judge intended to impose and allowed the defendants a recess to consider the matter further with counsel, a decision to let guilty pleas stand must be abided by as being made without duress or influence. Smith v. State, 231 Ga. 23, 200 S.E.2d 119 (1973).

Validity of agreement under which prosecuting attorney makes recommendations concerning punishment. — Although the rule that it is vital that the rights of the defendants should be zealously protected by the court, and that pleas of guilty, like confessions, should be scanned with great care, and, if necessary, rejected when it appears that the defendant has been led to make such plea in the belief that the defendant will receive some reward or avert some injury thereby is recognized, this rule is not available to a defendant who enters a plea of guilty under an agreement between the prosecuting attorney and the defense attorney that certain recommendations will be made by the prosecuting attorney as to punishment, such defendant through the defendant's counsel having express notice by the trial judge prior to the entry of such plea that no commitment would be made and no person had authority to make any commitment which would be binding upon the defendant. King v. State, 91 Ga. App. 388, 85 S.E.2d 637 (1955).

Guilty Pleas (Cont'd)

Setting aside of convictions based on pleas induced by hope for leniency. — Reason for allowing a defendant to set aside a conviction based on a plea of guilty which plea was induced by hope for leniency offered by public officials is not primarily to afford the defendant an opportunity to change the defendant's mind because the inducement or promises are not fulfilled, but to give effect to the law that only confessions understandingly and voluntarily made have probative value, and not those coercively induced by prosecuting officers in violation of law. Smith v. State, 231 Ga. 23, 200 S.E.2d 119 (1973).

Misleading of defendant by court officer as to effect of pleading guilty. — If someone on whom the defendant has a right to rely, someone connected with the court, such as the judge, the sheriff, the solicitor (now district attorney) or counsel for the defendant, should mislead the defendant as to what the defendant might expect if a plea of guilty is entered, and defendant is thus actuated by hope of lesser punishment if the plea is entered or fear of greater punishment if it is not, then the court should, these facts being plainly made to appear, withdraw the plea even after judgment is entered. Holston v. State, 103 Ga. App. 373, 119 S.E.2d 302 (1961).

For validity of guilty plea entered in counsel's absence, see Welch v. State, 63 Ga. App. 277, 11 S.E.2d 42 (1940).

Acceptance of guilty pleas in capital cases. — In capital cases, the court ought generally to advise the prisoner to retract the prisoner's guilty plea and plead to the indictment. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Plea bargaining in capital cases. — If a plea of guilty was entered in a capital felony case and the state seeks the death penalty under former Code 1933, § 27-2534.1, plea bargaining was not involved nor could it ever be involved. Therefore, former Code 1933, § 27-1404 (see O.C.G.A. § 17-7-93) would have no purpose under such a circumstance. Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980) (see O.C.G.A. § 17-10-30).

Guilty plea waives defenses and trial. — Valid plea of guilty waives all defenses known and unknown and waives the right to trial by jury. Thomason v. Caldwell, 229 Ga. 637, 194 S.E.2d 112 (1972).

Waiver of constitutional rights in guilty plea. — Because the transcript of proceedings and a trial counsel's affidavit did not show that the defendant was advised that a guilty plea would waive the privilege against self-incrimination and the right to confrontation, the trial court erred in denying the defendant's habeas corpus petition. Green v. State, 279 Ga. 687, 620 S.E.2d 788 (2005).

Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. Beckworth v. State, 281 Ga. 41, 635 S.E.2d 769 (2006).

Because the transcript of an inmate's guilty plea hearing failed to show that the inmate was expressly informed of, and voluntarily waived the privilege against compulsory self-incrimination, an order denying a petition for a writ of habeas corpus was reversed, despite the fact that the record showed that the inmate voluntarily waived the right to trial by jury and the right to confront one's accusers. Hawes v. State, 281 Ga. 822, 642 S.E.2d 92 (2007).

Because the record evidence showed that the defendant was advised of the right to remain silent, the right to a jury trial, and the right to confrontation, the defendant's guilty plea was knowingly and voluntarily entered upon a full understanding that those rights would be waived. Duffey v. State, 289 Ga. App. 141, 656 S.E.2d 167 (2007).

Plea of guilty is a waiver of trial. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Guilty plea constitutes a waiver of several basic rights, including the right

to trial by jury, the privilege against self-incrimination, and the right to confront one's accusers. McBryar v. McElroy, 510 F. Supp. 706 (N.D. Ga. 1981).

Error in admission of defendant's withdrawn guilty plea. — Error in the admission of evidence of a defendant's withdrawn guilty plea is of such serious magnitude that although the defendant erred procedurally in the manner and timeliness of pursuing the error, a new trial is required. No harm can be done a defendant greater than of calling to the attention of the jury the fact the defendant has previously pled guilty to the same charge for which the defendant is on trial under a subsequent plea of "not guilty". Shoemake v. State, 213 Ga. App. 528, 445 S.E.2d 558 (1994).

Mistaken plea of guilty. — Plea of guilty made by mistake to one of a number of pending indictments, when the intention was to plead guilty to another, may be corrected even after the entry has been made on the indictment and has been transferred to the minutes of the court. Davis v. State, 20 Ga. 674 (1856).

Cure of errors committed in taking and entering guilty plea. — Entry by the accused of the words, "I consent," underneath the verdict of guilty, did not cure the lack of observance of the accused's rights in taking and entering a plea of guilty. Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Recording of plea. — Court would reject the assertion that the trial court erred when the court failed to immediately record the plea when the record showed that the defendant's plea statement was filed with the clerk on the same date it was signed by the defendant. Craft v. State, 234 Ga. App. 305, 506 S.E.2d 663 (1998).

Motion to set aside plea denied. — When the defendant entered a guilty plea to aggravated assault, the trial court did not abuse the court's discretion in refusing to set aside the plea as the state established that the defendant was cognizant of the rights defendant was waiving and of the possible consequences of the plea; the record contained a transcript of the plea hearing and a sworn statement signed by defendant, both of which established that defendant's guilty plea was knowing and voluntary. Shields v. State, 259 Ga. App. 906, 578 S.E.2d 566 (2003).

Presumption that guilty plea has been made and entered. — In the absence of anything to the contrary, it will be presumed that the accused orally plead guilty, and that the clerk of the court entered the plea of guilty upon the minutes of the court. Jackson v. Lowry, 171 Ga. 349, 155 S.E. 466 (1930).

Entry on accusation as prima facie evidence of guilty plea. — When there is an entry on the accusation of waiver of arraignment and plea of guilty, signed by the acting solicitor, such record entry furnishes prima facie evidence of a plea of guilty by the defendant. Jackson v. Lowry, 171 Ga. 349, 155 S.E. 466 (1930).

Colloquy proved guilty plea was not made under duress. — Colloquy proved that a guilty plea was knowingly and voluntarily made; a defendant stated the defendant was satisfied with counsel and not under duress (such as claimed family pressure to plead guilty), knew defendant was waiving certain rights (such as speedy trial rights), so the trial court did not abuse the court's discretion by not letting the defendant withdraw that guilty plea after sentencing the defendant to twice as long a term as the defendant would have received if the defendant pled guilty at an earlier stage — the state located the complaining witness and so was in a better bargaining position. Jones v. State, 268 Ga. App. 101, 601 S.E.2d 469 (2004).

Burden of proving guilty plea intelligently and voluntarily entered. — After a prisoner raises the question of the validity of the prisoner's plea of guilty, the burden is on the state to show that the plea was intelligently and voluntarily entered. Cook v. State, 153 Ga. App. 362, 265 S.E.2d 323 (1980).

Guilty plea forestalls motion for new trial. — When the defendant has filed a guilty plea, the defendant cannot move for a new trial since there has been no verdict; therefore, all enumeration of error involving consideration of evidence and alleged harmful error committed during trial cannot be considered. Stevens v. State, 169 Ga. App. 646, 314 S.E.2d 481 (1984).

Guilty Pleas (Cont'd)

Guilty plea exchange offer admissible at sentencing. — Defendant may present evidence in the sentencing phase of trial that the defendant offered to plead guilty in exchange for a life sentence but the state refused the offer. Mobley v. State, 262 Ga. 808, 426 S.E.2d 150, cert. denied, 510 U.S. 870, 114 S. Ct. 198, 126 L. Ed. 2d 156 (1993).

Defendant's remark indicating willingness to plead guilty admissible at trial. — When a defendant's remark to a law enforcement official as to the defendant's willingness to plead guilty is a voluntary statement made subsequent to the defendant's receipt of Miranda warnings, and is not a response to an offer instituted by the officer, testimony about the remark is admissible. Stone v. State, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

Court rejecting plea agreement when defendant not previously informed. — Trial court cannot reject a plea agreement, impose a greater sentence than that called for in the agreement, and deny the defendant's request to withdraw the defendant's plea if the court did not inform the defendant on the record that the court was not bound by the plea agreement and intended to reject the plea agreement. Jackson v. State, 172 Ga. App. 874, 324 S.E.2d 816 (1984).

Trial court's refusal to accept defendant's guilty plea upheld. Echols v. State, 167 Ga. App. 307, 306 S.E.2d 324 (1983).

Extrinsic evidence did not support finding right against self-incrimination was knowingly, intelligently, or voluntarily waived. — Mere speculation that an appellant inmate had been informed of all three of the Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274 (1969) rights the inmate would be waiving by entering a guilty plea was insufficient to support a finding that extrinsic evidence showed that the inmate knowingly, intelligently, and voluntarily waived the inmate's right to self-incrimination, particularly in light of the fact that defense counsel testified during a hearing on the inmate's habeas petition that counsel did not recall what rights counsel might have discussed with the inmate but that it was not counsel's practice to get into the specifics of any particular right being waived. Denson v. Frazier, 284 Ga. 858, 672 S.E.2d 625 (2009).

Entry of Alford plea by juvenile. — Juvenile court erred by denying a juvenile's request to enter an Alford plea since the Georgia General Assembly did not expressly prohibit the entry of Alford pleas in juvenile court, and the juvenile court was required to construe O.C.G.A. § 15-11-580 liberally to ensure the juvenile's best interests. In the Interest of B. C., 333 Ga. App. 763, 777 S.E.2d 52 (2015).

Withdrawal of Pleas

Purpose of the withdrawal provision of this section was to provide a necessary part of the plea bargaining procedure. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

District court did not err in dismissing as time-barred an inmate's 28 U.S.C. § 2254 petition because the inmate's untimely motion to withdraw the inmate's plea of guilty under O.C.G.A. § 17-7-93(b) was not a "properly filed" application for state postconviction relief for purposes of 28 U.S.C. § 2244(d)(2)'s tolling provisions of the Antiterrorism and Effective Death Penalty Act of 1996's one-year time period for filing a 28 U.S.C. § 2254 petition. Colbert v. Head, 2005 U.S. App. LEXIS 17563 (11th Cir. Aug. 16, 2005) (Unpublished).

Withdrawal after term of court when sentence pronounced. — Trial court lacked jurisdiction to allow the defendant to withdraw the defendant's guilty plea when the term of court in which that defendant was sentenced expired. Tabatabaee v. State, 266 Ga. App. 462, 597 S.E.2d 518 (2004).

Trial court in February 2004 term of court lacked jurisdiction to allow the defendant to withdraw the defendant's guilty plea entered during the August 2003 term of court. State v. Manders, 271 Ga. App. 315, 609 S.E.2d 658 (2005).

It was not an abuse of discretion to deny the defendant's motion for a new trial, requested to facilitate the defendant's efforts to become a naturalized citizen, be-

cause the trial court considered that the defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims that the defendant's guilty plea was not voluntary were of no avail as the defendant failed to move to withdraw the plea or to appeal and the times for doing so had expired. Elias v. State, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

Because the defendant did not move to withdraw the plea before sentencing pursuant to O.C.G.A. § 17-7-93(b), which occurred when the trial court orally announced the sentence, but in fact, the withdrawal motion did not occur until after the term of court in which the plea was entered had expired, the trial court lacked jurisdiction to consider the motion. Storch v. State, 276 Ga. App. 789, 625 S.E.2d 70 (2005).

Trial court lacked jurisdiction to grant a motion to withdraw a guilty plea that was filed after the term of court expired in which the defendant was sentenced. Curry v. State, 274 Ga. App. 19, 616 S.E.2d 225 (2005).

When the defendant entered a guilty plea in 1997 and filed a motion to withdraw the guilty plea in 2006, the trial court was without jurisdiction to hear the motion because it was filed after the term of court in which the defendant was sentenced. Nhek v. State, 285 Ga. App. 186, 645 S.E.2d 683 (2007).

Trial court erred in dismissing the defendant's motion to withdraw a guilty plea. The defendant retained a statutory right to withdrawal under O.C.G.A. § 17-7-93(b) because the sentence imposed as a result of the guilty plea was void and the defendant had a right to withdrawal until a legal sentence was imposed. Kaiser v. State, 285 Ga. App. 63, 646 S.E.2d 84 (2007), cert. denied, No. S07C1275, 2007 Ga. LEXIS 696 (Ga. 2007).

When the record showed that a defendant waived a formal arraignment and pled guilty, a reading of the indictment was not required at the guilty plea hearing and there was no merit to the defendant's claim that the trial court should have granted the defendant's motion for an out-of-time appeal because the defendant was not formally arraigned pursuant to O.C.G.A. § 17-7-91, or because the trial court did not read the indictment to the defendant pursuant to O.C.G.A. § 17-7-93. Johnson v. State, 287 Ga. App. 759, 652 S.E.2d 836 (2007).

Trial court properly denied the defendant's motion to withdraw the defendant's guilty pleas because the defendant did not move to withdraw the defendant's guilty pleas until the term of court following the term in which the defendant was sentenced; therefore, the defendant's only available means to withdraw the defendant's guilty pleas was through habeas corpus proceedings, and even if the defendant's motion had been timely, the defendant voluntarily and intelligently entered the defendant's guilty pleas. Loyd v. State, 288 Ga. 481, 705 S.E.2d 616, cert. dismissed, 565 U.S. 971, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea to possession of a controlled substance as the defendant entered the guilty plea seven years before the defendant filed a motion to withdraw; therefore, the trial court lacked jurisdiction to allow withdrawal of the plea under the general rule providing that a trial court lacked jurisdiction to allow the withdrawal of a guilty plea when the term of court had expired in which the defendant was sentenced. In light of those time limitations, it was too late for the defendant to withdraw the defendant's guilty plea seven years later, and nothing in O.C.G.A. § 17-7-93(b) changed this. Simmons v. State, 315 Ga. App. 82, 726 S.E.2d 573 (2012).

Withdrawal denied in case of first offender. — Trial court did not err in instructing the defendant that the defendant would not be allowed to withdraw the Alford plea between the time the plea was entered and the pronouncement of the sentence; this instruction did not violate O.C.G.A. § 17-7-93(b) as that statute did not apply to pleas resulting in treatment as a first offender under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et

Withdrawal of Pleas (Cont'd)

seq. Winkles v. State, 275 Ga. App. 351, 620 S.E.2d 594 (2005).

Legislative intent as to nolo contendere pleas. — General Assembly intended for the plea of nolo contendere to stand upon the same footing as a plea of guilty in all respects, except when otherwise specially provided, to constitute the remedy of the evil of the old law when only a plea of guilty or not guilty was available, and intended that the right to withdraw the plea be accorded any time before pronouncement of judgment as provided in this section as to a plea of guilty. Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947).

Withdrawn guilty plea not admissible. — In two cousins' trial for the murder of a drug dealer, cousin one's trial counsel did not provide ineffective assistance by failing to seek admission of statements that cousin two made, which exonerated cousin one, when cousin two attempted to plead guilty because under O.C.G.A. § 17-7-93(b), cousin two's withdrawn guilty plea was not admissible. Esprit v. State, 305 Ga. 429, 826 S.E.2d 7 (2019).

Guilty plea may be withdrawn before sentence pronounced. — Before sentence is pronounced, the defendant may withdraw the defendant's plea of guilty as a matter of right. Welch v. State, 63 Ga. App. 277, 11 S.E.2d 42 (1940); Clark v. State, 72 Ga. App. 603, 34 S.E.2d 608 (1945); King v. State, 91 Ga. App. 388, 85 S.E.2d 637 (1955); Higgins v. State, 92 Ga. App. 739, 90 S.E.2d 40 (1955); Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967).

Before sentence is pronounced, the defendant has the right to withdraw the defendant's guilty plea. Galbreath v. State, 130 Ga. App. 179, 202 S.E.2d 562 (1973); Lee v. State, 139 Ga. App. 65, 227 S.E.2d 878 (1976); Weathers v. State, 149 Ga. App. 617, 255 S.E.2d 90 (1979).

Accused may withdraw a guilty plea at any time before judgment is announced and may then plead not guilty. Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

Defendant can withdraw the defendant's plea at any time before the defendant's sentence is pronounced; therefore, when the defendant was clearly informed of both the maximum and the minimum sentence defendant could receive before the defendant's sentence was entered, the defendant could have withdrawn the defendant's plea before the trial court pronounced the defendant's sentence if the defendant found the minimum sentence to be unacceptable. Johnson v. State, 242 Ga. App. 89, 528 S.E.2d 861 (2000).

Trial court erred in denying the motion to withdraw the defendant's plea prior to resentencing the defendant on the incest count as the defendant had an absolute right to withdraw the plea before sentence was pronounced. Further, as the sentence imposed on the remaining counts was likewise void, the defendant was entitled to withdraw the defendant's plea as to the other five counts. Martinez-Chavez v. State, 352 Ga. App. 142, 834 S.E.2d 139 (2019).

Right is not qualified or limited. — Right given a defendant under this section to withdraw a plea of guilty and plead not guilty at any time before judgment was pronounced was not qualified or limited in any way. Fowler v. State, 41 Ga. App. 333, 153 S.E. 90 (1930).

Until sentence is pronounced upon a prisoner, the prisoner has an unlimited right to withdraw the prisoner's plea of guilty. McCrary v. State, 215 Ga. 887, 114 S.E.2d 133 (1960).

Defendant had an unqualified statutory right to withdraw a guilty plea at any time before judgment was pronounced by oral announcement of the sentence by the court, notwithstanding an assertion by the state that the defendant was precluded from withdrawing the defendant's agreement because the defendant entered a negotiated plea agreement and received certain benefits by virtue of the agreement. Chives v. State, 214 Ga. App. 786, 449 S.E.2d 152 (1994).

Trial court's denial of the defendant's motion to withdraw the defendant's guilty plea was reversed; although the defendant signed a drug court contract obligating the defendant to undergo rehabilitation, the defendant was never sentenced and retained the ability to withdraw the plea as a matter of right. Stinson v. State,

264 Ga. App. 774, 592 S.E.2d 141 (2003).

Trial court must inform defendant of the right to withdraw a plea if a negotiated plea is rejected. This "bright line" rule cannot be satisfied with implicit rejection of a plea. Forrest v. State, 251 Ga. App. 487, 554 S.E.2d 735 (2001).

Trial court held a hearing on the defendant's motion to withdraw a guilty plea, but did not appoint an attorney to represent the defendant or inform the defendant of the right to counsel; thus, the defendant's constitutional right to counsel during the plea proceedings was denied. Kennedy v. State, 267 Ga. App. 314, 599 S.E.2d 290 (2004).

Because the trial judge accepted the negotiated agreement upon the defendant's entering of an Alford plea to a particular charge, there was no requirement that the defendant be informed about the right to withdraw the plea prior to judgment being pronounced, pursuant to O.C.G.A. § 17-7-93(b); such information to the defendant was only required if the trial court intended to reject the negotiated plea agreement. Storch v. State, 276 Ga. App. 789, 625 S.E.2d 70 (2005).

Oral sentence not reduced to writing could be changed with notice to defendant. — Although a magistrate who was appointed to preside at a county drug court pursuant to O.C.G.A. § 15-1-9.1(b)(2) had authority to accept a defendant's guilty plea to marijuana possession, the superior court judge had the power to set aside the sentence, which was not reduced to writing, pursuant to O.C.G.A. § 17-7-93(b), give notice of intent to impose a harsher sentence, and allow the defendant to withdraw the defendant's plea. Surh v. State, 303 Ga. App. 380, 693 S.E.2d 501, cert. denied, No. S10C1274, 2010 Ga. LEXIS 705 (Ga. 2010).

Plea may be withdrawn of right after dismissal and discharge of jurors. — Accused has the right to withdraw a guilty plea prior to judgment even after the witnesses have been dismissed and the jurors have been discharged in reliance upon the guilty plea. Nobles v. State, 17 Ga. App. 382, 86 S.E. 1073 (1915); Burkett v. State, 131 Ga. App. 177, 205 S.E.2d 496 (1974).

Exercise of the right to withdraw a guilty plea is not hampered or impaired by the fact that in reliance on the earlier plea of guilty witnesses and jurors may have been dismissed. Hardman v. State, 143 Ga. App. 689, 239 S.E.2d 699 (1977).

Pleas may be withdrawn even though sentence has been delayed at defendant's own instance. Nobles v. State, 17 Ga. App. 382, 86 S.E. 1073 (1915).

Right to withdraw plea is restricted to period before sentence is pronounced. — Reducing to writing of the trial judge's probation sentence and the filing of the sentence with the clerk of the court was sufficient compliance with former Code 1933, § 27-1404 (see O.C.G.A. § 17-7-93) so as to prevent the withdrawal of the plea of guilty as a matter of right. Davenport v. State, 136 Ga. App. 913, 222 S.E.2d 644 (1975).

Right to withdraw a plea of guilty ceases after sentence is entered. Gray v. State, 157 Ga. App. 745, 278 S.E.2d 457 (1981).

Defendant no longer has an absolute statutory right to withdraw the defendant's guilty plea after the trial court announces the sentence. Fair v. Zant, 715 F.2d 1519 (11th Cir. 1983).

Oral pronouncement of sentence by the trial court ends any absolute statutory right to withdraw a guilty plea. Coleman v. State, 256 Ga. 77, 343 S.E.2d 695 (1986).

Defendant does not have an absolute statutory right to withdraw a guilty plea after the trial court's oral announcement of the sentence. Stevens v. State, 202 Ga. App. 473, 414 S.E.2d 702 (1992).

Defendant did not have the right to withdraw the defendant's plea after the trial court pronounced the defendant's sentence, even though the defendant tried to do so before the court addressed the defendant's request to reduce the sentence. Manues v. State, 232 Ga. App. 454, 501 S.E.2d 826 (1998).

Even though the defendant's motion to withdraw a plea was signed the day before sentence was pronounced, because the motion was not filed until five days after sentence was pronounced, the trial court did not abuse the court's discretion in

Withdrawal of Pleas (Cont'd)

denying the motion. Isaac v. State, 237 Ga. App. 723, 516 S.E.2d 575 (1999).

Since the defendant did not move to withdraw the defendant's non-negotiated plea until after the trial court pronounced sentence, the defendant had no right to withdraw the plea. Brassfield v. State, 242 Ga. App. 747, 531 S.E.2d 148 (2000).

Absolute right to withdrawal lost once written sentence entered. — When the trial court simply neglects to pronounce orally the sentence at the plea hearing but does enter a written judgment of sentence, a defendant loses the defendant's absolute right to withdraw the defendant's guilty plea at the time the written sentence is filed and any motion to withdraw the plea must be made in the same term of court in which the sentence was filed. Barton v. State, 331 Ga. App. 887, 769 S.E.2d 96 (2015).

After sentence pronounced, withdrawal is within court's discretion. — Motion to withdraw a plea of guilty after sentence is pronounced is within the sound legal discretion of the court. Bearden v. State, 13 Ga. App. 264, 79 S.E. 79 (1913); Clark v. State, 72 Ga. App. 603, 34 S.E.2d 608 (1945); Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945); Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945); King v. State, 91 Ga. App. 388, 85 S.E.2d 637 (1955); Higgins v. State, 92 Ga. App. 739, 90 S.E.2d 40 (1955); McCrary v. State, 215 Ga. 887, 114 S.E.2d 133 (1960); Holston v. State, 103 Ga. App. 373, 119 S.E.2d 302 (1961); Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967); Marshall v. State, 128 Ga. App. 413, 197 S.E.2d 161 (1973); Thomas v. State, 231 Ga. 298, 201 S.E.2d 415 (1973); Galbreath v. State, 130 Ga. App. 179, 202 S.E.2d 562 (1973); Ballard v. State, 131 Ga. App. 847, 207 S.E.2d 246 (1974); Lee v. State, 139 Ga. App. 65, 227 S.E.2d 878 (1976); Weathers v. State, 149 Ga. App. 617, 255 S.E.2d 90 (1979); Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979); Crump v. State, 154 Ga. App. 359, 268 S.E.2d 411 (1980); Dankert v. State, 154 Ga. App. 392, 268 S.E.2d 435 (1980); Miller v. State, 160 Ga. App. 639, 287 S.E.2d 643 (1981).

When a motion to withdraw a plea of guilty is made after the sentence is entered in writing and handed to the clerk, the granting or refusal thereof is in the sound discretion of the trial judge. King v. State, 91 Ga. App. 388, 85 S.E.2d 637 (1955).

After a sentence has been filed with the clerk, it is discretionary with the trial judge whether the judge will permit withdrawal. Duncan v. State, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

Accused may withdraw a guilty plea at any time before judgment is announced and may then plead not guilty. However, once sentence is pronounced, a withdrawal of a plea is within the sound discretion of the court. Kight v. State, 158 Ga. App. 698, 282 S.E.2d 176 (1981); Bowens v. State, 194 Ga. App. 391, 390 S.E.2d 634 (1990); Threatt v. State, 211 Ga. App. 630, 440 S.E.2d 61 (1994), overruled on other grounds, 266 Ga. 657, 469 S.E.2d 22 (1996).

Defendant may withdraw the defendant's plea of guilty as a matter of right before sentence is pronounced, but after the pronouncement of a sentence, a ruling on a motion to withdraw a guilty plea is within the sound discretion of the trial court and this discretion will not be disturbed on appeal unless manifestly abused. DeLapuente v. State, 182 Ga. App. 808, 357 S.E.2d 155 (1987); Dalton v. State, 244 Ga. App. 203, 534 S.E.2d 523 (2000); Rowe v. State, 246 Ga. App. 855, 542 S.E.2d 578 (2000).

Offer to allow the defendant to withdraw the defendant's guilty plea if the defendant was not satisfied with the sentence expired by virtue of the defendant's failure to respond when sentence was pronounced. Freeman v. State, 211 Ga. App. 716, 440 S.E.2d 490 (1994).

After a guilty plea has been accepted and sentence has been pronounced, whether to allow a defendant to withdraw a guilty plea is within the discretion of the trial count, and the trial court's decision will not be disturbed on appeal unless the court has manifestly abused the court's discretion. Whitesides v. State, 266 Ga. App. 181, 596 S.E.2d 706 (2004).

Trial court did not abuse the court's discretion in denying the defendant's mo-

tion to withdraw a guilty plea to charges of trafficking in methamphetamine and possession of marijuana as the defendant acknowledged, and the record showed, that the trial court advised the defendant of the maximum allowable sentence on both a trafficking in methamphetamine and possession of marijuana charge, as well as the mandatory minimum sentence on the former offense; further, despite the fact that the waiver of rights form the defendant signed incorrectly stated that the maximum term of imprisonment was 30 years, rather than 31 years, given the aforementioned, the mistake did not amount to a manifest injustice requiring reversal of the court's refusal to allow withdrawal. Rodriguez v. State, 280 Ga. App. 423, 634 S.E.2d 182 (2006).

Even if a prior ruling did not preclude consideration of the voluntariness of the defendant's plea, as the defendant did not raise in the trial court the issue of the defendant's mental competence to enter a plea, the defendant was precluded from raising it on appeal; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the guilty plea. Adams v. State, 316 Ga. App. 161, 728 S.E.2d 711 (2012).

Appellate court's reversal did not give right to withdraw plea. — In the context of a defendant's absolute right to withdraw a guilty plea pursuant to O.C.G.A. § 17-7-93(b), the appellate court's reversal of an amendment to the sentence did not give defendant an absolute right to withdraw the plea as defendant's sentence of life in prison was still valid. Shaheed v. State, 276 Ga. 291, 578 S.E.2d 119 (2003).

When the defendant pled guilty to aggravated assault, armed robbery, and robbery, and the defendant's aggravated assault convictions and sentences were vacated on appeal, the defendant had no right, on remand, to withdraw the defendant's guilty plea as to the other convictions because there was no basis to find the separate and distinct sentences entered on those convictions were void. Murray v. State, 314 Ga. App. 240, 723 S.E.2d 531 (2012).

Withdrawal after term of court when sentence pronounced. — Trial court has no authority to permit a defendant to withdraw the defendant's plea after the term of court when sentence was pronounced. State v. Kight, 175 Ga. App. 65, 332 S.E.2d 363 (1985).

If sentence already had been pronounced prior to the defendant's filing a motion to withdraw a guilty plea, and the term of court at which the judgment was entered had also passed, the trial court did not abuse the court's discretion in denying the motion. Hughes v. State, 176 Ga. App. 443, 336 S.E.2d 346 (1985).

After the expiration of the term of court in which the sentence was entered and the time for filing an appeal from the conviction, the only remedy available to the defendant would be through habeas corpus proceedings. Staley v. State, 184 Ga. App. 402, 361 S.E.2d 702 (1987).

Because a trial court lacked jurisdiction to entertain a motion to withdraw a guilty plea filed after the term of court in which the defendant was sentenced under the plea, the trial court properly dismissed the defendant's motion based on a lack of jurisdiction. Smith v. State, 283 Ga. 376, 659 S.E.2d 380 (2008).

Court's judgment on withdrawal will not be set aside unless abused. Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945); King v. State, 91 Ga. App. 388, 85 S.E.2d 637 (1955).

Discretion of the trial judge will not be controlled absent a showing of a clear abuse of discretion. Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967).

Court's discretion was not to be disturbed on the appellate level unless manifestly abused. Thomas v. State, 231 Ga. 298, 201 S.E.2d 415 (1973); Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

Court's discretion as regards withdrawal of a guilty plea will not be disturbed unless there is a manifest abuse of discretion. Kight v. State, 158 Ga. App. 698, 282 S.E.2d 176 (1981).

Ruling on a motion to withdraw a guilty plea lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of such discretion. Johnson v. State, 260 Ga. App. 897, 581 S.E.2d 407 (2003).

Trial court did not abuse the court's discretion in denying the defendant's mo-

Withdrawal of Pleas (Cont'd)

tion to withdraw a guilty plea as: (1) the defendant's counsel was not ineffective; (2) no evidence of coercion was presented; (3) if the defendant proceeded to trial, the defendant's counsel would have been prepared; and (4) the defendant elected not to pursue a motion for replacement counsel; even assuming that counsel's performance was somehow deficient, the defendant failed to show a reasonable probability that, but for the allegedly deficient performance, the defendant would have elected to proceed to trial. Muckle v. State, 283 Ga. App. 395, 641 S.E.2d 603 (2007).

Adverse unanticipated collateral consequences are not valid reasons for reversal of the trial court's refusal to withdraw a plea. Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

Manner in which discretion to be exercised. — Trial court's discretion must be exercised, not in opposition to, but in accordance with, established rules of law. King v. State, 91 Ga. App. 388, 85 S.E.2d 637 (1955).

In exercising the court's discretion, the trial judge settles all conflicts in evidence and is the exclusive arbiter of the facts. Holston v. State, 103 Ga. App. 373, 119 S.E.2d 302 (1961).

Test for withdrawal of plea after sentencing. — Question in considering whether or not to allow the withdrawal of a plea of guilty after sentencing is whether the defendant entered the plea freely and voluntarily, without any hope of benefit. Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945).

Defendant's argument that the defendant had an absolute right to withdraw the defendant's guilty plea in its entirety before resentencing because a portion of the defendant's original sentence was vacated was rejected as case law precedent established that since only a discrete provision of the defendant's sentence was invalidated, the defendant was ineligible to withdraw the defendant's guilty plea. Troutman v. State, 348 Ga. App. 375, 823 S.E.2d 66 (2019).

Guilty plea freely and voluntarily entered. — Because a trial judge informed the defendant of the charges as well as the possible penalties for conviction on those charges, the defendant's guilty plea was freely and voluntarily entered; the defendant failed to show that counsel's trial strategies were ineffective, and consequently, the trial court properly denied the defendant's motion to withdraw the guilty pleas. Hart v. State, 272 Ga. App. 754, 613 S.E.2d 107 (2005).

Trial court did not err by denying a defendant's motion to withdraw the defendant's guilty plea as the plea was entered knowingly and intelligently since: (1) the trial court found a sufficient factual basis for the plea, determined that the defendant understood and voluntarily entered the plea, and correctly informed the defendant of the possible sentences the defendant could receive; and (2) the trial court further informed the defendant of the rights the defendant was waiving by pleading guilty, including the defendant's rights to remain silent, to trial by jury, to subpoena and confront witnesses, and to testify. Rios v. State, 281 Ga. 181, 637 S.E.2d 20 (2006).

Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea as the trial court was well aware of the medications the defendant was taking when the plea was entered, the medications did not affect the defendant's ability to understand the proceedings, and an expert opined that the defendant was feigning hallucinations and was competent to stand trial; hence, at that point, the trial court had no duty to make any further inquiries into the defendant's ability to competently tender a plea. McDowell v. State, 282 Ga. App. 754, 639 S.E.2d 644 (2006).

Because: (1) the record adequately showed that the defendant voluntarily entered a non-negotiated guilty plea, with a full understanding of the rights waived and the sentence which could have been imposed; (2) the trial court reviewed the relevant Boykin questions; and (3) the defendant had ample time to discuss the plea with counsel and was not rushed or forced to enter the plea, the trial court did not err in denying withdrawal of the guilty plea. Brown v. State, 285 Ga. App. 119, 645 S.E.2d 606 (2007).

In light of the record which showed that

the defendant: (1) was well advised during the guilty plea hearing that the sentence recommended by the state was without the possibility of parole; (2) was given the option to enter the plea or proceed to a jury trial; (3) discussed the entry of the guilty plea with counsel; and (4) chose to accept the negotiated plea offer, the trial court properly rejected the defendant's claim that the state failed to show that the plea was entered intelligently and voluntarily; thus, the defendant's post-sentence motion to withdraw the guilty plea was properly denied. Moore v. State, 286 Ga. App. 99, 648 S.E.2d 451 (2007).

Because the defendant failed to show sufficient evidence of a psychological impairment, due in part by ceasing to take needed medication, sleep deprivation, racing thoughts or other psychological turmoil, or that trial counsel was ineffective as to counsel's advice regarding sentencing as a recidivist under O.C.G.A. § 17-10-7, the appeals court agreed that a guilty plea was intelligently and voluntarily entered; thus, the trial court properly denied a motion to withdraw the guilty plea. Frost v. State, 286 Ga. App. 694, 649 S.E.2d 878 (2007).

Because the defendant failed to show that counsel's ineffectiveness warranted an order allowing the withdrawal of a guilty plea, or that a manifest injustice resulted due to counsel's ineffective assistance, but the record amply demonstrated that the defendant's plea was knowingly, intelligently, and voluntarily entered, the trial court properly denied a motion to withdraw the plea; moreover, the defendant's position ignored the state's other evidence that the state would have presented supporting the defendant's guilt had the case gone to trial. Sallins v. State, 289 Ga. App. 391, 657 S.E.2d 309 (2008).

Trial court properly denied withdrawal of the defendant's guilty plea because the record sufficiently showed that: (1) the defendant entered a guilty plea to two counts of child molestation both knowingly and voluntarily, and in recognition of the rights being waived, absent any coercion or hope; and (2) the sentence was properly imposed, absent any proof that defense counsel was ineffective. Geyer v. State, 289 Ga. App. 492, 657 S.E.2d 878 (2008).

Defendant voluntarily, knowingly, and intelligently entered into a plea of guilty to, inter alia, aggravated stalking because while the defendant thought the plea involved a reduced charge with no prison time, the defendant's trial counsel gave contradictory evidence, which was supported by the plea proceeding record; additionally, although the prosecutor conducted the plea colloquy and questioned the defendant about the waiver of the defendant's rights, such was not a ground for reversal. Ransom v. State, 293 Ga. App. 651, 667 S.E.2d 686 (2008).

Failure to advise of rights. — Because an inmate was not advised at a plea hearing of the right to confront witnesses and to avoid self-incrimination by either the defense attorney or the sentencing court, the inmate did not make a knowing and intelligent waiver of those rights; therefore, the trial court erred by denying the inmate's petition for habeas corpus. Johnson v. Smith, 280 Ga. 235, 626 S.E.2d 470 (2006).

Counsel ineffective for failing to inform defendant of right to withdraw plea. — Defendant's conviction based on a guilty plea was properly set aside because the defendant did not waive a statutory right to withdraw the guilty plea at any time prior to sentencing as there was no indication in the sentencing transcript that such a waiver was made; no reasonable attorney providing constitutionally effective representation would fail to inform the defendant of an absolute statutory right to withdraw a plea when the attorney had obtained new information that changed the attorney's assessment of the defendant's case and had not yet fully discussed that information and its relevance with the defendant; and there was prejudice as the defendant would have withdrawn the guilty plea prior to sentencing and continued with trial. Nelson v. Wilkey, No. S20A0013, 2020 Ga. LEXIS 468 (June 29, 2020).

Grounds for discretionary withdrawal of plea generally. — After sentence, the judge may permit a guilty plea to be withdrawn upon meritorious grounds addressed to the judge's discretion. Welch v. State, 63 Ga. App. 277, 11 S.E.2d 42 (1940).

Withdrawal of Pleas (Cont'd)

Defendant should be permitted to withdraw the defendant's plea, even after sentence is pronounced, upon reasonable grounds being timely shown and when the ends of justice dictate such a course, and the discretion vested in the trial courts in such matters should always be exercised in favor of innocence, liberty, and justice. Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967).

Trial court erred in refusing to allow the defendant to withdraw the defendant's guilty plea since the court did not inform the defendant personally that: (1) the trial court was not bound by any plea agreement; (2) the trial court intended to reject the plea agreement presently before the court; (3) the disposition of the present case could be less favorable to defendant than that contemplated by the plea agreement; and (4) the defendant could then withdraw the defendant's plea as a matter of right. Gordon v. State, 190 Ga. App. 414, 379 S.E.2d 221 (1989).

Trial court abused the court's discretion in denying the defendant's motion to withdraw the defendant's guilty plea when, even though the defendant gave the attorney power of attorney to enter a plea, there was no showing that the defendant knew the defendant was waiving specific federal rights, or that the defendant understood the nature of the charges against the defendant or consequences of the defendant's plea. Parks v. State, 223 Ga. App. 694, 479 S.E.2d 3 (1996).

Trial court did not err in denying defendant's motion to withdraw defendant's guilty plea to the offense of first-degree homicide by vehicle as the evidence showed that the plea was knowingly and voluntarily made, and that the defendant understood the nature of the offense and the consequences of the defendant's plea; moreover, the evidence did not show that the defendant's plea was made due to any ineffective assistance rendered by the defendant's counsel who properly prepared the defendant's case and advised the defendant about the sentence the defendant might receive. David v. State, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea in a case where the defendant pled guilty to charges of voluntary manslaughter and aggravated stalking involving the death of a woman who was stabbed 24 times as the trial court first determined that there was a factual basis for the plea and, thus, the record showed that the defendant knowingly and voluntarily pled guilty to the charges. Brown v. State, 261 Ga. App. 448, 582 S.E.2d 588 (2003).

When the defendant, at the defendant's sentencing hearing, presented evidence on the defendant's behalf without objection and with knowledge of the maximum possible punishment the defendant might face by entering a guilty plea, and had an opportunity to address the trial court but said nothing to indicate that the defendant had doubts about entering the guilty plea, the trial court's finding that the defendant did not demonstrate ineffective assistance of counsel based on counsel's failure to move to withdraw the guilty plea was affirmed. Voils v. State, 266 Ga. App. 738, 598 S.E.2d 33 (2004).

Fraud in obtaining plea as basis for withdrawal. — Exception to the rule that withdrawal is in the court's discretion occurs in cases where fraud has been practiced to obtain the plea of guilty. Griffin v. State, 12 Ga. App. 615, 77 S.E. 1080 (1913); Sanders v. State, 18 Ga. App. 786, 90 S.E. 728 (1916). See also Woodward v. State, 13 Ga. App. 130, 78 S.E. 1009 (1913); Polston v. State, 15 Ga. App. 632, 83 S.E. 1101 (1915).

Unawareness of waiver of privilege against self incrimination. — While Boykin does not command the use of any precise "magic words" in establishing that a defendant understands the rights the defendant is waiving by pleading guilty, the habeas court erred in finding that the state met the state's burden of establishing that the defendant's guilty plea was made voluntarily, knowingly, and intelligently because the record failed to show that any comment by the trial court, or by the defendant's counsel, informed the defendant that by pleading guilty the defendant would waive the privilege against compulsory self-incrimination. Arnold v. Howerton, 282 Ga. 66, 646 S.E.2d 75 (2007).

Misunderstanding or being misled by counsel. — Defendant's mere contention that the defendant did not understand or was misled by the defendant's own counsel affords no basis for withdrawal of the defendant's plea of guilty. Marshall v. State, 128 Ga. App. 413, 197 S.E.2d 161 (1973).

When counsel's testimony contradicted the defendant's testimony regarding the nature and quantity of consultation and counsel's decision not to consider a coindictee as a valuable witness was strategic or tactical, the defendant's guilty plea was not void due to ineffective assistance of counsel. McCutchen v. State, 276 Ga. 532, 579 S.E.2d 732 (2003).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea on grounds that the defendant's attorney failed to inform the defendant that the defendant's plea was open-ended as opposed to negotiated, where the plea transcript showed that the defendant was well aware that the plea was open-ended; that the defendant understood the consequences of the plea; and that the defendant entered the defendant's plea freely, knowingly, and voluntarily with a full understanding that the defendant was subject to the maximum sentence. Dudley v. State, 266 Ga. App. 336, 596 S.E.2d 772 (2004).

Defendant's motion to withdraw a guilty plea was properly denied as the defendant failed to show that the defense counsel's performance was deficient in advising the defendant to enter a non-negotiated plea without a recommendation from the state; the defendant did not overcome the presumption that the defense counsel's conduct was reasonable. The defendant's testimony that the defense counsel led the defendant to believe that the defendant's sentence would be no more than ten years was contradicted by the evidence. Brown v. State, 280 Ga. App. 767, 634 S.E.2d 875 (2006).

Defendant failed to show that the defendant received ineffective assistance of counsel with regard to being coerced or deceived by counsel as to length of sentence that could be imposed, and the trial court did not err by denying the defendant's motion to withdraw a guilty plea entered into because the record did not support the defendant's claim that counsel deceived the defendant about the length of the sentence as the defendant was advised of the maximum possible sentence and was told that there was no guarantee as to the length of sentence that would be imposed. Brantley v. State, 290 Ga. App. 764, 660 S.E.2d 846 (2008).

Trial court properly denied the defendant's motion to withdraw a guilty plea to a charge of malice murder because sufficient evidence was presented to support a finding that: (1) counsel did not render ineffective assistance in advising the defendant as to the plea; (2) counsel attempted, albeit unsuccessfully to pursue a voluntary manslaughter defense and plea deal with the state; (3) the defendant was generally competent at the time of the murder; (4) a statement by a proposed expert witness in support of said defense would have been inadmissible as an opinion on the ultimate issue and could not, in any event, have helped the defendant's case; and (5) the viability of any type of voluntary manslaughter defense was highly unlikely. Trauth v. State, 283 Ga. 141, 657 S.E.2d 225 (2008).

Effective assistance of counsel supported denial of motion to withdraw guilty plea. — Because the defendant failed to show that prejudice resulted from counsel's failure to convey that the state's negotiated plea offer had a time limit, but the evidence instead showed that the defendant had no intent to accept the offer and immediately and strongly rejected the offer, the trial court properly denied a motion to withdraw the defendant's guilty plea based on an ineffective assistance of counsel claim. Burch v. State, 289 Ga. App. 388, 657 S.E.2d 294 (2008).

Trial court did not abuse the court's discretion in denying a defendant's motion to withdraw the defendant's guilty plea because the defendant failed to prove the prejudice prong of the defendant's ineffectiveness claim since, at the hearing on the motion to withdraw the plea, the defendant proffered no evidence that a deoxyribonucleic acid (DNA) test pursuant to O.C.G.A. § 5-5-41 would have rebutted the state's evidence, regarding the defendant's incest conviction pursuant to

Withdrawal of Pleas (Cont'd)

O.C.G.A. § 16-6-22, that the defendant and the victim were half-siblings; in addition, counsel's strategy to forego a DNA test was one of trial tactics and did not provide a basis on which to find that counsel's representation was deficient. Hunter v. State, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Since the record did not support defendant's claim that the defendant was coerced into pleading guilty and the defendant did not show that the trial court erred in requiring a new bond, the trial court properly denied the defendant's motion to reduce or modify the sentence. Crumpton v. State, 267 Ga. App. 332, 599 S.E.2d 297 (2004).

Trial court properly denied the defendant's plea withdrawal motion as the court fully informed the defendant that the sentence the court intended on imposing would be without parole, despite failing to advise the defendant of that factor prior to the acceptance of the plea. Thomas v. State, 287 Ga. App. 500, 651 S.E.2d 801 (2007).

Because the defendant failed to present the testimony of either trial counsel to support a claim of ineffective assistance of counsel and, thus, the record of the new trial hearing was silent as to what actions were taken by counsel to prepare for the plea or to investigate the ramifications of the previous plea, the trial court did not err in denying the defendant's withdrawal of the plea. Jackson v. State, 288 Ga. App. 742, 655 S.E.2d 323 (2007).

Showing of reason for disavowing statement. — Defendant should not be permitted to disavow a statement reflecting the consequences of a guilty plea without a showing demonstrating a good reason to disregard it. Anderson v. State, 194 Ga. App. 395, 390 S.E.2d 637 (1990).

Erroneous denial of motion to withdraw plea. — See Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945); Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945).

Trial court erred in denying the defendant's motion for an out-of-time appeal of the denial of the defendant's motion to withdraw the defendant's guilty plea. It was obvious that the defendant had attempted to appeal the denial of the defendant's motion to withdraw and that the defendant's request for counsel to help the defendant pursue the defendant's appeal had never been ruled upon; prejudice was presumed and the harmless error analysis did not apply since there had been a total denial of the assistance of counsel. Stockton v. State, 298 Ga. App. 84, 679 S.E.2d 109 (2009).

Motion to withdraw plea properly denied. — As counsel did not render ineffective assistance, denial of the defendant's motion to withdraw the defendant's guilty plea, which argued that the defendant was forced to plead guilty to possession of a firearm by a convicted felon due to defense counsel's ineffective assistance, was not an abuse of discretion. Johnson v. State, 274 Ga. App. 641, 618 S.E.2d 716 (2005).

Denial of a motion to withdraw a guilty plea was proper because: (1) the record showed that the defendant knowingly and voluntarily withdrew the pre-sentencing motion to change the plea to not guilty; (2) the trial counsel did not render ineffective assistance in failing to obtain a psychiatric evaluation as there was no showing that the evaluation would have shown the existence of a psychiatric defense; and (3) speculation was insufficient to satisfy the prejudice prong of Strickland. Terrell v. State, 274 Ga. App. 539, 618 S.E.2d 175 (2005).

Probationer, who elected to plead guilty and underwent alternative treatment in a Drug Court program offered under O.C.G.A. § 16-13-2(a), was not entitled to credit for time spent in treatment when the probationer was subsequently terminated from the program and sentenced on the original crime; moreover, a defendant in the probationer's position, who pled guilty and utilized the benefits of a rehabilitative option in order to avoid an adjudication of guilt, could not withdraw the plea as a matter of right under O.C.G.A. § 17-7-93(b). Stinson v. State, 279 Ga. App. 107, 630 S.E.2d 553 (2006).

Trial court did not abuse the court's discretion in denying the defendant's extraordinary motion to set aside a plea, which was treated as a motion to with-

draw the guilty plea, as the state met the state's burden of showing that the defendant entered the plea knowingly and voluntarily, and there was no manifest injustice shown by the denial of the post-sentence request to withdraw pursuant to O.C.G.A. § 17-7-93(b). Williams v. State, 279 Ga. App. 388, 631 S.E.2d 417 (2006).

Defendant's motion to withdraw the defendant's guilty plea was properly denied since: (1) the defense counsel was not ineffective; (2) the state showed that the plea was knowing, intelligent, and voluntary; (3) the trial court was entitled to discredit contradictory testimony given by the defendant at the motion to withdraw the plea hearing; and (4) the defendant's claim that the defendant had nothing to gain by entering a "blind" plea failed as even assuming merger of the charges, for sentencing purposes, the defendant still would have faced an additional five years' to serve if the defendant had not pled guilty. Brown v. State, 280 Ga. App. 767, 634 S.E.2d 875 (2006).

Trial court did not err by denying a motion to withdraw the defendant's guilty plea due to ineffective assistance of counsel at the plea hearing as: (1) counsel met with the defendant several times prior to the plea hearing, reviewed the district attorney's file, and discussed with the defendant the state's evidence; (2) counsel moved to suppress the defendant's statements to the police and discussed the options available with the defendant after the motion was denied, including the state's offer of a plea recommendation; and (3) the defendant failed to show how additional communication with counsel would have changed the defendant's decision to enter a guilty plea. Rios v. State, 281 Ga. 181, 637 S.E.2d 20 (2006).

Trial court did not abuse the court's discretion in denying the defendant's post-sentence motion to withdraw a guilty plea because the defendant failed to show the ineffective assistance of trial counsel in incorrectly assessing the strength of the state's case and recognizing the existence of exculpatory evidence; moreover, any coercion the defendant experienced did not manifest itself from counsel's actions, but arose from the circumstances the defendant felt during the entire hearing process. Collier v. State, 281 Ga. App. 646, 637 S.E.2d 72 (2006).

Trial court's order denying the defendant's motion to withdraw a nolo contendere plea was upheld on appeal as the court was authorized to reject the defendant's self-serving evidence to find that the plea was freely, knowingly, and voluntarily entered; moreover, the defendant's coercion claims did not trump the court's authority to find the same. Patel v. State, 283 Ga. App. 181, 641 S.E.2d 184 (2006).

Because no evidence was presented to support the defendant's claims that a guilty plea was involuntarily entered, made as a result of duress or threats by the state, entered while the defendant was under the influence, or because trial counsel was ineffective, the trial court properly denied the defendant's amended motion to withdraw the plea. Schlau v. State, 282 Ga. App. 460, 638 S.E.2d 895 (2006), cert. denied, No. S07C0424, 2007 Ga. LEXIS 147 (Ga. 2007).

Trial court did not abuse the court's discretion in denying the defendant's plea withdrawal motion on ineffective assistance of counsel grounds as the evidence showed that trial counsel made a reasonable strategic decision, based on the defendant's own statements that failed to show standing, not to move for suppression of the evidence seized pursuant to an allegedly defective warrant affidavit, and as a result, the defendant failed to show prejudice based upon that failure. Lawton v. State, 285 Ga. App. 45, 645 S.E.2d 571 (2007), cert. denied, No. S07C1244, 2007 Ga. LEXIS 670 (Ga. 2007).

Trial court properly dismissed the defendant's motion to correct an allegedly void felony sentence as the sentence was authorized by the law in existence at the time of the defendant's statutory rape convictions, and the defendant failed to seek withdrawal of the guilty pleas which led to the same as a prerequisite to challenge the sentence imposed; thus, any further relief had to be sought through a petition for habeas corpus. McClendon v. State, 287 Ga. App. 515, 651 S.E.2d 820 (2007), cert. denied, No. S08C0222, 2008 Ga. LEXIS 174 (Ga. 2008).

Withdrawal of Pleas (Cont'd)

Trial court did not err in denying the defendant's motion for an out-of-time appeal based on a withdrawal of a guilty plea since the record sufficiently showed that despite initially withdrawing the plea, the defendant negotiated another plea with the state and never again moved to withdraw the plea. Robertson v. State, 287 Ga. App. 271, 651 S.E.2d 198 (2007).

Because the defendant waived issues concerning the effectiveness of the plea attorney's representation, and failed to make a strong showing that a motion to suppress would have been meritorious, the defendant's motion to withdraw a guilty plea on grounds that counsel was ineffective was properly denied. Hammett v. State, 288 Ga. App. 255, 653 S.E.2d 852 (2007).

Order modifying the trial court's prior banishment order imposed as a condition of the defendant's probation was upheld on appeal as was the denial of the defendant's motion to withdraw a negotiated plea, because: (1) the defendant's sentence was independent, and thus, not part of the negotiated plea agreement; and (2) the trial court adequately considered that the defendant's crimes were likely motivated by the relationship the defendant had with the victim, the defendant's ex-spouse, where the ex-spouse resided and worked, as well as where the ex-spouse's immediate family lived, by determining that the banishment order was issued to protect those affected, but also served a rehabilitative purpose by removing a temptation by the defendant to re-offend. Hallford v. State, 289 Ga. App. 350, 657 S.E.2d 10 (2008).

Trial court did not err in denying the defendant's withdrawal of a plea of guilty to a charge of possession of a firearm by a convicted felon on grounds that the plea was involuntarily entered as the record adequately showed that the trial court informed the defendant of all the constitutional rights that would be waived upon the entry of that plea. Davis v. State, 289 Ga. App. 526, 657 S.E.2d 609 (2008).

Based on the plea hearing transcript and the testimony of the defendant's attorney, the trial court was authorized to reject the defendant's claim that the defendant's Alford plea had not been knowing and voluntary and therefore properly denied the defendant's motion to withdraw the plea. The fact that the defendant's interpreter did not testify at the plea withdrawal hearing provided no basis for reversal. Luviano v. State, 291 Ga. App. 677, 662 S.E.2d 770 (2008).

Defendant's motion to withdraw a guilty plea was properly denied when the defendant claimed that trial counsel was ineffective by misinforming the defendant that the defendant's sentence would run concurrently with any imposed by Tennessee for a parole violation and that the sentence would be served in Tennessee. The motion had been filed well beyond the term of court in which the defendant was sentenced and thus was outside the trial court's jurisdiction; furthermore, the trial court was entitled to give credit to counsel's testimony and documents indicating that the Georgia and Tennessee sentences were indeed running concurrently and to counsel's testimony that the defendant had been forewarned that the defendant might not be able to serve the sentence in Tennessee. Maples v. State, 293 Ga. App. 232, 666 S.E.2d 609 (2008).

As the transcript of a guilty plea hearing showed the defendant knew the rights the defendant was waiving and the possible consequences of a guilty plea to child molestation, the defendant's former counsel testified the defendant expressed no doubts about the guilty plea, and only the defendant's self-serving testimony indicated the defendant was impaired or under duress when the guilty plea was entered, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the plea. Likely v. State, 293 Ga. App. 484, 667 S.E.2d 648 (2008).

Trial court properly denied the defendant's motion to withdraw the defendant's guilty plea based on ineffective assistance under the Sixth Amendment. The record showed that trial counsel, who obtained discovery materials, investigated the case, spoke to the victim and other eyewitnesses, and met with the defendant, was adequately prepared to try the case; moreover, the defendant did not show that

additional trial preparation would likely have changed reasonable counsel's advice regarding the guilty plea or the outcome of a trial. Hammett v. State, 297 Ga. App. 235, 676 S.E.2d 880 (2009).

There was no merit to the defendant's argument that a guilty plea was invalid because the defendant, who was 17 at the time of the offense and entered the plea over a year later, did not have the opportunity to speak to the defendant's parent before entry of the plea and because the parent was not present in the courtroom. The defendant cited no authority for this contention, and the trial court made careful inquiry showing that the defendant fully understood the nature of the charges and the rights the defendant was relinquishing; accordingly, the trial court properly denied the defendant's motion to withdraw the defendant's plea on this ground. Robertson v. State, 297 Ga. App. 228, 676 S.E.2d 871 (2009), cert. denied, No. S09C1300, 2009 Ga. LEXIS 406 (Ga. 2009).

Because the defendant failed to show the manifest injustice necessary to authorize post-sentence withdrawal of the defendant's guilty plea, the trial court did not err when the court denied the defendant's motion to withdraw. Among other evidence, the transcript showed that the assistant district attorney informed the defendant that the defendant was pleading guilty under the repeat offender statute. Leonard v. State, 297 Ga. App. 515, 677 S.E.2d 726 (2009).

Trial court properly denied a defendant's motion to withdraw a guilty plea to voluntary manslaughter. Pretermitting whether counsel's performance was deficient, the defendant failed to establish a reasonable probability that the defendant would have insisted on a trial if the defendant had always known the defendant could be sentenced to serve 15 years instead of ten; furthermore, the defendant would have been tried for felony murder had the defendant gone to trial. Johnson v. State, 298 Ga. App. 197, 679 S.E.2d 763 (2009).

Because the defendant failed to preserve an argument that the defendant's guilty plea was voidable as a matter of law under O.C.G.A. § 13-3-20, and because the transcript from the plea hearing showed on its face that the plea was entered knowingly, intelligently, and voluntarily, the trial court properly denied the defendant's motion to withdraw the plea. Boykins v. State, 298 Ga. App. 654, 680 S.E.2d 665 (2009).

Because a police officer was authorized to stop the defendant's vehicle based on a suspicion that the defendant had illegally dumped trash, and because the defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, the defendant's ineffective assistance claim failed, and the trial court properly denied the defendant's motion to withdraw the defendant's Alford plea. Bishop v. State, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea because the state met the state's burden by showing from the record that the defendant was cognizant of the rights the defendant was waiving and of the possible consequences of the defendant's plea, and the defendant confirmed that the defendant had read and fully understood the charges pending against the defendant and understood that by pleading guilty the defendant gave up the defendant's right to trial by jury; the defendant understood that while the defendant's attorney would make a sentence recommendation, the trial court could sentence the defendant up to the maximum permitted by law, and the defendant testified that no one used force, threats, or promises to make the defendant plead guilty against the defendant's will, that the defendant was satisfied with the services of the defendant's attorney, that the defendant's decision to plead guilty was made freely and voluntarily, that the defendant committed the offenses, and that the facts outlined by the state were accurate. Lavendar v. State, 306 Ga. App. 257, 701 S.E.2d 892 (2010).

Trial court properly denied the defendant's motion to withdraw the defendant's guilty pleas because the defendant failed to show that withdrawal of the defendant's pleas was necessary to correct a manifest injustice, and the trial court determined that a factual basis existed for

Withdrawal of Pleas (Cont'd)

the pleas pursuant to Ga. Unif. Super. Ct. R. 33.9 and that the defendant understood the nature of the charges to which the defendant was pleading pursuant to Ga. Unif. Super. Ct. R. 33.8(A); the district attorney did not misstate the law when the district attorney advised the defendant that a defendant in a case when the state was seeking the death penalty did not have an absolute right to withdraw the defendant's guilty plea before judgment was pronounced. Loyd v. State, 288 Ga. 481, 705 S.E.2d 616, cert. dismissed, 565 U.S. 971, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Because the defendant declined the opportunity at a plea hearing to discuss any concerns with counsel's representation, the defendant failed to demonstrate that counsel was ineffective; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the defendant's plea on that basis. Norwood v. State, 311 Ga. App. 815, 717 S.E.2d 316 (2011).

Defendant's contentions provided no basis for reversing the trial court's denial of the motion to withdraw the guilty plea because the record authorized the trial court to reject the defendant's claim that the defendant's counsel's performance was deficient and that there was a reasonable probability that, absent the deficiency, the defendant would have not pled guilty. The trial court expressly found that the defendant's testimony as to counsel's alleged promise regarding the sentence to be imposed lacked credibility and was contradicted by the testimony of defense counsel and the evidence of record. Davis v. State, 317 Ga. App. 157, 730 S.E.2d 30 (2012).

Defendant had no right to withdraw the defendant's guilty plea, because the defendant's first appeal only invalidated a discrete provision of the sentence, expressly leaving all other provision intact, and the plea thereon ineligible for withdrawal in the instant action, and the out-of-term motion was untimely. Humphrey v. State, 299 Ga. 197, 787 S.E.2d 169 (2016).

While the Georgia Court of Appeals has held that one's right to withdraw a guilty plea before sentencing under the terms of O.C.G.A. § 17-7-93(b) can never be waived, the Georgia Supreme Court is not bound by those decisions, and it hereby expressly overrules Thompson v. State, 462 S.E.2d 404 (1995) and Ware v. State, 196 S.E.2d 896 (1973). Blackwell v. State, 299 Ga. 122, 786 S.E.2d 669 (2016).

Waiver or right to withdraw guilty plea. — Criminal defendant's right under O.C.G.A. § 17-7-93(b) to withdraw a guilty plea prior to sentencing is a right that can be waived as there is no federal or state constitutional provision stating that a criminal defendant may withdraw a plea as a matter of right prior to sentence being pronounced; there is no express language in O.C.G.A. § 17-7-93(b) itself indicating that, although the right to withdraw a guilty plea before sentence is pronounced exists, the right cannot be waived; and there is no public policy prohibiting the waiver of that right as the waiver of the right to withdraw a guilty plea after entering the plea fosters the interests of the state and the defendant by allowing the parties to avoid the uncertainty of a jury trial. Blackwell v. State, 299 Ga. 122, 786 S.E.2d 669 (2016).

Defendant's motion to withdraw the defendant's guilty plea before sentencing was properly denied because a criminal defendant's right to withdraw a guilty plea prior to sentencing was a right that could be waived; and the defendant waived that right as the exchange between the defendant and the prosecutor at the defendant's guilty plea hearing showed that the defendant understood that the defendant would not be allowed to withdraw the defendant's guilty plea once it had been entered; and a later exchange with the trial court itself at the guilty plea hearing underscored the fact that the defendant understood and affirmatively agreed that the defendant would not be able to withdraw the defendant's guilty plea once the plea had been entered. Blackwell v. State, 299 Ga. 122, 786 S.E.2d 669 (2016).

Trial court erred in denying the defendant's motion to withdraw the guilty plea because the language of the form allowing a defendant to change a plea was too imprecise and too vague to establish that the defendant made a voluntary, knowing,

and intelligent waiver of the right to withdraw the plea before a sentence was pronounced. Rice v. State, 354 Ga. App. 103, 840 S.E.2d 508 (2020).

Overruling of motion to withdraw is not reversible error. — It is not reversible error to overrule the defendant's motion to withdraw the defendant's plea of guilty after sentencing. Sears v. State, 45 Ga. App. 344, 164 S.E. 458 (1932).

Effect of withdrawal of sentence and postponement of pronouncement. — When the defendant initially enters a guilty plea and subsequently the judge orally pronounces a sentence, but on the defendant's motion withdraws the sentence and postpones pronouncement, at which time the defendant moves to withdraw the defendant's guilty plea and enter a plea of not guilty, it is error for the court to refuse to allow the defendant to do so. Clark v. State, 72 Ga. App. 603, 34 S.E.2d 608 (1945).

Withdrawal may not be accomplished through motion for new trial. — Neither before nor after sentence can a motion for a new trial be employed as a means of withdrawing a plea of guilty. Welch v. State, 63 Ga. App. 277, 11 S.E.2d 42 (1940).

When waiver of right to withdraw guilty plea valid. — Right of the defendant to withdraw the defendant's plea of guilty and plead not guilty is effectively waived only when the waiver is wholly voluntary and comes from the defendant without any solicitation or coercion whatsoever from either the state or the court. Farmer v. State, 128 Ga. App. 416, 196 S.E.2d 893 (1973).

Withdrawal of guilty plea when state seeks death penalty. — Guilty plea, voluntarily and knowingly entered in a capital felony case other than treason or aircraft hijacking, wherein the state seeks the death penalty, may not be withdrawn as a matter of right. Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Defendant does not have the right in a case in which the state seeks the death penalty to withdraw a guilty plea voluntarily and knowingly entered. Browner v. State, 257 Ga. 321, 357 S.E.2d 559 (1987).

Consideration against the defendant of a withdrawn plea of guilty was prohibited by this section. Ward v. State, 123 Ga. App. 216, 180 S.E.2d 280 (1971).

This section applied to nolo contendere pleas. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Nolo contendere pleas stand on the same footing as a plea of guilty under this section. Marshall v. State, 128 Ga. App. 413, 197 S.E.2d 161 (1973).

Nolo contendere plea may be withdrawn. — Defendant who has entered a plea of nolo contendere may as a matter of right withdraw the plea after an oral announcement of sentence but before sentence is properly pronounced, i.e., in writing. Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947).

Voluntary nolo contendere. — State met the state's burden of showing that the trial court expressly found that the defendant understood the nature of the charges and consequences of entering a nolo contendere plea; that no promises, force, or threats were used to obtain the plea; and that the defendant knowingly, freely, and voluntarily entered the plea; moreover, to contradict the defendant's claims, the state further presented evidence that prior to the plea, no form of coercion was imposed, and defense counsel expressly acquiesced to the sentence entered by the court with no objection from the defendant. Patel v. State, 283 Ga. App. 181, 641 S.E.2d 184 (2006).

Withdrawal of nolo contendere plea properly denied. — Because the defendant's appointed counsel conducted a sufficient investigation of the case to determine that the defendant had a viable defense and to advise the defendant to adhere to the nolo contendere plea the defendant entered, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the plea. Hopkins v. State, 274 Ga. App. 872, 619 S.E.2d 368 (2005).

Withdrawal after term of court when guilty plea entered. — Trial court properly held that the court lacked jurisdiction to entertain a defendant's motion

Withdrawal of Pleas (Cont'd)

to withdraw a guilty plea because the term of court at which the guilty plea was entered had expired; moreover, authority to modify sentences under O.C.G.A. § 17-10-1(f) did not include power to vacate a conviction on which the sentence was based. Ellison v. State, 283 Ga. 461, 660 S.E.2d 373 (2008).

Withdrawal of guilty plea not allowed. — Defendant could not withdraw the defendant's guilty plea after defense counsel kept the defendant informed of plea negotiations and recommended that the defendant not go to trial, and the defendant's verified acknowledgement of the plea hearing indicated that the defendant knowingly and voluntarily pled guilty. Weeks v. State, 260 Ga. App. 129, 578 S.E.2d 910 (2003).

Trial court did not abuse the court's discretion in denying the defendant's post-sentencing motion to withdraw the defendant's guilty plea to several offenses given that: (1) the record contradicted the defendant's claim of coercion by showing that the defendant was fully informed of the charges and the sentence, that the defendant waived the defendant's various trial rights and the right to remain silent, and that the defendant stated at the plea hearing that the defendant was acting voluntarily and was not coerced; (2) there was no support for the defendant's alleged fear that defense counsel would not defend the case if the defendant pled not guilty; (3) the trial court did not abuse the court's discretion in finding on the facts of the case that the recommendations of defendant's counsel and defendant's family to proceed with the guilty plea did not constitute coercion; and (4) contrary to the defendant's ineffective assistance claim, in which the defendant asserted that defense counsel gave confusing advice about the sentence and failed to inform the defendant that the defendant could withdraw the plea before sentencing, the record supported the trial court's findings that the defendant was well aware of the sentence which the trial court intended to impose and that defense counsel told the defendant of the opportunity to withdraw the plea before sentencing. Johnson v. State, 260 Ga. App. 897, 581 S.E.2d 407 (2003).

Denial of the defendant's motion to withdraw the defendant's guilty plea was affirmed on appeal when the defendant's purported statements of the case and the facts were not supported by proper record citations, the defendant was cognizant of all the rights the defendant was waiving, along with the possible consequences of the defendant's plea, and the defendant's plea was knowing and voluntary. Colbert v. State, 264 Ga. App. 519, 591 S.E.2d 364 (2003).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea as the plea was entered knowingly, intelligently, or voluntarily; the defendant did not show that the plea was the result of ineffective assistance of counsel since the record showed that defense counsel fully advised the defendant in all aspects of the plea and no evidence existed to show that defense counsel was unprepared, unresponsive, or otherwise incompetent to represent the defendant. Payne v. State, 271 Ga. App. 619, 610 S.E.2d 572 (2005).

Defendant's motion to withdraw a guilty plea to possession of cocaine was properly denied because the record revealed that the defendant entered the plea freely and voluntarily with a full understanding of the nature of the charges, the consequences of the plea, and the rights that the defendant was relinquishing; the defendant replied cogently to the trial court's inquiries during the guilty plea colloquy and made a reasoned decision to plead guilty, and the trial court's failure to inform the defendant that the defendant was waiving the right to appeal the denial of the motion to suppress and the right to appeal any issue regarding the sufficiency of the evidence was not error because the trial court twice advised the defendant that, by pleading guilty, the defendant was giving up the right to any determination by a jury as to guilt or innocence. Covin v. State, 272 Ga. App. 65, 611 S.E.2d 729 (2005).

Because the defendant's guilty plea and waiver of counsel were both knowing and voluntary, and because the delay in the appeal was caused by the defendant, the

trial court properly denied the defendant's motion to withdraw the plea. Smith v. State, 274 Ga. App. 568, 618 S.E.2d 182 (2005).

Because defense counsel went over the voluntary manslaughter statute with the defendant and explained intent to the defendant, the defendant failed to show that counsel was ineffective; because the defendant's plea was freely and voluntarily made, the trial court did not err in denying the defendant's motion for a new trial. Howard v. State, 274 Ga. App. 861, 619 S.E.2d 363 (2005).

Because the record showed that the defendant's plea was freely, voluntarily, knowingly, and understandingly made and entered, the trial court did not err in finding the defendant guilty of armed robbery and possession of a firearm during the commission of a crime. Isaac v. State, 275 Ga. App. 262, 620 S.E.2d 182 (2005).

Denial of a defendant's motion to withdraw a guilty plea was not an abuse of discretion as the plea was made voluntarily and intelligently since the transcript revealed that the defendant: (1) understood the nature of the charges; (2) understood that by pleading guilty the defendant was waiving the defendant's rights to a jury trial, to cross-examine witnesses, to testify or to present other evidence, and not to incriminate the defendant; (3) knew the possible sentence; (4) was not promised special treatment in exchange for the guilty plea; (5) was not coerced; and (6) admitted that the defendant was offering the plea freely and voluntarily with a full understanding of all of the facts; moreover, defense counsel fully informed the defendant of the potential consequences of entering a non-negotiated plea. Price v. State, 280 Ga. App. 869, 635 S.E.2d 236 (2006).

Plea erroneously withdrawn absent formal defense motion. — Trial court erroneously dismissed an accusation charging the defendant with possession of alcohol by an underage person in violation of O.C.G.A. § 3-3-23(a)(2) based solely on the defendant's completion of an alcohol education course, without providing notice to the state or the defendant, and without conducting a sentencing hearing as such impermissibly interfered with the state's right to prosecute and no defect on the face of the accusation existed; moreover, the trial court erred in withdrawing the defendant's no contest plea absent a formal defense motion seeking the plea. State v. Carr, 287 Ga. App. 691, 652 S.E.2d 597 (2007).

Inapplicable to pleas resulting in first offender status. — Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea, since the state presented a sufficient factual basis for the crimes, the trial court iterated a sufficient allocution on the record, and sentenced the defendant pursuant to the agreed plea; furthermore, O.C.G.A. § 17-7-93 was inapplicable to pleas resulting in first offender status. Johanson v. State, 260 Ga. App. 181, 581 S.E.2d 564 (2003).

Duress is question of fact for trial court to resolve. — With respect to the voluntariness of a guilty plea, duress is a question of fact for the trial court to resolve, and an appeals court will only reverse the trial court's decision on this matter upon a showing of an abuse of discretion; a defendant was proven not to be under family pressure to plead guilty by the defendant's statements that the defendant was under no pressure to plead guilty. Jones v. State, 268 Ga. App. 101, 601 S.E.2d 469 (2004).

Motion to withdraw guilty plea could not be construed as habeas corpus petition as the motion was filed in the county in which the defendant was convicted, rather than against the warden in the county in which the defendant was incarcerated. Curry v. State, 274 Ga. App. 19, 616 S.E.2d 225 (2005).

Trial court properly denied the defendant's motion and amended motion to withdraw a guilty plea as the entry of the plea waived any right to assert a speedy trial issue on appeal. Moreover, given the fact that the defendant was represented by counsel at the time both pro se speedy trial motions were filed, and absent evidence that counsel filed or adopted the motions, no viable demand for a speedy trial existed in the record. Wallace v. State, 288 Ga. App. 480, 654 S.E.2d 442 (2007).

Sentence proper when Alford plea withdrawn. — Defendant's claim that

Withdrawal of Pleas (Cont'd)

the defendant was improperly sentenced on additional counts because those counts were to be dismissed as part of a negotiated plea was disingenuous. While the defendant initially entered an Alford plea to two counts in exchange for the state's agreement to drop the other charges, it was clear that the defendant changed the defendant's mind; while looking for the original indictment at trial, the parties mentioned that the last time the parties saw the indictment was when the defendant entered the plea, and no one said that the defendant wanted to continue with that plea, and the defendant admitted at the first hearing on the defendant's motion for a new trial that the defendant withdrew the guilty plea. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Failure to advise of effect on immigration status was not basis to set aside plea. — Denial of the defendant's motion for an out-of-time appeal was proper because the defendant failed to show that the defendant's guilty plea was not knowingly and voluntarily entered, and, inter alia, the record showed that the defendant understood the rights the defendant was waiving and the possible consequences of the plea; the effect of the plea on the defendant's immigration status was a "collateral consequence" of the plea, and any failure to advise the defendant of this effect pursuant to O.C.G.A. § 17-7-93(c) was not a basis to set aside the plea. The state was not required to show that Ga. Unif. Super. Ct. R. 33.8 was recited to the letter to rebut an attack on a guilty plea. Smith v. State, 298 Ga. App. 458, 680 S.E.2d 516 (2009), aff'd, 287 Ga. 391, 697 S.E.2d 177 (2010).

Although a trial court did not comply with O.C.G.A. § 17-7-93(c) and Ga. Unif. Super. Ct. R. 33.8(C)(2) when the court failed to advise a resident alien that the alien's guilty but mentally ill plea could have an impact on immigration status, the immigration consequences were collateral consequences, the asserted fact that the defendant was not a citizen was not apparent from the record, there was no record evidence that the defendant was not aware of the potential immigration consequences from some other source and, therefore, the defendant did not show resulting harm or manifest injustice. Smith v. State, 287 Ga. 391, 697 S.E.2d 177 (2010), overruled on other grounds by Collier v. State, 834 S.E.2d 769, 2019 Ga. LEXIS 708 (Ga. 2019).

Evidence of withdrawn guilty plea improperly admitted. — Defendant testified to having no knowledge of a syringe or methamphetamine found by police; the codefendant's counsel impeached the defendant on cross-examination with evidence of the defendant's withdrawn guilty plea to possession of methamphetamine. As evidence of a withdrawn guilty plea was inadmissible under O.C.G.A. § 17-7-93(b), and it could not be said that this evidence did not affect the verdict, the defendant was entitled to a new trial. Bertholf v. State, 298 Ga. App. 612, 680 S.E.2d 652 (2009).

Merger waived when defendant voluntarily pled guilty. — Trial court did not err in denying the defendant's request to merge the defendant's convictions for statutory rape and fornication for the purpose of sentencing because the defendant waived the issue of whether the offenses should have been merged when the defendant knowingly and voluntarily pled guilty to each of the crimes. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 556 et seq., 570 et seq., 622 et seq., 664 et seq.

Am. Jur. Proof of Facts. — Government's Breach of Plea Bargain, 27 POF2d 133.

Am. Jur. Trials. — Withdrawal of Guilty Plea, 42 Am. Jur. Trials 519.

C.J.S. — 16 C.J.S., Constitutional Law, § 203. 16C C.J.S., Constitutional Law, § 1644 et seq. 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 222 et seq., 230 et seq., 253 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 710.

ALR. — Pleas of nolo contendere or guilty in capital case, 6 A.L.R. 694.

Right to withdraw plea of guilty, 20 A.L.R. 1445; 66 A.L.R. 628.

Writ of error coram nobis as remedy where plea of guilty is entered under fraud, duress, or mistake, 30 A.L.R. 686.

Duty of court to accept tendered plea of guilt of lesser degree of crime where prosecuting officer has agreed to recommend acceptance of such plea if defendant will turn state's evidence, 96 A.L.R. 1064.

Plea of guilty as affected by objection that it was not made by defendant personally, 110 A.L.R. 1300.

Plea of guilty without advice of counsel, 149 A.L.R. 1403.

Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 A.L.R.2d 683.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes, 43 A.L.R.3d 281.

Right to withdraw guilty plea in state criminal proceeding where court refuses to grant concession contemplated by plea bargain, 66 A.L.R.3d 902.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining, 8 A.L.R.4th 660.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 A.L.R.4th 8.

Judge's participation in plea bargaining negotiations as rendering accused's guilty plea involuntary, 10 A.L.R.4th 689.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 A.L.R.4th 61.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea, 23 A.L.R.4th 251.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment, 31 A.L.R.4th 504.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness, 58 A.L.R.4th 1229.

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 87 A.L.R.4th 384.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

Validity, construction, and application of state criminal disenfranchisement provisions, 10 A.L.R.6th 265.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant — State cases, 11 A.L.R.6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea, 12 A.L.R.6th 389.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Particular circumstances as constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel, 13 A.L.R.6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Newly discovered or available evidence, and possible defense, 14 A.L.R.6th 517.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Sentencing and punishment issues; ineffective assistance of counsel, 15 A.L.R.6th 173.

Court's duty to advise sex offender as to sex offender registration consequences or

other restrictions arising from plea of guilty, or to determine that offender is advised thereof, 41 A.L.R.6th 141.

Am. Jur. Trials. — Withdrawal of Guilty Plea, 42 Am. Jur. Trials 519.

17-7-94. Recordation and effect of plea of "not guilty" or of standing mute.

If the person accused of committing a crime, upon being arraigned, pleads "not guilty" or stands mute, the clerk shall immediately record upon the minutes of the court the plea of "not guilty," together with the arraignment; and the arraignment and plea shall constitute the issue between the accused and the state.

History. — Laws 1833, Cobb's 1851 Digest, p. 834; Code 1863, § 4525; Code 1868, § 4544; Code 1873, § 4638; Code 1882, § 4638; Penal Code 1895, § 947; Penal Code 1910, § 972; Code 1933, § 27-1405.

Law reviews. — For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957).

JUDICIAL DECISIONS

Entry of Alford plea by juvenile. — Juvenile court erred by denying a juvenile's request to enter an Alford plea since the Georgia General Assembly did not expressly prohibit the entry of Alford pleas in juvenile court, and the juvenile court was required to construe O.C.G.A. § 15-11-580 liberally to ensure the juvenile's best interests. In the Interest of B. C., 333 Ga. App. 763, 777 S.E.2d 52 (2015).

Plea of not guilty forms issue to be tried by jury. — Under this section, the defendant's plea of not guilty to the first indictment forms an issue to be tried by the jury, and it is the duty of the state to try the defendant upon that issue alone without in effect announcing to the prospective jurors that there also exist other indictments against this defendant for other crimes. Sides v. State, 213 Ga. 482, 99 S.E.2d 884 (1957).

Defendant's refusal to plead. — Felony murder defendant asserted that the trial court erred in directing the clerk of court to enter a plea of not guilty for the defendant when the defendant declined to enter a plea, stating instead, "I want to plead mute." However, under O.C.G.A. § 17-7-94, if a defendant stands mute, the clerk is required to enter a plea of not guilty. Johnson v. State, 300 Ga. 252, 794 S.E.2d 60 (2016).

Charges to jury that indictment and plea form the issues. — Charge of the court to the jury that: "neither the indictment nor the plea of not guilty is evidence, and is not to be considered by you as evidence," and that: "the indictment and plea of not guilty form the issues which you, the ladies and gentlemen of the jury, are to determine," is a correct charge of the law. Zilinmon v. State, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

Identification of defendant. — Since the defendant appeared at arraignment and entered a plea of not guilty, but had not raised the objection that the defendant was not the person named in the indictment, it was reasonable for the jury to infer that the defendant was the person so named. Robinson v. State, 231 Ga. App. 368, 498 S.E.2d 579 (1998).

Charge to jury regarding fact that defendant stood mute at defendant's arraignment. — Charge to the jury that "to this indictment the defendant has stood mute, which has the same effect as entering a plea of not guilty," when counsel stated that the accused stood mute and waived a jury, and the solicitor (now district attorney) objected to waiving a jury,

is not erroneous on grounds that the court failed to inform the jury that the accused also sought to waive the jury, and that the charge could cause the jury to believe that the accused admitted guilt by not pleading not guilty. Bloodworth v. State, 216 Ga. 572, 118 S.E.2d 374 (1961).

Clerk's recordation controls as to when issue is joined. — It is the clerk's recordation on the minutes which controls as to when issue is joined for purposes of determining whether there has been a denial of the right to a speedy trial. State v. Fly, 193 Ga. App. 190, 387 S.E.2d 347 (1989).

By formally denying the charge, the defendant's plea formed the issue of whether the defendant was or was not guilty of the charge. The prosecutor's initial failure to record it and later refusal to do so did not avoid the issue being joined de jure. State v. Fly, 193 Ga. App. 190, 387 S.E.2d 347 (1989).

Cited in Johnson v. State, 7 Ga. App. 48, 66 S.E. 148 (1909); Kincade v. State, 14 Ga. App. 544, 81 S.E. 910 (1914); Carter v. State, 204 Ga. 242, 49 S.E.2d 492 (1948); McBride v. State, 119 Ga. App. 418, 167 S.E.2d 374 (1969); Brown v. State, 235 Ga. 353, 219 S.E.2d 419 (1975); Mahar v. State, 137 Ga. App. 116, 223 S.E.2d 204 (1975); Jones v. Lee, 244 Ga. 837, 262 S.E.2d 130 (1979); Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (1998); Gregg v. State, 253 Ga. App. 243, 558 S.E.2d 729 (2001); Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 574, 584.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 215 et seq., 250 et seq.

ALR. — Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695.

17-7-95. Plea of nolo contendere in noncapital felony cases; imposition of sentence; use of plea in other proceedings; use of plea to effect civil disqualifications; imposition of sentence upon plea deemed jeopardy.

(a) The defendant in all criminal cases other than capital felonies in any court of this state, whether the offense charged is a felony or a misdemeanor, may, with the consent and approval of the judge of the court, enter a plea of nolo contendere instead of a plea of guilty or not guilty.

(b) Should the judge allow a plea of nolo contendere to be entered, he shall thereupon be authorized to impose such sentence as may be authorized by law as to the offense charged.

(c) Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose; and the plea shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of this state. The plea

shall be deemed and held to put the defendant in jeopardy within the meaning of Article I, Section I, Paragraph XVIII of the Constitution of this state after sentence has been imposed.

History. — Ga. L. 1946, p. 142, §§ 1-3; Ga. L. 1982, p. 3, § 17; Ga. L. 1983, p. 3, § 51.

Cross references. — Record of proceedings, Uniform State Court Rules, Rule 33.11.

U.S. Code. — Plea nolo contendere, Federal Rules of Criminal Procedure, Rule 11(b).

Law reviews. — For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957). For article, "The Effect in Georgia of a Plea of Nolo Contendere Entered in a Georgia Court," see 13 Ga. L. Rev. 723 (1979). For survey article on recent developments in Georgia administrative law, see 34 Mercer L. Rev. 393 (1982). For annual survey of evidence law, see 56 Mercer L. Rev. 235 (2004). For article, "The Misunderstood Alford Plea: A Primer," see 19 Ga. St. B.J. 8 (Aug. 2013).

JUDICIAL DECISIONS

Purpose of plea of nolo contendere. — O.C.G.A. § 17-7-95 was designed to prevent the state from introducing a nolo contendere plea as evidence of a prior similar crime. Corbitt v. State, 190 Ga. App. 509, 379 S.E.2d 535 (1989).

Origin. — Privilege of entering a plea of nolo contendere is statutory in origin, and it was designed to cover situations when the side effects of a plea of guilty, in addition to the penalties provided by law, would be too harsh. Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Legislative intent. — General Assembly intended for the plea of nolo contendere to stand upon the same footing as a plea of guilty in all respects, except when otherwise specially provided, to constitute the remedy of the evil of the old law when only a plea of guilty or not guilty was available, and intended that the right to withdraw the plea be accorded any time before pronouncement of judgment, as provided in former Code 1933, § 27-1404 (see O.C.G.A. § 17-7-93), as to a plea of guilty. Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947).

Pleas of nolo contendere in this state are entirely of statutory origin. — Prior to Ga. L. 1946, p. 142, no such procedure was embraced in the law, although pleas of nolo contendere had been in use in the federal district courts. Nelson v. State, 87 Ga. App. 644, 75 S.E.2d 39 (1953).

Licensing laws excepted from prohibited use. — Words "except as otherwise provided by law" in O.C.G.A. § 17-7-95(c) apply to except both state laws and local ordinances dealing with professional licensing from the provisions limiting the use of a nolo contendere plea; thus, a taxi driver's license could be revoked based on the driver's plea of nolo contendere to a charge of driving under the influence brought under city ordinances. City of Atlanta v. Okonkwo, 216 Ga. App. 821, 456 S.E.2d 58 (1995).

Construction with § 40-5-58. — Effect of O.C.G.A. § 40-5-58(d) is to create an exception to the rule of O.C.G.A. § 17-7-95 concerning the consequences of a plea of nolo contendere. O.C.G.A. § 40-5-58(d) does not run afoul of the prohibition in Ga. Const. 1976, Art. III, Sec. VII, Para. IV (Ga. Const. 1983, Art. III, Sec. V, Para. III) against the passage of laws referring to more than one subject matter or containing matter different from what is expressed in the title. Smith v. State, 248 Ga. 828, 286 S.E.2d 709 (1982).

O.C.G.A. § 40-5-58(d) does not constitute an amendment to or repeal of O.C.G.A. § 17-7-95 within the meaning of Ga. Const. 1976, Art. III, Sec. VII, Para. XII (Ga. Const. 1983, Art. III, Sec. V, Para. IV). Smith v. State, 248 Ga. 828, 286 S.E.2d 709 (1982).

Construction with § 40-5-63. — Ga. L. 1946, p. 142, §§ 1-3 (see O.C.G.A. § 17-7-95) refers generally to the effects of pleas of nolo contendere as compared with

pleas of guilty and makes no reference to the suspension of licenses. Since former Code 1933, § 6813-312 (see O.C.G.A. § 40-5-63(a)(2)) referred not to crimes generally, but only to the specific offenses of driving under the influence of alcohol or drugs, the two statutes have concurrent efficacy. Howe v. Cofer, 144 Ga. App. 589, 241 S.E.2d 472 (1978).

Plea of nolo contendere defined. — Plea of nolo contendere is defined as an assertion by the defendant that the defendant does not desire to contest the truth of the charges against the defendant. Thus, it is not a plea of not guilty, nor is it a plea of guilty. Rather, it lies approximately midway between the two extremes. Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Plea of nolo contendere constitutes a plea of guilty except that the plea cannot work any civil disqualification on the defendant. Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Conditional pleas not accepted. — Because the conditional plea procedures established in Mims v. State, 201 Ga. App. 277, 410 S.E.2d 824, (1991), are disapproved, pleas in which the accused attempts to condition upon the preservation of the rights to raise non-jurisdictional errors by the trial court will not be considered by the appeals court. Hooten v. State, 212 Ga. App. 770, 442 S.E.2d 836 (1994).

When plea may be entered. — Subject to the approval and consent of the judge of the court, a plea of nolo contendere may be entered in any criminal case in any court of the state, except in capital felony cases. Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Plea admitted as harmless error. — Despite the prohibition in O.C.G.A. § 17-7-95(c) of the admission of a nolo contendere plea as evidence of a prior similar crime, given that evidence of five other similar drug transactions was properly submitted to the jury, the defendant's plea was admissible as not having contributed to the judgment of conviction. Parrott v. State, 206 Ga. App. 829, 427 S.E.2d 276 (1993).

Entering a plea of nolo contendere is a privilege rather than a right. Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Privilege of entering plea is in court's discretion. — Privilege of a defendant to enter a plea of nolo contendere is within the discretion of the trial court. Bennett v. State, 153 Ga. App. 21, 264 S.E.2d 516 (1980).

Right to petition. — Trial court's refusal to consider the defendant's petition to enter a plea of nolo contendere based on a blanket policy foreclosing any consideration of the propriety of the plea in all cases was an abdication by the court of the court's judicial responsibility. Furthermore, if the right to tender a petition to enter a plea of nolo contendere is to be preserved on appeal, the record must reflect an objection and ruling thereon to avoid waiver. Vanegas v. State, 249 Ga. App. 76, 547 S.E.2d 718 (2001).

Defendant need not be informed of all possible consequences of plea. — While it is unquestioned that a guilty plea or a nolo contendere plea must be knowingly and voluntarily made after proper advice and with a full understanding of the consequences, the trial court is not required to inform a defendant of all the possible collateral consequences of the defendant's plea including those at the hands of a different sovereign. Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

Daughter's recantation of accusations. — Defendant's daughter's recantation of the accusations made against the defendant could not serve as a basis for a claim that there was clear and convincing proof of the defendant's innocence at the time the court accepted an Alford plea as such was known to the defendant before the guilty plea was entered. Schlau v. State, 282 Ga. App. 460, 638 S.E.2d 895 (2006), cert. denied, No. S07C0424, 2007 Ga. LEXIS 147 (Ga. 2007).

Father's nolo contendere plea to family violence battery inadmissible in custody proceeding. — In a child custody modification pursuant to O.C.G.A. § 19-9-3(a)(2), the trial court erred in considering evidence of the father's nolo contendere plea of family violence battery against the child; the plea was not admissible pursuant to O.C.G.A. § 17-7-95(c), and the conduct reflected in the plea occurred prior to the parties' most

recent custody order. Wilson v. Perkins, 344 Ga. App. 869, 811 S.E.2d 518 (2018).

Good faith reliance on advice of counsel. — Person cannot avoid the legal consequences of a plea even if based on good faith reliance on the advice of counsel. Davis v. State, 151 Ga. App. 736, 261 S.E.2d 468 (1979).

Defendant who has entered a plea of nolo contendere may withdraw the plea after an oral announcement of sentence but before sentence is properly pronounced, i.e., in writing as a matter of right. Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947).

Authorized sentence may be imposed upon acceptance of plea. — When the judge accepts the plea of nolo contendere, the judge is empowered to impose whatever sentence is provided by law for the crime, just as if the defendant has been convicted by a jury or entered a plea of guilty. Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Civil disqualification may be made a condition of a suspended sentence under a plea of nolo contendere. Falkenhainer v. State, 122 Ga. App. 478, 177 S.E.2d 380 (1970).

Validity of sentence imposed on basis of unauthorized nolo contendere plea to capital felony. — See Fortson v. Hopper, 242 Ga. 81, 247 S.E.2d 875 (1978).

Double jeopardy bar when indictment not stating specific date or transaction. — When a case belongs to the class of cases, such as possession of liquor on which taxes have not been paid, when the state by the generality of the indictment need not be confined to proof of any specific date or transaction within the period of limitation, the result is that a plea of nolo contendere for a prior particular crime will usually operate as a bar for any such offense committed within the period of limitation previously to the second indictment, since to hold otherwise would twice place the defendant in jeopardy. Key v. State, 83 Ga. App. 839, 65 S.E.2d 278 (1951).

Reinstatement of guilty plea by judge after return from absence. — Sentencing judge did not err in vacating and setting aside allowance of change of plea of guilty and acceptance of a nolo contendere plea by judge acting in judge's absence and in reinstating plea of guilty. Hall v. State, 163 Ga. App. 59, 293 S.E.2d 874 (1982).

Disqualification from public office. — When defendant pled nolo contendere in Florida to a felony, which was a felony under Georgia law, the defendant was exempted from disqualification to hold public office by O.C.G.A. § 17-7-95(c) as the nolo plea could not be deemed a guilty plea for the purposes of effecting a civil disqualification of defendant to hold public office. Hardin v. Brookins, 275 Ga. 477, 569 S.E.2d 511 (2002).

In a case in which the defendant appealed a conviction for false swearing, in violation of O.C.G.A. § 16-10-71(a), challenging the sufficiency of the evidence, the state failed to prove that the defendant had the requisite criminal intent to support the conviction when the defendant signed a declarations of candidacy for county commissioner as set forth in O.C.G.A. §§ 21-2-132 and 21-2-153. Pursuant to O.C.G.A. § 17-7-95(c), a judgment imposing a sentence following a plea of nolo contendere was considered a conviction for some purposes; however, such a conviction did not disqualify the defendant from holding public office or otherwise deprive the defendant of any civil or political rights, and there was no evidence that the defendant intended to deceive the election board or the voters as the defendant believed that the 1986 nolo contendere conviction to a charge of aggravated assault was generally known in the county. Spillers v. State, 299 Ga. App. 854, 683 S.E.2d 903 (2009).

Judge who enters plea of nolo contendere to crime involving moral turpitude is guilty of conduct which brings the judicial office into disrepute. This is so even though the question of guilt is not formally adjudicated by such a plea. In re Judge No. 491, 249 Ga. 30, 287 S.E.2d 2 (1982).

Judicial Qualifications Commission may investigate judge's nolo contendere plea. — Consideration by the Judicial Qualifications Commission of a judge's nolo contendere plea to a felony involving moral turpitude, pursuant to

Ga. Const. 1976, Art. VI, Sec. XIII, Para. III (Ga. Const. 1983, Art. VI, Sec. VII, Para. VII), is not a denial of equal protection and due process to the defendant under either state or federal Constitutions. In re Judge No. 491, 249 Ga. 30, 287 S.E.2d 2 (1982).

Admission of conviction on plea as impeachment evidence. — Trial court, in an action for conversion, was authorized to admit a properly certified copy of the plaintiff's shoplifting conviction on a plea of nolo contendere for consideration by the jury as impeachment evidence, subject to the plaintiff's right to explain the circumstances surrounding the conviction. Tilley v. Page, 181 Ga. App. 98, 351 S.E.2d 464 (1986).

On appeal from a conviction for driving under the influence of alcohol, the state's use of a previous conviction entered on a nolo contendere plea entitled the appellant to a new trial because the nolo contendere plea was not admissible for impeachment under previous exceptions provided by law. Rocco v. State, 191 Ga. App. 655, 382 S.E.2d 391 (1989).

It would violate rules of evidentiary law, and contravene the purpose of O.C.G.A. § 17-7-95(c), to allow the prosecution to elicit testimony from a criminal defendant on cross-examination and then impeach such testimony through use of a prior criminal conviction entered on a plea of nolo contendere. State v. Rocco, 259 Ga. 463, 384 S.E.2d 183 (1989); Waters v. State, 210 Ga. App. 305, 436 S.E.2d 44 (1993).

State may use the conviction of the defendant entered on a nolo contendere plea to disprove the testimony of a defense witness that no charges had been brought against the defendant as a result of the crime which was the subject of the plea. In such case, it is the fact that the nolo contendere plea had been entered, and not the defendant's guilt of the crime charged, that is used to impeach the witness' testimony. State v. Rocco, 259 Ga. 463, 384 S.E.2d 183 (1989).

Simple battery, a misdemeanor, has been recognized to be a crime not involving moral turpitude, and a plea of nolo contendere to a charge of simple battery is admissible for impeachment of the defendant in the subsequent trial of the civil suit stemming from the battery. Jabaley v. Mitchell, 201 Ga. App. 477, 411 S.E.2d 545 (1991).

Trial court properly did not permit the defendant to impeach a crime scene investigator's testimony by inquiring into the fact that the officer pled nolo contendere to a misdemeanor criminal trespass charge because: (1) defense counsel failed to lay a proper ground for the conviction's admission as no certified copy of a conviction was tendered; (2) criminal trespass is a misdemeanor and not a crime of moral turpitude; as such, it cannot be used for impeachment purposes; and (3) a plea of nolo contendere cannot be used against a defendant in any other court as an admission of guilt or for any purpose. Armour v. State, 265 Ga. App. 569, 594 S.E.2d 765 (2004).

Allowing the use of a plea of nolo contendere for impeachment purposes is in direct conflict with O.C.G.A. § 17-7-95(c). Pitmon v. State, 265 Ga. App. 655, 595 S.E.2d 360 (2004).

Defendant was properly prevented from impeaching the credibility of the victim's friend as a witness based on the witness's nolo contendere plea to misdemeanor shoplifting because when the legislature enacted O.C.G.A. § 17-7-95(c), which prohibited the use of such a plea in any other court for any purpose, the statute did not carve out an exception for impeachment. Hooper v. State, 284 Ga. 824, 672 S.E.2d 638 (2009).

Nolo contendere plea could not be used as proof of prior conviction under recidivist statute. — Trial court erred in considering the defendant's nolo contendere plea as proof of a prior conviction under the recidivist statute because the plain language of O.C.G.A. §§ 17-7-95 and 17-10-7(c) indicated that such a plea could not be used against the defendant in sentencing the defendant as a recidivist. Miller v. State, 353 Ga. App. 518, 838 S.E.2d 602 (2020).

Evidence of similar crime resulting in nolo contendere plea. — State may use as a similar transaction, evidence of an independent crime committed by the accused that resulted in a plea of nolo contendere, provided that no evidence of

the actual nolo plea is introduced. Proulx v. State, 196 Ga. App. 303, 395 S.E.2d 668 (1990); Hansen v. State, 205 Ga. App. 604, 423 S.E.2d 273, cert. denied, 205 Ga. App. 900, 423 S.E.2d 273 (1992).

Evidence of a prior driving under the influence offense that culminated in a plea of nolo contendere was not rendered inadmissible under O.C.G.A. § 17-7-95(c) because the state made no reference to the plea in presenting evidence of the offense as a similar transaction. Harris v. State, 210 Ga. App. 366, 436 S.E.2d 231 (1993).

Trial court did not err in admitting into evidence a no contest plea and in "making reference" to the plea with regard to the similar transaction evidence as the defendant's failure to object to the introduction of the evidence precluded review of the issue on appeal; further, the plea was admissible to show a conviction for purposes of the defendant's alleged failure to register as a sex offender under former O.C.G.A. § 42-1-12 and the jury was permitted to consider the plea as similar transaction evidence. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Admission of no contest plea not plain error. — Pretermitting whether the second defendant showed that the admission of the evidence of the second defendant's no contest plea to disrupting a public school and affray was obviously erroneous, the second defendant did not even allege that the outcome of the trial was likely affected by its admission, especially considering that other, independent evidence was presented that the second defendant was involved in fighting at the second defendant's public school. Anthony v. State, 303 Ga. 399, 811 S.E.2d 399 (2018).

Nolo contendere plea not admissible to establish probation violation. — Under the plain and unambiguous language of O.C.G.A. § 17-7-95(c), a nolo contendere plea cannot be used to establish a probation violation. Bolden v. State, 275 Ga. 180, 563 S.E.2d 858 (2002).

"Alford plea" not a plea of nolo contendere. — Defendant's plea of guilty under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), was not a plea of nolo contendere because the plea required a court determination that there was a factual basis therefor and such plea could be used as evidence of a similar act. Dixon v. State, 240 Ga. App. 644, 524 S.E.2d 734 (1999).

Sentence proper when Alford plea withdrawn. — Defendant's claim that the defendant was improperly sentenced on additional counts because those counts were to be dismissed as part of a negotiated plea was disingenuous. While defendant initially entered an Alford plea to two counts in exchange for the state's agreement to drop the other charges, it was clear that the defendant changed the defendant's mind; while looking for the original indictment at trial, the parties mentioned that the last time the parties saw the indictment was when the defendant entered the plea, and no one said that the defendant wanted to continue with that plea, and the defendant admitted at the first hearing on the defendant's motion for a new trial that the defendant withdrew the guilty plea. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Counsel not ineffective for failure to anticipate change in law. — Because defense counsel could not have been held to a duty to anticipate changes in the law regarding the use of a nolo plea to impeach a witness, the defendant's allegations of ineffective assistance of counsel lacked merit. Martin v. State, 281 Ga. 778, 642 S.E.2d 837 (2007).

Punitive damages. — O.C.G.A. § 17-7-95 prohibits use of a prior plea of nolo contendere as evidence relevant to the issue of punitive damages. Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 (1994).

In an action for injuries arising from an automobile accident, after the defendant pled guilty to driving under the influence of alcohol, evidence that the defendant twice previously committed the offense of DUI was admissible for the purpose of determining punitive damages as long as there was no reference to prior pleas of nolo contendere, or to the disposition of DUI charges resulting from such pleas. Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 (1994).

Cited in Smith v. State, 76 Ga. App. 847, 47 S.E.2d 518 (1948); Connelly v. State, 128 Ga. App. 265, 196 S.E.2d 411 (1973); Cook v. State, 242 Ga. 657, 251 S.E.2d 230 (1978); Beal v. Braunecker, 185 Ga. App. 429, 364 S.E.2d 308 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Plea does not forfeit qualification for license to carry a pistol. — Plea of nolo contendere to a felony is not deemed a plea of guilty to the felony so as to prevent the individual from qualifying for a license to carry a pistol. 1974 Op. Att'y Gen. No. U74-67.

Plea does not forfeit right to possess firearm. — Plea of nolo contendere in a misdemeanor crime of domestic violence does not take away the right to possess a firearm under the Gun Control Act of 1968, 18 U.S.C. § 921 et seq. 1998 Op. Att'y Gen. No. 98-2.

Consideration of the plea by the Board of Regents in appointment to teaching position. — Since a plea of nolo contendere may not be raised in another proceeding as a basis for any civil disqualification, the Board of Regents of the University System of Georgia is not legally prohibited by the plea from appointing an individual to a teaching position. 1963-65 Op. Att'y Gen. p. 566.

Conviction resulting from a nolo contendere plea cannot be used to impose any disability including disqualification from voting, holding public office, and jury service. 1983 Op. Att'y Gen. No. 83-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 640 et seq., 649 et seq.

C.J.S. — 16B C.J.S., Constitutional Law, § 1350. 22 C.J.S., Criminal Procedure and Rights of the Accused, §§ 237 et seq., 252. 23 C.J.S., Criminal Procedure and Rights of the Accused, § 1241. 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2298.

ALR. — Plea of nolo contendere or nonvult contendere, 152 A.L.R. 253; 89 A.L.R.2d 540.

Duty of court, upon plea of guilty or nolo contendere to offense involving several degrees, to hear evidence to determine degree, 34 A.L.R.2d 919.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 A.L.R.4th 8.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 11 A.L.R.5th 52.

17-7-96. Prosecuting officer to enter arraignment and plea on indictment or accusation.

The arraignment and plea of the person accused of committing a crime shall be entered on the indictment or accusation by the prosecuting attorney or other person acting as prosecuting officer on the part of the state.

History. — Laws 1833, Cobb's 1851 Digest, p. 835; Code 1863, § 4528; Code 1868, § 4547; Code 1873, § 4641; Code 1882, § 4641; Penal Code 1895, § 949;

Penal Code 1910, § 974; Code 1933, § 27-1407.

U.S. Code. — Arraignment and pleas, Federal Rules of Criminal Procedure, Rules 10 and 11.

JUDICIAL DECISIONS

District attorney is ordinarily the prosecuting officer. — In criminal proceedings initiated by indictment by the grand jury, the solicitor general (now district attorney) is ordinarily the prosecuting officer for the state. Curtis v. State, 99 Ga. App. 732, 109 S.E.2d 868 (1959).

Signature of the defendant is not required on the plea entered on the indictment because the signature by the solicitor general (now district attorney) is sufficient. Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970).

Signature of the defendant is not required on the plea entered on the indictment. When the indictment showed clearly that the district attorney entered and signed this statement: "The Defendant Vaughn Baker waives being formally arraigned and pleads not guilty," this satisfied the requirements of the statutes and the rights of the defendant at trial. Baker v. State, 202 Ga. App. 892, 416 S.E.2d 295, cert. denied, 202 Ga. App. 905, 416 S.E.2d 295 (1992).

Entries made when arraignment waived. — When arraignment is waived, the solicitor general (now district attorney) may enter this fact and the plea of not guilty on the indictment and an issue is made for trial. No further pleading need be done by the defendant. Tarver v. State, 95 Ga. 222, 21 S.E. 381 (1894).

Effect of entry when arraignment and plea have not actually taken place. — When the solicitor general (now district attorney) enters on the indictment arraignment and plea when by inadvertence there has been neither arraignment nor plea, and as a result there is really no issue before the court, the solicitor general (now district attorney) may enter a nolle prosequi at any time before the introduction of evidence. In such a case, there being no issue, the defendant is not entitled to a verdict of not guilty. Bryans v. State, 34 Ga. 323 (1866).

Cited in Goforth v. Wigley, 178 Ga. App. 558, 343 S.E.2d 788 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 572.

17-7-97. Proceedings upon failure of clerk to record arraignment and plea; effect of proceedings.

If the clerk of the court shall fail or neglect to record the arraignment and plea of the person accused of committing a crime at the time the arraignment and plea are made, the recordation may be done at any time afterward by order of the court; and this shall cure the error or omission of the clerk.

History. — Laws 1833, Cobb's 1851 Digest, p. 835; Code 1863, § 4527; Code 1868, § 4546; Code 1873, § 4640; Code 1882, § 4640; Penal Code 1895, § 948; Penal Code 1910, § 973; Code 1933, § 27-1406.

Cross references. — Effect of mistake or misprision of clerk or other ministerial officer generally, § 17-1-3.

JUDICIAL DECISIONS

Waiver for failure to timely call court's attention to defects. — Law of this state is well settled that a defendant may waive arraignment and plea by failure to call the attention of the court to this defect in the proceedings at the proper time, and when it does not appear that the defendant made any mention of the fact until after the verdict the defendant is conclusively presumed to have done so. Sellers v. State, 82 Ga. App. 761, 62 S.E.2d 395 (1950).

Prima facie proof of guilty plea. — When there is an entry on the accusation of waiver of arraignment and plea of guilty, signed by the acting solicitor (now district attorney), such record entry furnishes prima facie evidence of a plea of guilty by the defendant. Jackson v. Lowry, 171 Ga. 349, 155 S.E. 466 (1930).

Presumption that guilty plea has been made and entered. — In the absence of anything to the contrary, it will be presumed that the accused orally plead guilty, and that the clerk of the court entered the plea of guilty upon the minutes of the court as required by the Code. Jackson v. Lowry, 171 Ga. 349, 155 S.E. 466 (1930).

Cited in Johnson v. State, 7 Ga. App. 48, 66 S.E. 148 (1909); Thigpen v. Ault, 231 Ga. 796, 204 S.E.2d 147 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 570 et seq.

ARTICLE 6

DEMURRERS, MOTIONS, AND SPECIAL PLEAS AND EXCEPTIONS

RESEARCH REFERENCES

Am. Jur. Trials. — Incompetency and Commitment Proceedings, 8 Am. Jur. Trials 483.

Representing the Mentally Ill: Civil Commitment Proceedings, 26 Am. Jur. Trials 97.

PART 1

GENERAL PROVISIONS

17-7-110. Time for filing pretrial motions.

All pretrial motions, including demurrers and special pleas, shall be filed within ten days after the date of arraignment, unless the time for filing is extended by the court.

History. — Code 1981, § 17-7-110, enacted by Ga. L. 2003, p. 154, § 2.

Editor's notes. — This Code section formerly pertained to copy of indictment or accusation to be furnished. The former Code section was based on Laws 1833, Cobb's 1851 Digest, p. 834; Code 1863, §§ 4522, 4523; Code 1868, §§ 4541, 4542; Code 1873, §§ 4634, 4635; Code 1882, §§ 4634, 4635; Penal Code 1895, § 945; Penal Code 1910, § 970; Code 1933, § 27-1403; Ga. L. 1966, p. 430, § 3; Ga. L.

1983, p. 503, § 2 and was repealed by Ga. L. 1994, p. 1895, § 1, effective January 1, 1995.

Law reviews. — For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

JUDICIAL DECISIONS

Construction of ten day period. — While there may be a constitutional or other right to make a certain motion after the time period set forth in O.C.G.A. § 17-7-110, that does not mean ruling that a motion filed within the time period set forth in § 17-7-110 is untimely; under the plain language of the statute, any pretrial motion will be considered timely if made before ten days after the date of the arraignment, and some motions may be cognizable after that time, but determining the timeliness of such must rest upon other authority. State v. Dempsey, 290 Ga. 763, 727 S.E.2d 670 (2012).

O.C.G.A. § 17-7-110 provides that all pretrial motions, including demurrers and special pleas, shall be filed within ten days after the date of arraignment, unless the time for filing is extended by the court. The failure to file a timely special demurrer seeking additional information constitutes a waiver of the right to be tried on a perfect indictment. Strickland v. State, 349 Ga. App. 673, 824 S.E.2d 555 (2019).

Motion untimely and no extension sought. — Trial court did not err in refusing to consider the defendant's motion to suppress because the motion was untimely, the defendant failed to hire private counsel as was indicated and, even after court-appointed counsel was provided, the defendant failed to seek leave to file a motion for an extension after the ten day filing period. Taylor v. State, 326 Ga. App. 27, 755 S.E.2d 839 (2014).

Trial court did not err in refusing to hear the defendant's motion to suppress on the ground that the motion was untimely because the defendant failed to move for and obtain an extension of time; the defendant's proffered amendment of the motion to suppress, which was tendered more than one month after the defendant waived arraignment, was untimely; and, although the defendant had the benefit of testimony from the state's witnesses regarding the issues in the case at the probation revocation hearing in July 2010, the defendant failed to take timely advantage of the opportunity to challenge the traffic stop. Gonzalez v. State, 334 Ga. App. 706, 780 S.E.2d 383 (2015).

Failure to file motion to suppress to challenge evidence. — Because the defendant did not file a timely motion to suppress any physical evidence in the case, the defendant waived any right to claim that the underlying search which produced the physical evidence was unconstitutional; thus, the defendant was not entitled to exclusion of testimony describing the physical evidence on the basis that the testimony was the fruit of an unconstitutional search. Riley v. State, No. A20A1376, 2020 Ga. App. LEXIS 431 (July 21, 2020).

Motion to quash indictment properly denied. — Defendant's motion to quash an indictment and a subsequent motion to quash a failure to register as a sex offender count under former O.C.G.A. § 42-1-12 were properly denied as whether the rule on the timing of a motion to quash had been changed by O.C.G.A. § 17-7-110 was not reached because the trial court also properly denied the motion on the merits; the defendant waived the right to challenge the form of the failure to register count of the indictment because the defendant's motion was not made before entry of a not guilty plea and even if § 17-7-110 applied to the filing of the defendant's motion, it was untimely under that statute. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Motion to quash indictment should have been granted. — Trial court erred in denying the defendant's motion to quash an indictment because the motion was filed before the statutory deadline contained in O.C.G.A. § 17-7-110; no arraignment occurred when the defendant

filed the motion. State v. Dempsey, 290 Ga. 763, 727 S.E.2d 670 (2012).

Oral motion to dismiss indictment properly denied. — Trial court properly denied the defendant's oral motion in arrest of judgment or motion to dismiss or general demurrer, made after the jury was sworn but before the trial began, as while the nolle pros of the coindictee could have been drawn more explicitly, considering it in context and in light of a subsequent indictment, which only contained one count against the coindictee, there was no intent shown that the charges against defendant required reindictment. Atkins v. State, 291 Ga. App. 863, 663 S.E.2d 286 (2008).

State waived claim that motion was untimely. — State waived the state's claim that the defendant's motion to suppress, filed two months after arraignment, was untimely as the state failed to raise the issue or object to the motion on that basis before the trial court; moreover, the state's failure to object was particularly significant in light of the express provision in O.C.G.A. § 17-7-110 allowing the trial court to extend the time for filing. Hicks v. State, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Untimely pretrial motions properly denied. — Trial court did not abuse the court's discretion by denying the defendant's motion to file untimely pre-trial motions because it was within the court's discretion to refuse to consider the motion since the defendant failed to use reasonable diligence to obtain counsel prior to the arraignment. Preston v. State, 327 Ga. App. 556, 760 S.E.2d 176 (2014).

Special demurrers to indictment. — Defendant's special demurrers to an indictment charging the defendant with 24 counts of sexual exploitation of children were improperly dismissed as untimely under O.C.G.A. § 17-7-110 because the plain language of a 2003 amendment allowed special demurrers to be filed within ten days of arraignment as the defendant had done; the court of appeals improperly interpreted case law decided after the statute's effective date as the defendants in those cases had been convicted and arraigned prior to the effective date of the statute. Palmer v. State, 282 Ga. 466, 651 S.E.2d 86 (2007).

Accusation was not fatally defective because the accusation informed the defendants of the charges against the defendants and protected the defendants against another prosecution for the same offense, and the defendants could not admit that the defendants passed in an area defined by markings as a no-passing zone without being guilty of the crime charged. Moreover, to the extent that the defendants' attack on the accusation could be read as a special demurrer, seeking greater specificity, the attack was waived by the defendants' failure to raise the issue within ten days after the defendants pled to the accusation. Haynes-Turner v. State, 289 Ga. App. 652, 658 S.E.2d 203 (2008).

Because the defendant argued that the accusation charging the defendant with two traffic violations failed to charge any offense, the trial court did not err in considering the defendant's demurrer on the merits even though the defendant's motion was filed more than ten days after the defendant waived arraignment. State v. Shabazz, 291 Ga. App. 751, 662 S.E.2d 828 (2008).

Defendants' contention that a felony murder indictment was deficient because the indictment did not contain all the essential elements of the underlying crime of aggravated assault was, in essence, a special demurrer seeking greater specificity with regard to the predicate felony. Pursuant to O.C.G.A. § 17-7-110, the defendant's failure to file a timely special demurrer seeking additional information constituted a waiver of the right to be tried on a perfect indictment. Dasher v. State, 285 Ga. 308, 676 S.E.2d 181 (2009).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion for a new trial on the ground that the indictments were fatally flawed because the indictments did not specifically allege the required element of force in charging rape because by alleging "unlawful" carnal knowledge during 1992 to 1995, the indictment asserted a charge of forcible rape under the law in effect prior to the 1996 amendment, therefore, the indictment did establish cognizable charges. Additionally, the defendant filed

no special demurrers as to the form of the indictment and, thus, waived any argument in that regard. Flournoy v. State, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

Because the defendant did not file a timely special demurrer to the indictment or a timely motion in arrest of judgment, the defendant waived any claim that could have been raised via special or general demurrer. Kirt v. State, 309 Ga. App. 227, 709 S.E.2d 840 (2011).

Because the defendant did not file a special demurrer, the defendant waived the right to a special indictment. Bryant v. State, 320 Ga. App. 838, 740 S.E.2d 772 (2013).

No ground exists for dismissing an appeal based on a special demurrer, or for that matter any motion, if the motion was not timely filed in the trial court. Kimbrough v. State, 336 Ga. App. 381, 785 S.E.2d 54 (2016).

Indictment sufficiently alleged possession of a weapon during the commission of certain crimes, O.C.G.A. § 16-11-106, by alleging that the defendant had a handgun during the commission of the crime of aggravated assault; if the defendant sought to know to which of the two aggravated assault counts was referred to, the defendant's motion was a special demurrer and was untimely under O.C.G.A. § 17-7-110. Allen v. State, 300 Ga. 500, 796 S.E.2d 708 (2017).

To the extent that the defendant argued that an indictment should have been more specific as to the timing in which the offenses were committed, such argument amounted to a special demurrer and because the defendant failed to file a special demurrer, the defendant waived the right to perfect the indictment. Miller v. State, 305 Ga. 276, 824 S.E.2d 342 (2019).

Failure to file timely special demurrer. — Defendant's motions for a new trial and in arrest of judgment challenging the wording of the indictment charging the defendant with aggravated assault, O.C.G.A. § 16-5-21(a)(2), (3), were properly denied because the defendant could not have admitted the allegations of the indictment without admitting that the defendant was guilty of a crime and, under O.C.G.A. § 17-7-110, having failed to file a timely special demurrer, the defendant waived the right to a perfect indictment. McDaniel v. State, 298 Ga. App. 558, 680 S.E.2d 593 (2009).

Failure to file special demurrer to indictment waived later challenge. — In a prosecution for felony murder and multiple armed robberies, as the defendant did not file a special demurrer seeking greater specificity with regard to the predicate felony, i.e., the name of the armed robbery victim, to the extent the defendant's merger argument alleged insufficiency of the indictment due to the state's failure to specify which armed robbery count was the underlying offense for the felony murder charge, it was waived. Henderson v. State, 285 Ga. 240, 675 S.E.2d 28 (2009).

Defendant waived the defendant's right to be tried under a perfect indictment because the defendant did not file a special demurrer within ten days after the arraignment as required by O.C.G.A. § 17-7-110. Additionally, to the extent the defendant's motion was one in arrest of judgment, the motion was untimely because the motion was not filed in the same term of court as the judgment as required by O.C.G.A. § 17-9-61. Thompson v. State, 286 Ga. 889, 692 S.E.2d 379 (2010), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Because the defendant failed to raise a challenge to the indictment in a timely written special demurrer, the challenge was waived. State v. Wilson, 318 Ga. App. 88, 732 S.E.2d 330 (2012).

Trial court did not err by finding that the defendant waived the defendant's right to challenge the indictment charging the defendant with reckless driving because the defendant failed to timely file a written special demurrer. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

Seven year delay in challenging indictment based on grand jury composition. — Appellants waived the appellants' challenge to the indictment based on the composition of the grand jury because an elected official served on the grand jury that returned the indictment since the appellants failed to challenge the indictment on the ground that the grand jury was illegally constituted until

the appellants filed amended motions for new trial more than seven years after the statutory deadline for such a claim. Bighams v. State, 296 Ga. 267, 765 S.E.2d 917 (2014).

Demand remained effective when matter transferred to another court. — Statutory demand for a speedy trial pursuant to O.C.G.A. § 17-7-110 was effective when the demand was first filed in a court that was later abolished as that court was a constitutional court with jury jurisdiction and two terms of court; the defendant's demand remained effective following the transfer of the criminal matter to another court. State v. Reid, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Counsel's failure to file timely demurrer not ineffective assistance because demurrer was meritless. — Criminal attempt to possess cocaine was properly used as the underlying felony for a felony murder conviction because the defendant's plan to rob a cocaine dealer was the proximate cause of the victim's death, and the plan to rob an individual dealing in illegal drugs carried with it a foreseeable risk of danger and death; therefore, counsel was not ineffective in failing to file a demurrer to the indictment within the time provided in O.C.G.A. § 17-7-110. Funck v. State, 296 Ga. 371, 768 S.E.2d 468 (2015).

Section did not apply. — Motion for discharge and acquittal based on the constitutional speedy trial right, and a renewal of that motion, were timely filed by the defendant when both motions were filed prior to the time of trial; the time limitations under O.C.G.A. § 17-7-110 were not applicable. State v. Reid, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Cited in Dingler v. State, 281 Ga. App. 721, 637 S.E.2d 120 (2006); Langlands v. State, 282 Ga. 103, 646 S.E.2d 253 (2007); Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007); Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158 (2011); State v. Mojica, 316 Ga. App. 619, 730 S.E.2d 94 (2012); Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013); Smith v. State, 338 Ga. App. 635, 791 S.E.2d 418 (2016); Bullard v. State, 307 Ga. 482, 837 S.E.2d 348 (2019).

17-7-111. Demurrers and special pleas to be in writing; right to plead "not guilty" if demurrer or plea denied.

If the defendant, upon being arraigned, demurs to the indictment, pleads to the jurisdiction of the court, pleads in abatement, or enters any other special plea in bar, the demurrer or plea shall be made in writing. If the demurrer or plea is decided against the defendant, he may nevertheless plead and rely on the general issue of "not guilty."

History. — Laws 1833, Cobb's 1851 Digest, p. 834; Code 1863, § 4526; Code 1868, § 4545; Code 1873, § 4639; Code 1882, § 4639; Penal Code 1895, § 950; Penal Code 1910, § 975; Code 1933, § 27-1501.

JUDICIAL DECISIONS

Analysis

General Consideration
Special Pleas in Bar
Challenge to Indictment

General Consideration

When pleas available generally. — Prisoner, upon being arraigned, may demur to the indictment, plead to the jurisdiction of the court, or file a plea in abatement or in bar, but if such pleas are not made preliminary to the trial, the pleas are held to be waived in contemplation of law. Jones v. Mills, 216 Ga. 616, 118

General Consideration (Cont'd)

S.E.2d 484 (1961).

Oral renewed motion for discharge and acquittal proper. — Motion for discharge and acquittal based on the constitutional speedy trial right, which was orally renewed by the defendant at the time of trial, was proper as such a motion did not have to be in writing pursuant to O.C.G.A. § 17-7-111. State v. Reid, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Motions must be timely and in writing. — If a demurrer or plea in abatement or bar is not made in writing previous to the trial, the making thereof will be held to have been waived. Hill v. State, 41 Ga. 484 (1871); Hall v. State, 103 Ga. 403, 29 S.E. 915 (1898); Gilmore v. State, 118 Ga. 299, 45 S.E. 226 (1903); Wilkerson v. State, 14 Ga. App. 475, 81 S.E. 395 (1914); Reddick v. State, 24 Ga. App. 776, 102 S.E. 132 (1920).

Requirements of this section were imperative, and a demurrer not shown to have been in writing will be overruled. Wimbish v. State, 70 Ga. 718 (1883); McGarr v. State, 75 Ga. 155 (1885); Lampkin v. State, 87 Ga. 516, 13 S.E. 523 (1891); Sims v. State, 110 Ga. 290, 34 S.E. 1020 (1900).

Regardless of how the motions are designated, such motions must be made in writing upon the defendant's being arraigned and when such motions are not made at the proper time, the motions are deemed to have been waived. Bryant v. State, 224 Ga. 235, 161 S.E.2d 312 (1968).

When the defendant's motions to quash the indictment because of prejudicial delay were not made in writing upon the defendant's being arraigned, the motions were deemed to have been waived. Hardwick v. State, 158 Ga. App. 154, 279 S.E.2d 253 (1981).

As must all exceptions to form and procedural matters. — All exceptions to form or matters relating to procedure in returning an indictment under the provisions of this section that may arise by special demurrer or by plea in abatement or plea in bar must be made in writing preliminary to trial and if not made at the proper time are considered waived. Peppers v. Balkcom, 218 Ga. 749, 130 S.E.2d 709 (1963).

Special demurrers not made at or before arraignment are waived. Carter v. State, 155 Ga. App. 49, 270 S.E.2d 233 (1980).

Demurrer must not only be filed but brought to court's attention. — Though a demurrer is properly filed before arraignment, yet if the demurrant proceeds to trial without having brought it to the attention of the court it is too late to do so after a juror has been sworn. Gilmore v. State, 118 Ga. 299, 45 S.E. 226 (1903); Chambers v. State, 22 Ga. App. 748, 97 S.E. 256 (1918).

Demurrers, pleas, and answers must be disposed of in that order; it is error to proceed with the trial when demurrers or pleas remain for consideration. Birt v. State, 127 Ga. App. 532, 194 S.E.2d 335 (1972).

Effect of sustaining special demurrer. — Sustaining of a special demurrer, the result of which is either to strike from or add to the material allegations of an indictment, is equivalent to sustaining a general demurrer and quashing the indictment. Gentry v. State, 63 Ga. App. 275, 11 S.E.2d 39 (1940).

Validity of arraignment held before pleas ruled on. — When the arraignment takes place, subject to hearing any pleas that may be filed prior to the trial of the case, the failure to hear such pleas prior to the entering of a not guilty plea does not vitiate such arraignment, since such a procedure does not cause a defendant to be tried without arraignment nor does it preclude the defendant from filing any defensive pleading and obtaining a ruling thereon prior to trial. Brown v. State, 235 Ga. 353, 219 S.E.2d 419 (1975).

Cited in Higgins v. State, 92 Ga. App. 739, 90 S.E.2d 40 (1955); Lyons v. State, 94 Ga. App. 570, 95 S.E.2d 478 (1956); Brown v. State, 223 Ga. 76, 153 S.E.2d 709 (1967); Smith v. State, 224 Ga. 750, 164 S.E.2d 784 (1968); McBride v. State, 119 Ga. App. 418, 167 S.E.2d 374 (1969); Spell v. State, 120 Ga. App. 398, 170 S.E.2d 701 (1969); Jones v. State, 226 Ga. 747, 177 S.E.2d 231 (1970); United States ex rel. Huguley v. Martin, 325 F. Supp. 489 (N.D. Ga. 1971); Robertson v. State, 127 Ga. App. 6, 192 S.E.2d 502 (1972); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975);

Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484 (1976); Hampton v. State, 141 Ga. App. 866, 234 S.E.2d 698 (1977); Cronch v. State, 141 Ga. App. 851, 235 S.E.2d 40 (1977); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Parrish v. State, 160 Ga. App. 601, 287 S.E.2d 603 (1981); Miller v. State, 182 Ga. App. 700, 356 S.E.2d 900 (1987); Hope v. State, 193 Ga. App. 202, 387 S.E.2d 414 (1989); Dunbar v. State, 209 Ga. App. 97, 432 S.E.2d 829 (1993); Hall v. State, 213 Ga. App. 242, 445 S.E.2d 578 (1994); Thompson v. State, 234 Ga. App. 74, 506 S.E.2d 201 (1998); Pearson v. State, 258 Ga. App. 651, 574 S.E.2d 820 (2002).

Special Pleas in Bar

Plea in bar of trial for former jeopardy must be made in writing upon arraignment, and before pleading to the merits. Holmes v. State, 120 Ga. App. 281, 170 S.E.2d 312 (1969).

Special pleas in bar must be filed on arraignment before pleading to the merits. Barlow v. State, 13 Ga. App. 306, 79 S.E. 93 (1913).

Waiver of plea of former plea jeopardy — If not made in writing at the proper time, a plea of former jeopardy is waived. Holmes v. State, 120 Ga. App. 281, 170 S.E.2d 312 (1969).

Plea in abatement not allowed after entrance of the general issue plea of not guilty. Wilkerson v. State, 14 Ga. App. 475, 81 S.E. 395 (1914).

Special demurrers not made at or before arraignment are waived. Carter v. State, 155 Ga. App. 49, 270 S.E.2d 233 (1980).

Pleas in abatement must be certain in intent and leave nothing to be supplied by intendment. Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Pleas in abatement are dilatory pleas and are not favored. Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Pleas in abatement must be strictly construed. — In considering such pleas, every inference must be against the pleader. Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Objection to selection of grand jurors through plea in abatement. — Plea in abatement based on alleged irregularity in drawing names of grand jurors who returned the indictment should be filed before pleading to the merits, and not being so filed is too late. When the defendant is arrested and gives bond before the indictment is returned, the defendant should object to the grand jurors before return of the indictment, and, failing to do so, cannot afterwards object by plea in abatement. Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940).

Alleged disqualification of a grand juror propter affectum is not a valid ground for plea in abatement to an indictment, nor is it a good ground for a motion for a new trial after verdict, even though the parties were ignorant of such defect until after the verdict. Mitchell v. State, 69 Ga. App. 771, 26 S.E.2d 663 (1943).

Sufficiency of grand jury evidence may not be challenged by plea in abatement. — When a competent witness or witnesses were sworn and examined before the grand jury before whom the indictment was preferred, a plea in abatement on the ground that the indictment was found on insufficient or illegal evidence or no evidence, will not be sustained, because it comes under the rule that no inquiry into the sufficiency or legality of the evidence is indulged. The sufficiency of the evidence introduced before the grand jury is a question for determination by the grand jury and not by the court. Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409 (1940).

Motion for new trial on double jeopardy grounds. — When the special ground of a motion for new trial is that the appellant has been subject to double jeopardy, it is a matter for special plea, to be interposed at arraignment and ruled on at that time. Reid v. State, 119 Ga. App. 368, 166 S.E.2d 900 (1969).

Raising issue of defendant's insanity. — If the insanity of the defendant is known to defendant's counsel, then counsel has a professional, moral, and legal duty to file a plea of insanity, as provided by law. If unknown, then it can be raised by a ground of a motion for a new trial by a proper showing. Huguley v. State, 120

Special Pleas in Bar (Cont'd)

Ga. App. 332, 170 S.E.2d 450 (1969), cert. denied, 400 U.S. 834, 91 S. Ct. 68, 27 L. Ed. 2d 66 (1970).

Denial of second plea in bar alleging same claim as first upheld. — Because the court of appeals previously upheld the denial of the defendant's first plea in bar regarding the alleged denial of a speedy trial right, the trial court's order denying the defendant's second plea in bar on the same grounds was also upheld, despite the fact that the law of the case rule had been statutorily abolished. Bass v. State, 287 Ga. App. 600, 653 S.E.2d 749 (2007).

Denial of defendant's motion requesting that defendant be examined by psychiatrist. — It is not error for a trial court to deny the defendant's motion requesting that the defendant be examined by a psychiatrist at county expense when the defendant had not entered a special plea of insanity at the time of trial. Huguley v. State, 120 Ga. App. 332, 170 S.E.2d 450 (1969), cert. denied, 400 U.S. 834, 91 S. Ct. 68, 27 L. Ed. 2d 66 (1970).

Challenge to Indictment

General and special demurrers distinguished. — General demurrer challenges the sufficiency of the substance of the indictment, whereas a special demurrer challenges the sufficiency of the form of the indictment. Bramblett v. State, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978); Carter v. State, 155 Ga. App. 49, 270 S.E.2d 233 (1980).

Motion to quash indictment is general demurrer. — Motion to quash is classified as a general rather than a special demurrer to an indictment. Traylor v. State, 165 Ga. App. 226, 299 S.E.2d 911 (1983).

Motions to quash an indictment must be filed prior to pleading to the merits. Sadler v. State, 124 Ga. App. 266, 183 S.E.2d 501 (1971).

Ineffective assistance of counsel. — Because trial counsel failed to generally demur to the aggravated assault indictment which was so fundamentally flawed that the indictment charged no crime at all, and failed to file a motion in arrest of judgment after trial, counsel rendered ineffective assistance. Youngblood v. State, 253 Ga. App. 327, 558 S.E.2d 854 (2002).

O.C.G.A. § 17-7-111 does not preclude an oral objection to the sufficiency of an indictment or accusation at any time during trial if the indictment or accusation is so defective that judgment upon the indictment or accusation would be arrested. Pullen v. State, 199 Ga. App. 881, 406 S.E.2d 283 (1991).

Requirement that all motions and demurrers be made and filed at or before the time of arraignment, and the requirement of O.C.G.A. § 17-7-111 that such motions be in writing do not preclude an oral objection to the sufficiency of an indictment or accusation at any time during trial if the indictment or accusation is so defective that judgment upon the indictment or accusation would be arrested. Ross v. State, 235 Ga. App. 7, 508 S.E.2d 424 (1998).

Defendant's oral motion to quash indictment was ineffective. — When the transcript revealed that the defendant, during a pre-trial hearing, made an oral motion to quash the indictment and when there was a question of a law enforcement officer's authority to make the initial stop in this case, the defendant's oral motion to quash the indictment against the defendant was ineffective for the purpose offered since the indictment was in the record and was in proper form and substance and since an objection to it must be in writing when an indictment is not on the indictment's face so defective that a motion in arrest of judgment would lie. State v. O'Quinn, 192 Ga. App. 359, 384 S.E.2d 888 (1989).

Trial court properly denied the defendant's oral motion in arrest of judgment or motion to dismiss or general demurrer, made after the jury was sworn but before the trial began, as while the nolle pros of the coindictee could have been drawn more explicitly, considering it in context and in light of a subsequent indictment, which only contained one count against the coindictee, there was no intent shown that the charges against the defendant required reindictment. Atkins v. State, 291 Ga. App. 863, 663 S.E.2d 286 (2008).

Necessity of writing. — Defendant's motion to quash an accusation charging reckless driving was properly denied since the motion was not made in writing and was not raised at arraignment. Freeman v. State, 234 Ga. App. 110, 505 S.E.2d 836 (1998).

Exception to an indictment for formal defects must be taken by demurrer before trial. Foss v. State, 15 Ga. App. 478, 83 S.E. 880 (1914).

Effect of sustaining special demurrer. — Sustaining of a special demurrer, the result of which is either to strike from or add to the material allegations of an indictment, is equivalent to sustaining a general demurrer and quashing the indictment. Gentry v. State, 63 Ga. App. 275, 11 S.E.2d 39 (1940).

How form of indictment excepted to. — When the accused desires to take exception to the form of an indictment, it is necessary that the defendant do so by demurrer or motion to quash, made in writing and before pleading to the merits. Gower v. State, 71 Ga. App. 127, 30 S.E.2d 298 (1944); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955); Lankford v. State, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993).

Failure to plead venue. — While the phrase "as prosecuting attorney for the county and state aforesaid" sufficiently established venue to support a violation of O.C.G.A. § 40-6-391(A)(1), the state's failure to sufficiently allege venue in order to sustain a second count, charging a violation of § 40-6-391(A)(5), supported the defendant's motion to quash the count and reversal of the conviction on the count. Werner v. State, 280 Ga. App. 853, 635 S.E.2d 234 (2006).

If the indictment or accusation is so defective that judgment upon the indictment or accusation would be arrested, attention may be called to this defect at any time during the trial, and the indictment or accusation may be quashed on oral motion. Gower v. State, 71 Ga. App. 127, 30 S.E.2d 298 (1944).

Procedure for complaining of defects and irregularities in indictment. — Defects and irregularities in an indictment cannot be complained of in a ground for a motion for a new trial. Such must be taken advantage of by demurrer, plea in abatement, or plea in bar. Loomis v. Edwards, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 969, 70 S. Ct. 987, 94 L. Ed. 1377 (1950).

Attack on indictment for defects not apparent on face. — Motion to quash, being merely a demurrer, is not a proper method of attacking an indictment for a defect not appearing upon its face, and position can properly be raised only by a plea in abatement. Lastinger v. State, 84 Ga. App. 760, 67 S.E.2d 411 (1951).

Burden is upon defendant to show that indictment was returned wholly upon illegal evidence. A failure to show that only incompetent evidence was presented to the grand jury will subject plea in abatement to dismissal. Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Material amendment of an indictment. — Indictment cannot be materially amended by striking from or adding to the indictment's allegations, except by the grand jury, and only by the grand jury before the indictment is returned into court. It is bad practice for the court to do either, and if such additions or subtractions materially affect the indictment, it becomes void and cannot be the basis of a conviction. Gentry v. State, 63 Ga. App. 275, 11 S.E.2d 39 (1940).

Post-conviction challenge to indictment. — One who waives one's right to be tried upon an indictment perfect in form as well as substance, and takes one's chances of acquittal, will not be heard, after conviction, to urge defects in the indictment, unless such defects are so great that the indictment is absolutely void. Tanner v. State, 90 Ga. App. 789, 84 S.E.2d 600 (1954).

When no demurrer to the indictment has been filed, the defendant will not be heard after conviction to urge defects in the indictment unless the defects are so great that the indictment is absolutely void. Ivie v. State, 151 Ga. App. 496, 260 S.E.2d 543 (1979).

Waiver of challenge to indictment. — Defendant has a right to be tried upon an indictment that is perfect in form and substance, but this right can be waived

Challenge to Indictment (Cont'd)

under certain circumstances if a defendant fails to timely challenge the indictment. McKay v. State, 234 Ga. App. 556, 507 S.E.2d 484 (1998).

Exception to the denial of a motion to quash the indictment cannot be properly made a ground of a motion for new trial. Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

Indictment which charges an offense defined by a legislative act, in the language of the act, when the description of the acts alleged as constituting the offense is full enough to put the defendant on notice of the offense with which the defendant is charged, is sufficiently specific. Gaines v. State, 80 Ga. App. 512, 56 S.E.2d 772 (1949).

Accusation which alleges the violation of a statute in the language of the statute together with the other necessary allegations is sufficient to put the defendant on notice as against what facts and charges the defendant must contend as every essential ingredient of the offense charged is set forth in the accusation with sufficient clearness to enable the defendant to clearly understand the nature of the offense, and the accusation is exact enough to protect the defendant from a second jeopardy. Gaines v. State, 80 Ga. App. 512, 56 S.E.2d 772 (1949).

Attack on indictment on grounds that defendant's spouse testified before grand jury. — If the defendant pleads guilty to a defective indictment in which the defendant has incriminated oneself, and the defendant's spouse has testified, it is too late afterwards, in proceedings instituted to secure the release of the defendant by writ of habeas corpus, to attack the indictment upon that ground. Bradford v. Mills, 208 Ga. 198, 66 S.E.2d 58 (1951).

Special demurrer. — When a crime may be committed in more than one way, the failure to charge the manner in which the crime was committed subjects the indictment or accusation to special demurrer. Haska v. State, 240 Ga. App. 527, 523 S.E.2d 589 (1999); State v. Jones, 251 Ga. App. 192, 553 S.E.2d 631 (2001).

Indictment which fails to allege a specific date on which the offense occurred is not perfect in form and is subject to a timely special demurrer except when the evidence does not permit the state to identify a single date on which the offense occurred. State v. Gamblin, 251 Ga. App. 283, 553 S.E.2d 866 (2001).

For special demurrer to indictment charging robbery by force, see Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940).

For demurrer to indictment for automobile theft on grounds of vagueness, see Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978).

For special demurrer to indictment for liquor on which taxes not paid, eliminating surplusage, see Gentry v. State, 63 Ga. App. 275, 11 S.E.2d 39 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 132 et seq., 467 et seq., 585 et seq. 41 Am. Jur. 2d, Indictments and Informations, § 270 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2542 et seq. 42 C.J.S., Indictments and Information, § 258 et seq. 71 C.J.S., Pleading, § 230 et seq.

ALR. — Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 A.L.R.4th 61.

When is dismissal of indictment appropriate remedy for misconduct of government official, 10 A.L.R. Fed. 3d 3.

Construction and Application of Supreme Court's Holding in Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988), that Harmless Error Standard Under Fed. R. Crim. P. 52(a) Applies to Dismissal of Indictment, 20 A.L.R. Fed. 3d 1.

17-7-112. Plea of misnomer.

A plea of misnomer should state the true name of the accused person, that he had never been known by any other name than that, and that he was not known and called by the name which was contained in the indictment or accusation.

History. — Penal Code 1895, § 954; Penal Code 1910, § 979; Code 1933, § 27-1505.

History of Code section. — This Code section is derived from the decisions in Wilson v. State, 69 Ga. 224 (1882) and Wiggins v. State, 80 Ga. 468, 5 S.E. 503 (1888).

JUDICIAL DECISIONS

Time for filing plea of misnomer is before arraignment. After plea of guilty or conviction is too late. Dutton v. State, 92 Ga. 14, 18 S.E. 545 (1893); Pulliam v. Donaldson, 140 Ga. 864, 80 S.E. 315 (1913).

If accused is known by different names it is lawful for indictment to identify accused by such names as aliases. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

If the accused is indicted, with an alias, under more than one name, a special plea of misnomer, to be good, must aver unequivocally that the accused has never been known by either of the names set out in the indictment, and that neither is the accused's true name. Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

If the accused is indicted under an alleged true name and an alias, a special plea of misnomer to be good must aver unequivocally that the accused has never been known by either of the names set out in the indictment, and that neither were the accused's true name. Wilson v. State, 69 Ga. 224 (1882); Henderson v. State, 95 Ga. 326, 22 S.E. 537 (1895); Stinchcomb v. State, 119 Ga. 442, 46 S.E. 639 (1904).

Trial counsel was not ineffective because the defendant failed to show either a deficiency or that the outcome of the trial would have been different had counsel investigated or attempted to remedy the purported name discrepancy between the defendant's birth certificate and the name on the indictment; the defendant was positively identified at trial by various witnesses as the perpetrator of the charged crimes; the names on the birth certificate and the indictment consisted of the same four names, though listed in different order; and the defendant did not show that the defendant was never known by the names under which the defendant was indicted, including the alias. Adams v. State, 350 Ga. App. 340, 829 S.E.2d 412 (2019).

Motion to quash is not proper remedy for striking alias from indictment, instead, the defendant should file a special plea of misnomer averring that the defendant has never been known by any of the names set out in the indictment. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Indictment citing a name by which one is generally called is sufficient to withstand a plea of misnomer. Roland v. State, 127 Ga. 401, 56 S.E. 412 (1907).

Indictment which describes the accused by Christian and surnames is sufficient even if the indictment fails to designate the accused by the initial of the accused's middle name. Veal v. State, 116 Ga. 589, 42 S.E. 705 (1902).

Doctrine of idem sonans. — Under the doctrine of idem sonans, if two names though spelled differently sound alike, the names are to be regarded as the same and are sufficient to withstand a plea of misnomer. Webb v. State, 149 Ga. 211, 99 S.E. 630 (1919).

Names with similar sound or spelling not subject to misnomer. — Question of idem sonans may be determined either by pronunciation or by spelling, or by both. Lovett v. State, 9 Ga. App. 232, 70 S.E. 989 (1911).

For illustrative cases, see Biggers v. State, 109 Ga. 105, 34 S.E. 210 (1899) ("Biggers" and "Bickers"); Washington v. State, 113 Ga. 698, 39 S.E. 294 (1901) ("Serena" and "Surrena"); Woody v. State, 113 Ga. 927, 39 S.E. 297 (1901) ("Gittings" and "Giddans"); Roland v. State, 127 Ga. 401, 56 S.E. 412 (1907) ("Roland" and "Rowlin"); Lovett v. State, 9 Ga. App. 232, 70 S.E. 989 (1911) ("Jerry Lovett" and "Jerry Levatte"); Watkins v. State, 18 Ga. App. 500, 89 S.E. 624 (1916) ("Maria" and "Marie").

Misnomer not sufficiently shown. — Defendant's argument that a trial court erred by rejecting the defendant's "Special Plea of Misnomer" filed pursuant to O.C.G.A. § 17-7-112 was without merit because the case was proceeding according to the accusation filed by the solicitor (now district attorney) pursuant to O.C.G.A. § 17-7-71(b)(1), which contained the defendant's correct name. Switlick v. State, 295 Ga. App. 849, 673 S.E.2d 323 (2009).

Defendant Latoya Thornton's claim of misnomer and motion to quash were rejected because, contrary to the defendant's claims, the defendant had previously been arrested and booked into jail under the name Latoia Jordan. The accusation naming the defendant as Latoia Jordan therefore was sufficient because Jordan was another name by which the defendant was known. Thornton v. State, 325 Ga. App. 475, 753 S.E.2d 139 (2013).

Question of what a name spells is for the jury. Washington v. State, 113 Ga. 698, 39 S.E. 294 (1901).

Judge may find indictment name to equal defendant's. — When a judge finds the name in the indictment, though somewhat illegible, is really the same as that admitted to be the true name of the accused in the plea, the judge's decision is controlling. Gunn v. State, 10 Ga. App. 819, 74 S.E. 312 (1912).

No new trial when plea stricken. — No new trial can be had on motion from a ruling of the court in striking a plea of misnomer. McDow v. State, 113 Ga. 699, 39 S.E. 295 (1901); Wilkinson v. State, 18 Ga. App. 330, 89 S.E. 460 (1916).

For example of charge of this rule to jury, see Jackson v. State, 134 Ga. 473, 68 S.E. 71 (1910).

Cited in Rountree v. State, 34 Ga. App. 668, 130 S.E. 919 (1925); Jackson v. State, 153 Ga. App. 462, 265 S.E.2d 368 (1980); Cook v. State, 162 Ga. App. 778, 293 S.E.2d 46 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 589, 595 et seq.

ALR. — Necessity in indictment charging violation of statute regarding wages, or hours, of naming particular employees, 81 A.L.R. 76.

Time and manner of raising objection of misnomer of defendant in indictment or information, 132 A.L.R. 410.

17-7-113. Time for making exception to form of indictment or accusation.

All exceptions which go merely to the form of an indictment or accusation shall be made before trial.

History. — Laws 1833, Cobb's 1851 Digest, p. 833; Code 1863, § 4517; Code 1868, § 4536; Code 1873, § 4629; Code 1882, § 4629; Penal Code 1895, § 955; Penal Code 1910, § 980; Code 1933, § 27-1601.

JUDICIAL DECISIONS

Analysis

General Consideration
Motion in Arrest of Judgment
New Trial

General Consideration

Indictment defects handled by pre-trial demurrer or post-conviction motion to arrest judgment. — Defects in an indictment or accusation must be taken advantage of either by demurrer before trial or by motion in arrest of judgment after conviction. Rucker v. State, 114 Ga. 13, 39 S.E. 902 (1901).

How form of indictment excepted to. — When the accused desires to take exception to the form of an indictment, it is necessary that the accused do so by demurrer or motion to quash, made in writing and before pleading to the merits. Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

Exception to the denial of a motion to quash the indictment cannot be properly made a ground of a motion for new trial. Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

Exceptions to form must be taken before joinder of issue. — Exceptions which go merely to the form of the indictment, if not taken before joinder of issue, are considered to be waived. Driver v. State, 60 Ga. App. 719, 4 S.E.2d 922 (1939).

When demurrers, motions, and pleas to be made. — Motions to quash an indictment must be filed prior to pleading to the merits. Sadler v. State, 124 Ga. App. 266, 183 S.E.2d 501 (1971).

Demurrer to the indictment, motion to quash, or plea in abatement must be entered before trial. Sheffield v. State, 235 Ga. 507, 220 S.E.2d 265 (1975).

Defendant waives any alleged defects by going to trial under the indictment without complaint. Sheffield v. State, 235 Ga. 507, 220 S.E.2d 265 (1975).

All demurrers to the form of the indictment, i.e., special demurrers, must be made at or before arraignment. Bramblett v. State, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978).

Special demurrers not made at or before arraignment are waived. Bramblett v. State, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978); Carter v. State, 155 Ga. App. 49, 270 S.E.2d 233 (1980).

There was no merit to the defendant's contention that the defendant's indictment improperly charged defendant with two counts, one of murder and one of voluntary manslaughter, and that the defendant was therefore unable to determine the offense with which the defendant would be charged. The defendant made no objection to the indictment at or prior to trial and consequently waived any right to make any objection on appeal. O'Toole v. State, 258 Ga. 614, 373 S.E.2d 12 (1988).

Trial court properly denied a defendant's motion to quash when the indictment quoted the language of O.C.G.A. § 16-9-1 and identified the offense as forgery in the first degree, and further identified the date and place of the offense as well as the bank on which the purported check was drawn and the check number. The defendant could not reasonably claim that the defendant was surprised by evidence at trial or was unable to prepare a defense, or that the defendant risked future prosecution for the same offense; the challenge at best went to the form of the accusation and should have been raised via special demurrer prior to trial. Wilkes v. State, 293 Ga. App. 724, 667 S.E.2d 705 (2008), overruled on other grounds, Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

Contention that an accusation improperly identifies the victim is a challenge to the form of the accusation, and such challenges must be made before trial. Mooney v. State, 250 Ga. App. 13, 550 S.E.2d 421 (2001).

Waiver of right to perfect accusation or indictment. — One may waive defects in the accusation or indictment, and after waiver may not question the

General Consideration (Cont'd)

indictment unless absolutely void. Lanier v. State, 5 Ga. App. 472, 63 S.E. 536 (1909); Isaacs v. State, 7 Ga. App. 799, 68 S.E. 338 (1910).

One who waives the right to be tried upon an indictment perfect in form as well as substance, and takes one's chances of acquittal, will not be heard, after conviction, to urge defects in the indictment, unless those defects are so great that the accusation is absolutely void. Driver v. State, 60 Ga. App. 719, 4 S.E.2d 922 (1939); Tanner v. State, 90 Ga. App. 789, 84 S.E.2d 600 (1954).

Unless the defects appearing in an indictment or accusation are so great that the indictment or accusation is absolutely void, the right to a perfect indictment or accusation may be waived, and is waived by going to trial under a defective indictment or accusation without complaint. Moore v. State, 94 Ga. App. 210, 94 S.E.2d 80 (1956).

Defendant has a right to be tried upon an indictment that is perfect in form and substance, but this right can be waived under certain circumstances if a defendant fails to timely challenge the indictment. McKay v. State, 234 Ga. App. 556, 507 S.E.2d 484 (1998).

When defects waived. — If exceptions to form are not taken by special demurrer or plea before joinder of issue the exceptions are considered as waived. The exceptions cannot be reached by a motion in arrest of judgment. Newsome v. State, 2 Ga. App. 392, 58 S.E. 672 (1907).

When an indictment incorrectly charged the defendant with possession of a substance composed of a purity of one-tenth of a percent of cocaine, and the defendant moved, at trial, to dismiss the indictment, the trial court properly refused and constructively amended the indictment before the jury to read "ten percent." By waiting until trial to complain of the form of the indictment, the defendant was too late; motions to quash must be entered before trial, or are waived. Arena v. State, 194 Ga. App. 883, 392 S.E.2d 264 (1990).

Demurrer to indictment is too late when filed after pleading to the merits. — Demurrer to indictment charging the defendant with robbery by force, on grounds of lack of particularity in description of stolen property and collective valuation of the articles taken, being special in nature and not having been filed until after the defendant pled to the merits, was too late; nor did the court err in refusing to allow the defendant to withdraw such plea. Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940).

Cited in McCoy v. State, 15 Ga. 205 (1854); Long v. State, 38 Ga. 491 (1868); Bell v. State, 41 Ga. 589 (1871); Bostock v. State, 61 Ga. 635 (1878); Lampkin v. State, 87 Ga. 516, 13 S.E. 523 (1891); Martin v. State, 115 Ga. 255, 41 S.E. 576 (1902); Wells v. State, 116 Ga. 87, 42 S.E. 390 (1902); Tate v. State, 142 Ga. App. 487, 236 S.E.2d 173 (1977); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Joiner v. State, 163 Ga. App. 521, 295 S.E.2d 219 (1982); State v. Tollison, 176 Ga. App. 35, 335 S.E.2d 153 (1985); Dunbar v. State, 209 Ga. App. 97, 432 S.E.2d 829 (1993); Foster v. State, 218 Ga. App. 569, 462 S.E.2d 455 (1995); Smith v. State, 239 Ga. App. 515, 521 S.E.2d 450 (1999); Yates v. State, 248 Ga. App. 35, 545 S.E.2d 169 (2001).

Motion in Arrest of Judgment

When motion in arrest of judgment must be made. — Motion in arrest of judgment must be made during the term at which the trial was held and the sentence imposed. Spence v. State, 7 Ga. App. 825, 68 S.E. 443 (1910); Beall v. State, 21 Ga. App. 73, 94 S.E. 74 (1917); Rambo v. State, 25 Ga. App. 390, 103 S.E. 494 (1920).

Motion in arrest of judgment only for errors on merits. — Motion in arrest of judgment after verdict may take advantage of such defects as might be taken advantage of by demurrer before pleading to the merits. It lies only for matters affecting the merits, not for matters of form. Wood v. State, 46 Ga. 322 (1872); White v. State, 93 Ga. 47, 19 S.E. 49 (1894); Boswell v. State, 114 Ga. 40, 39 S.E. 897 (1901); Scandrett v. State, 124 Ga. 141, 52 S.E. 160 (1905); Foss v. State, 15 Ga. App. 478, 83 S.E. 880 (1914).

Without consideration of trial evidence. — Evidence in the trial may not be

considered on a motion in arrest of judgment because the motion may be based only upon those defects in the indictment which are apparent on the face of the record and not cured by the verdict. Sessions v. State, 3 Ga. App. 13, 59 S.E. 196 (1907).

Defects must be obvious. — Motion in arrest of judgment is to be based upon only those defects apparent on the face of the record which are not cured by the verdict. Spence v. State, 7 Ga. App. 825, 68 S.E. 443 (1910); Darsey v. State, 17 Ga. App. 280, 86 S.E. 781 (1915); Beall v. State, 21 Ga. App. 73, 94 S.E. 74 (1917).

Defect must be incurable. — Motion in arrest of judgment must be predicated upon a defect in the indictment which is not amendable. Smith v. State, 17 Ga. App. 612, 87 S.E. 846 (1916).

Motion in arrest of judgment must specify the defects which render the indictment fatally defective. Rolin v. State, 70 Ga. 719 (1883).

Unconstitutional statute as basis for indictment. — Motion in arrest of judgment may be used in order to show that the indictment is based upon an unconstitutional statute because such a defect is not amendable. Boswell v. State, 114 Ga. 40, 39 S.E. 897 (1901).

Verdict too vague. — Motion in arrest of judgment is a proper remedy when the verdict is so vague and uncertain that no legal judgment could be rendered thereon. O'Connell v. State, 55 Ga. 191 (1875); Smith v. State, 117 Ga. 16, 43 S.E. 440 (1903).

Verdict and indictment show no guilt. — Motion in arrest of judgment is the proper remedy when the verdict construed with the indictment fails to find the defendant guilty of any offense. Lanier v. State, 5 Ga. App. 472, 63 S.E. 536 (1909).

Felony verdict given for misdemeanor indictment. — Motion in arrest of judgment is the proper remedy where a verdict for a felony is rendered under an indictment for a misdemeanor. Allen v. State, 86 Ga. 399, 12 S.E. 651 (1890); Wells v. State, 116 Ga. 87, 42 S.E. 390 (1902).

Conviction void on face. — Motion in arrest of judgment is the proper remedy when judgment of conviction is void on the judgment's face. Ezzard v. State, 11 Ga. App. 30, 74 S.E. 551 (1912).

Indictment void. — Motion in arrest of judgment is the proper remedy when the indictment is void. Lanier v. State, 5 Ga. App. 472, 63 S.E. 536 (1909); Isaacs v. State, 7 Ga. App. 799, 68 S.E. 338 (1910).

Georgia no longer strictly applies the fatal variance rule. Tyson v. State, 145 Ga. App. 21, 243 S.E.2d 314 (1978).

Clerical error in otherwise good indictment. — When the indictment in a case is otherwise good, the clerical error of writing inadvertently the word "accused" for the word "prosecutor" does not vitiate the indictment. Since the word which is changed does not so obscure the sense that a juror or person of ordinary intelligence cannot with certainty ascertain the meaning, the defendant will not be permitted after the verdict to take advantage of this mere clerical error which is corrected by the necessary intendment of the indictment. Lewis v. State, 55 Ga. App. 743, 191 S.E. 278 (1937).

Motion in arrest of judgment is properly denied when the indictment is demurrable but not void. Gazaway v. State, 9 Ga. App. 194, 70 S.E. 978 (1911).

Motion not appropriate although guilty plea withdrawal not shown on record. — Motion in arrest of judgment is properly denied when withdrawal of plea of guilty is not shown on the record. Garner v. State, 42 Ga. 203 (1871).

Motion not appropriate when copy bill not fully endorsed. — Motion in arrest of judgment is properly denied when a copy bill of an indictment which has been established does not have upon it any endorsement of "true bill" or other finding by the grand jury. Hughes v. State, 76 Ga. 39 (1885).

Misjoinder of offenses in same count. — Motion in arrest of judgment is properly denied although misjoinder of offenses occurs in the same count of the indictment. Lampkin v. State, 87 Ga. 516, 13 S.E. 523 (1891).

County name stated only in caption. — Motion in arrest of judgment is properly denied even when a blank is left in indictment for name of county, the county being stated in the caption. Lambert v. State, 11 Ga. App. 149, 74 S.E. 858 (1912).

Motion in Arrest of Judgment (Cont'd)

Body of bill and verdict show different offenses. — When a return of "true bill for voluntary manslaughter" was endorsed by the grand jury and the accused was found guilty of this offense, the judgment of conviction will not be arrested because the offense of murder was charged in the body of the bill. Williams v. State, 13 Ga. App. 83, 78 S.E. 854 (1913).

Verdict finds defendants and prior convicts guilty. — Motion in arrest of judgment is properly denied when the defendants are jointly indicted with others, whose cases have been disposed of either by pleas of guilty or by verdict of guilty, and the verdict returned finds all of the defendants guilty. This is a good verdict. Bird v. State, 9 Ga. App. 218, 70 S.E. 966 (1911).

Indictment omits ownership in burglary case. — Motion in arrest of judgment is properly denied when after verdict of guilty of burglary the motion is made because the indictment failed to allege ownership. Berry v. State, 92 Ga. 47, 17 S.E. 1006 (1893).

Larceny (now theft) indictment omits status of company. — Motion in arrest of judgment is properly denied in a trial of larceny although the indictment does not state whether the company is an artificial or natural person or firm. Hatfield v. State, 76 Ga. 499 (1886).

Record omits stating if defendant present at judgment. — Motion in arrest of judgment is properly denied although the record is silent as to whether the prisoner and the prisoner's counsel were present when the verdict was rendered and when sentence pronounced. Smith v. State, 60 Ga. 430 (1878); Franks v. State, 120 Ga. 495, 48 S.E. 148 (1904).

Juror serving twice. — Motion in arrest of judgment is properly denied when juror after serving first week voluntarily serves again and the defendant does not challenge the array. McAfee v. State, 31 Ga. 411 (1860).

Effect of sustaining a motion in arrest of judgment is to declare the indictment void. Hill v. Nelms, 122 Ga. 572, 50 S.E. 344 (1905).

Trial court did not err in denying the defendant's motion in arrest of judgment, which the defendant filed to attack the validity of the indictment filed against the defendant, as O.C.G.A. § 40-6-391 could properly serve as a predicate offense under the vehicular homicide statute; a presumption that the defendant was not under the influence at the time of the accident did not apply. The legislature intended § 40-6-391 to serve as a statutory predicate for the vehicular homicide statute, and the defendant's conviction under the vehicular homicide statute after application of the predicate offense, § 40-6-391, did not violate the defendant's equal protection rights under either the state or federal constitutions. David v. State, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

New Trial

Refusal to sustain a motion in arrest of judgment gives no ground for a new trial. Stokes v. State, 84 Ga. 258, 10 S.E. 740 (1890); Gaines v. State, 108 Ga. 772, 33 S.E. 632 (1899).

Defects in indictment. — Defects in an indictment or accusation furnish no ground for a new trial. Scandrett v. State, 124 Ga. 141, 52 S.E. 160 (1905); Stubbs v. State, 1 Ga. App. 504, 58 S.E. 236 (1907); Rogers v. State, 1 Ga. App. 527, 58 S.E. 236 (1907); Foss v. State, 15 Ga. App. 478, 83 S.E. 880 (1914).

Motion for new trial sets aside judgment and is heard first. — When a motion for a new trial and a motion in arrest of judgment are both made, though the latter be made first, the former will be heard first and if sustained dispense with a hearing on the latter, for it in effect sets aside the judgment. Williams v. State, 121 Ga. 579, 49 S.E. 689 (1905).

For example of the effect of making motion for new trial on ground which will support motion in arrest of judgment, see Tate v. Cowart, 48 Ga. 540 (1873); Boswell v. State, 114 Ga. 40, 39 S.E. 897 (1901).

For example of the effect of making motion in arrest of judgment in a proper case for a motion for a new trial, see Lowther v. State, 18 Ga. App. 461, 89 S.E. 536 (1916).

New trial should be granted based on Ineffective assistance of counsel. — Trial court's denial of the defendant's motion for a new trial as to the vehicular homicide and serious-injury-by-vehicle convictions was properly reversed because the defendant demonstrated prejudice under Strickland as absent trial counsel's failure to raise a general demurrer after jeopardy attached, the result of the trial would have been more favorable to the defendant as the defendant would not have been convicted under the indictment of any of the seven felonies. State v. Heath, 843 S.E.2d 801, No. S19G0967, 2020 Ga. LEXIS 362 (2020).

RESEARCH REFERENCES

ALR. — Sufficiency of indictment as affected by bill of particulars, 10 A.L.R. 982.

Description in indictment for perjury of proceeding in which perjury was committed, 24 A.L.R. 1137.

Power of court to pass on competency, legality, or sufficiency of evidence on which indictment is based, 31 A.L.R. 1479.

Sufficiency of description of automobile, or automobile equipment or accessories, in indictment, information, or complaint in criminal proceedings, 100 A.L.R. 791.

Necessity of alleging in information or indictment that act was "unlawful," 169 A.L.R. 166.

Necessity of naming owner of building in indictment or information for burglary, 169 A.L.R. 887.

Necessity of alleging in indictment or information limitation-tolling facts, 52 A.L.R.3d 922.

Use of abbreviation in indictment or information, 92 A.L.R.3d 494.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

Part 2

Insanity and Mental Incompetency

Administrative rules and regulations. — Mental Health Services, Official Compilation of the Rules and Regulations of the State of Georgia, Institutional, Center, and Program Services, Subject 125-4-5.

Pretrial Examination and for Commitment Because of Incompetency to Stand Trial, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Services, Mental Health, Developmental Disabilities and Addictive Diseases, Subject 290-4-3.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Insanity Defense, 41 POF2d 615.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 257. 39 C.J.S., Habeas Corpus, § 272 et seq. 57 C.J.S., Mental Health, § 118 et seq.

17-7-129. Mental capacity to stand trial; release of competency evaluation to prosecuting attorney.

(a) When information becomes known to the court sufficient to raise a bona fide doubt regarding the accused's mental competency to stand trial, the court has a duty, sua sponte, to inquire into the accused's mental competency to stand trial. The court may order the Department of Behavioral Health and Developmental Disabilities to conduct an evaluation of the accused's competency. If the court determines that it

is necessary to have a trial on the issue of competency, the court shall follow the procedures set forth in Code Section 17-7-130. The court's order shall set forth those facts which give rise to its bona fide doubt as to the accused's mental competency to stand trial. The evaluation of the Department of Behavioral Health and Developmental Disabilities shall be submitted to the court, and the court shall submit such evaluation to the attorney for the accused or, if pro se, to the accused, but otherwise, the report shall remain under seal.

(b) If the court orders a competency evaluation and the accused serves notice of a special plea of mental incompetency to stand trial or raises the issue of insanity, the court shall release the competency evaluation to the prosecuting attorney. Such evaluation shall not be released to any other person absent a court order.

History. — Code 1981, § 17-7-129, enacted by Ga. L. 2011, p. 372, § 1/HB 421.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 35 et seq., 798.
31A Am. Jur. 2d, Expert and Opinion Evidence, §§ 117, 136.

C.J.S. — 31A C.J.S., Evidence, § 225.
32 C.J.S., Evidence, §§ 763 et seq., 885 et seq.

17-7-130. Proceedings upon plea of mental incompetency to stand trial.

(a) As used in this Code section, the term:

(1) "Child" means an accused person under the jurisdiction of the superior court pursuant to Code Section 15-11-560.

(2) "Civil commitment" means the accused's involuntary inpatient or outpatient commitment pursuant to Chapter 3 or 4 of Title 37, as appropriate.

(3) "Court" means the court which has jurisdiction over the criminal charges against the accused.

(4) "Department" means the Department of Behavioral Health and Developmental Disabilities.

(5) "Developmental disability" shall have the same meaning as set forth in paragraph (8) of Code Section 37-1-1.

(6) "Inpatient" shall have the same meaning as in paragraph (9.1) of Code Section 37-3-1; provided, however, that as applied to a child for purposes of this Code section, the term shall mean a child who is mentally ill or has a developmental disability and is in need of involuntary placement.

(7) "Nonviolent offense" means any offense other than a violent offense.

(8) "Outpatient" shall have the same meaning as in paragraph (12.1) of Code Section 37-3-1, provided that:

(A) As applied to a child for purposes of this Code section, the term shall mean a child who is mentally ill or has a developmental disability and is in need of involuntary placement; and

(B) The court determines that the accused meets the criteria for release on bail or other pre-trial release pursuant to Code Section 17-6-1.

(9) "Serious violent felony" shall have the same meaning as set forth in Code Section 17-10-6.1.

(10) "Sexual offense" shall have the same meaning as set forth in Code Section 17-10-6.2.

(11) "Violent offense" means:

(A)(i) A serious violent felony;

(ii) A sexual offense;

(iii) Criminal attempt to commit a serious violent felony;

(iv) Criminal attempt to commit a sexual offense;

(v) Aggravated assault;

(vi) Hijacking a motor vehicle in the first degree or hijacking an aircraft;

(vii) Aggravated battery;

(viii) Aggravated stalking;

(ix) Arson in the first degree or in the second degree;

(x) Stalking;

(xi) Fleeing and attempting to elude a police officer;

(xii) Any offense which involves the use of a deadly weapon or destructive device; and

(B) Those felony offenses deemed by the court to involve an allegation of actual or potential physical harm to another person.

(b)(1) If an accused files a motion requesting a competency evaluation, the court may order the department to conduct an evaluation by a physician or licensed psychologist to determine the accused's mental competency to stand trial and, if such physician or licensed psychologist determines the accused to be mentally incompetent to

stand trial, to make recommendations as to restoring the accused to competency. If the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department. The department's evaluation shall be submitted to the court, and the court shall submit such evaluation to the attorney for the accused or if pro se, to the accused, but otherwise, the evaluation shall be under seal and shall not be released to any other person absent a court order.

(2) If the accused files a special plea alleging that the accused is mentally incompetent to stand trial, it shall be the duty of the court to have a bench trial, unless the state or the accused demands a special jury trial, to determine the accused's competency to stand trial. Once a special plea has been filed, the court shall submit the department's evaluation to the prosecuting attorney.

(c) If the court finds the accused is mentally incompetent to stand trial, the court may order a department physician or licensed psychologist to evaluate and diagnose the accused as to whether there is a substantial probability that the accused will attain mental competency to stand trial in the foreseeable future. The court shall retain jurisdiction over the accused and shall transfer the accused to the physical custody of the department. At its discretion, the court may allow the evaluation to be performed on the accused as an outpatient if the accused is charged with a nonviolent offense. Such evaluation shall be performed within 90 days after the department has received actual custody of an accused or, in the case of an outpatient, a court order requiring evaluation of an accused. If the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department. If the evaluation shows:

(1) That the accused is mentally competent to stand trial, the department shall immediately report that determination and the reasons therefor to the court, and the court shall submit such determination to the attorney for the accused or, if pro se, to the accused and to the prosecuting attorney. The accused shall be returned to the court as provided for in subsection (d) of this Code section;

(2) That the accused is mentally incompetent to stand trial and that there is not a substantial probability that the accused will attain competency in the foreseeable future, the court shall follow the procedures set forth in subsection (e) of this Code section for civil commitment or release; or

(3) That the accused is mentally incompetent to stand trial but there is a substantial probability that the accused will attain competency in the foreseeable future, by the end of the 90 day period, or at

any prior time, the department shall report that finding and the reasons therefor to the court and shall retain custody over the accused for the purpose of continued treatment for an additional period not to exceed nine months; provided, however, that if the accused is charged with a misdemeanor offense or a nonviolent offense, the court shall retain jurisdiction over the accused but may, in its discretion, allow continued treatment to be done on an outpatient basis by the department. The department shall monitor the accused's outpatient treatment for the additional period not to exceed nine months. If, by the end of the nine-month period or at any prior time the accused's condition warrants, the accused is still determined by the department physician or licensed psychologist to be mentally incompetent to stand trial, irrespective of the probability of recovery in the foreseeable future, the department shall report that finding and the reasons therefor to the court. The court shall then follow the procedures in subsection (e) of this Code section for civil commitment or release.

(d)(1) If the department's physician or licensed psychologist determines at any time that the accused is mentally competent to stand trial, the department shall notify the court, and the accused shall be discharged into the custody of a sheriff of the jurisdiction of the court unless the charges which led to the evaluation or civil commitment have been dismissed, in which case, the accused shall be discharged from the department. In the event a sheriff does not appear and take custody of the accused within 20 days after notice to the appropriate sheriff of the jurisdiction of the court, the presiding judge of the court, and the prosecuting attorney for the court, the department shall itself return the accused to one of the court's detention facilities, and the cost of returning the accused shall be paid by the county in which the court is located. All notifications under this paragraph shall be sent by certified mail or statutory overnight delivery, return receipt requested. As an alternative to returning the accused to the sheriff of the jurisdiction of the court, the department may hold the accused at the department's secure facility instead of at the court's detention facilities whenever a department physician or licensed psychologist provides written notice to the court that such detention in the court's facilities would be detrimental to the well-being of the accused. Such alternative detention shall continue only until the date of the accused's trial. Regardless of where the accused is held, the court shall hold a bench trial to determine the accused's mental competency to stand trial within 45 days of receiving the department's evaluation or, if demanded, shall conduct a special jury trial within six months of receiving the department's evaluation.

(2) If the accused is an outpatient and the department's physician or licensed psychologist determines at any time that the accused is

mentally competent to stand trial, the accused may remain in the community under conditions of bond or other conditions ordered by the court, if any, until the date of the accused's trial, which shall be within 45 days of the court receiving the department's evaluation if tried by the court or within six months of receiving the department's evaluation if a special jury trial is demanded.

(e) If the evaluation performed pursuant to subsection (c) of this Code section shows that the accused is mentally incompetent to stand trial and that there is not a substantial probability that the accused will attain competency in the foreseeable future:

(1) If the accused is charged with a misdemeanor, the department shall return the physical custody of the accused to a sheriff of the jurisdiction of the court; provided, however, that as an alternative to returning the accused to the sheriff of the jurisdiction of the court, the department may hold the accused at the department's secure facility instead of at the court's detention facilities whenever a department physician or licensed psychologist provides written notice to the court that such detention in the court's facilities would be detrimental to the well-being of the accused. Such alternative detention shall continue only until the date of the accused's trial. Regardless of where the accused is held, the court shall, within 45 days of receiving the department's evaluation:

(A) Consider entry of a nolle prosequi of the charges pursuant to Code Section 17-8-3 and, if the accused is not a child, request that the department petition the probate court of the jurisdiction of the accused's residence for civil commitment of the accused; or

(B) If the court finds that the accused does not meet the criteria for civil commitment, the accused shall be released in accordance with the provisions of Chapter 6 of this title; or

(2) If the accused is charged with a felony, the department shall return the physical custody of the accused to a sheriff of the jurisdiction of the court; provided, however, that as an alternative to returning the accused to the sheriff of the jurisdiction of the court, the department may hold the accused at the department's secure facility instead of at the court's detention facilities whenever a department physician or licensed psychologist provides written notice to the court that such detention in the court's facilities would be detrimental to the well-being of the accused. Such alternative detention shall continue only until the date of the accused's trial. The department shall report to the court its finding regarding the accused's mental competency to stand trial, the reasons therefor, and its opinion as to whether the accused currently meets the criteria for civil commitment. The court may order an independent evaluation of the accused

by a court appointed licensed clinical psychologist or psychiatrist, who shall report to the court in writing as to the current mental and emotional condition of the accused. Regardless of where the accused is held, the court shall, within 45 days of receiving the department's evaluation:

(A) Consider entry of a nolle prosequi of the charges pursuant to Code Section 17-8-3 and, if the accused is not a child, request that the department petition the probate court of the jurisdiction of the accused's residence for civil commitment of the accused; or

(B) Retain jurisdiction of the accused and conduct a trial at which the court shall hear evidence and consider all psychiatric and psychological evaluations submitted to the court and determine whether the state has proved by clear and convincing evidence that the accused meets the criteria for civil commitment. The burden of proof in such trials shall be upon the state. Following the trial:

(i) If the court finds that the accused does not meet the criteria for civil commitment, the accused shall be released in accordance with the provisions of Chapter 6 of this title;

(ii) If the court finds that the accused meets the criteria for civil commitment, the judge may issue an order civilly committing the accused, and the court shall order the civil commitment to be on an inpatient or outpatient placement; provided, however, that if the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department;

(iii) If the accused is civilly committed pursuant to division (ii) of this subparagraph and was charged with a nonviolent offense, the court may order civil commitment on an annual basis, but in no case for a period to exceed the maximum period for which the accused could have been sentenced on the most serious nonviolent offense charged or a period to exceed five years, whichever is less, provided that civil commitment shall be reevaluated by a department physician or licensed psychologist on an annual basis;

(iv) If the accused is civilly committed pursuant to division (ii) of this subparagraph and was charged with a violent offense, the court may order civil commitment on an annual basis, but in no case for a period to exceed the maximum period for which the accused could have been sentenced on the most serious violent offense charged, provided that civil commitment shall be reevaluated by a department physician or licensed psychologist on an annual basis;

(v) Following the civil commitment pursuant to division (ii) of this subparagraph, a department physician or licensed psychologist shall submit to the court his or her annual evaluation as to whether the civilly committed accused continues to meet the criteria for civil commitment. The court shall mail the annual evaluation to the attorney for the accused or, if pro se, to the accused and to the prosecuting attorney. The court shall review the case annually and enter the appropriate order to renew the civil commitment, to change the civil commitment status, or, in the event the charges are dismissed, to transfer the jurisdiction of the case to the probate court of the jurisdiction of the accused's residence for further civil commitment; provided, however, that after the department submits its annual evaluation, if the state or the accused requests a hearing regarding civil commitment, the court shall hold a hearing on such issue; and

(vi) An accused who is civilly committed pursuant to division (ii) of this subparagraph may make an application for release from civil commitment but shall only be released from that civil commitment by order of the court in accordance with the procedures specified in paragraphs (1) through (3) of subsection (f) of Code Section 17-7-131, except that the burden of proof in such release hearing shall be on the state, and if the civilly committed accused is indigent, the accused may petition the court to have an evaluation performed by a physician or licensed psychologist of the accused's choice, and the court may order the cost of such evaluation be paid for by the county.

(f) If, at any time, the department's physician or licensed psychologist determines that the accused is mentally incompetent to stand trial but later determines that the accused is mentally competent to stand trial, the court shall be so notified and shall order the accused detained or discharged in accordance with paragraph (1) of subsection (d) of this Code section. Any accused determined by a department physician or licensed psychologist to be mentally competent to stand trial and returned to the court as provided in subsection (d) of this Code section shall again be entitled to file a special plea as provided for in this Code section.

(g) If an accused is determined by a department physician or licensed psychologist to be mentally incompetent to stand trial, whether or not civilly committed pursuant to this Code section, the state may file at any time a motion for rehearing on the issue of the accused's mental competency to stand trial. If the state's motion is granted, the case shall proceed as provided in this Code section.

(h) Nothing in this Code section shall prevent the accused or the state from seeking a court order for a nondepartment mental compe-

tency evaluation of the accused at the cost of the movant. If a nondepartment mental competency evaluation is ordered, the court shall abide by the time frames for trial as set forth in this Code section unless the court determines, for good cause shown, that such time frames require adjustment for a nondepartment evaluation.

(i) The "Crime Victims' Bill of Rights," as set forth in Chapter 17 of this title, shall be applicable to any judicial proceeding held pursuant to this Code section, and notice shall be provided to any victim as set forth in such chapter.

History. — Orig. Code 1863, § 4195; Code 1868, § 4234; Code 1873, § 4299; Code 1882, § 4299; Penal Code 1895, § 951; Penal Code 1910, § 976; Code 1933, § 27-1502; Ga. L. 1977, p. 1293, § 3; Ga. L. 1982, p. 3, § 17; Ga. L. 1995, p. 1250, §§ 1.1, 1.2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2007, p. 663, § 1/SB 190; Ga. L. 2009, p. 453, § 3-2/HB 228; Ga. L. 2010, p. 286, § 12/SB 244; Ga. L. 2011, p. 372, § 2/HB 421; Ga. L. 2013, p. 294, § 4-16/HB 242; Ga. L. 2017, p. 417, § 3-2/SB 104.

Cross references. — Mental capacity as it relates to culpability for criminal acts, § 16-3-2 et seq. Manner of service of petition for release of person detained in facility pursuant to court order, §§ 37-3-148, 37-4-108, 37-7-148.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007 and 2008, "or" was deleted at the end of division (a)(3)(A)(ix); "et.seq" was changed to "et seq." in subsection (b) and subparagraph (d)(2)(A); "subparagraph (a)(3)(A)" was substituted for "subparagraph (A) of paragraph (3) of subsection (a)" in the second sentence of subsection (b); and "Chapter 3 or 4 of Title 37" was substituted for "Chapters 3 or 4 of Title 37" near the middle of the introductory language of subsection (d).

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

U.S. Code. — Defense of insanity, Federal Rules of Criminal Procedure, Rule 12.2.

Law reviews. — For article, "The Georgia Law of Insanity," see 3 Ga. B.J. 28 (1941). For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004); 58 Mercer L. Rev. 111 (2006). For annual survey of criminal law, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 83 (2006). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

For note discussing criminal responsibility and mental illness as a defense in Georgia, see 23 Ga. B.J. 538 (1961). For note, "Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective," see 15 Ga. L. Rev. 1065 (1981). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 144 (1995). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Procedure
Application
Burden of Proof
Obligations of Counsel
Jury Instructions and Responsibilities
Appeals

General Consideration

Constitutionality. — Placement of the burden of proof on the defendant to prove incompetence by a preponderance of the evidence does not violate due process. Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

Because the nature of automatic commitment does not bear a reasonable relation to the state's purpose of accurately determining the restorability of individual defendants' competency to stand trial, that aspect of O.C.G.A. § 17-7-130(c) violated due process when applied to the defendants who have been deprived of their liberty based solely on that statutory provision. O.C.G.A. § 17-7-130(c) should be construed as limiting the detention authorized to the reasonable time needed to fulfill the statute's purpose of determining a defendant's competency to stand trial. Carr v. State, 303 Ga. 853, 815 S.E.2d 903 (2018).

Nature of automatic commitment under O.C.G.A. § 17-7-130(c) applicable to all those defendants who had been accused of violent crimes and found to be mentally incompetent to stand trial was held to not bear a reasonable relationship to the state's purpose of accurately determining the restorability of the individual defendants' competency to stand trial; thus, that aspect of § 17-7-130(c) violated due process. McGouirk v. State, 303 Ga. 881, 815 S.E.2d 825 (2018).

Limitation on detention to ensure constitutionality. — Georgia Supreme Court agreed that indefinite or even unreasonably extended detention under O.C.G.A. § 17-7-130(c) for incompetency to stand trial would be unconstitutional, but the Court does not agree that the statute permits such extended detention. Instead, to avoid that constitutional concern, the Court construes § 17-7-130(c) as limiting the detention the statute authorizes to the reasonable time needed to fulfill the statute's purpose. Carr v. State, 303 Ga. 853, 815 S.E.2d 903 (2018).

Automatic detention without an individualized determination of whether the confinement reasonably advances the government's purpose violated a defendant's right to due process, and the Georgia Supreme Court therefore held that O.C.G.A. § 17-7-130(c) could not be applied constitutionally to defendants who are not already being detained on another, lawful ground. Carr v. State, 303 Ga. 853, 815 S.E.2d 903 (2018).

Trial of person in state of insanity forbidden. — Former Code 1933, § 27-1504, which guaranteed that one charged with crime would not be tried while in a condition of insanity, and former Code 1933, § 27-1502 (see O.C.G.A. § 17-7-130), which secured to such individual the right to have the question of the individual's mental condition at the time of the trial inquired into before being required to plead to the indictment, are declaratory of the common-law rule which forbids the trial of any person while the person is in a state of insanity. The reason upon which such rule rested at common law, that is, the incapacity of one who is insane to make a rational defense, furnished the guiding principle for their proper application. Brown v. State, 215 Ga. 784, 113 S.E.2d 618 (1960).

Section was declaratory of the common law which forbid the trial of persons while in the state of insanity, that is, incapable of making a rational defense. Cronch v. State, 141 Ga. App. 851, 235 S.E.2d 40 (1977).

For history of former Code 1933, §§ 27- 1502 and 27-1504 (see O.C.G.A. § 17-7-130), see Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979).

Section impliedly repeals Code 1933, § 27-1504. — "Mental incompetency" as used in former Code 1933, § 27-1502 (see O.C.G.A. § 17-7-130) included those mental states embraced in the terms "lunatic" and "insane person" in former Code 1933, § 27-1504, as those terms all relate solely to the mental ability or capacity of a defendant to intelligently participate in the defendant's trial. Thus, the amendment by Ga. L. 1977, p. 1293, by implication repealed former Code 1933, § 27-1504. If this were not true, a defendant could enter a special plea of mental incompetency under former Code 1933, § 27-1502, another plea of "lunacy" under former Code 1933, § 27-1504, and a third plea of "insanity at the time of trial" under former Code 1933, § 27-1504, and demand a special jury trial on all three issues even though all three relate to the same mental state. No such result was envisioned by the General Assembly. Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979).

Choice between proceeding under § 16-3-2 or § 17-7-130. — Special plea of insanity under former Code 1933, § 26-702 (see O.C.G.A. § 16-3-2) was proper if the defendant became insane since the crime was committed or was insane at the time of the trial. A plea of insanity may be taken advantage of under the general issue under former Code 1933, § 27-1502 (see O.C.G.A. § 17-7-130) if the defendant was insane prior to the time the alleged crime was committed or was insane at the time the crime was alleged to have been committed. Orange v. State, 77 Ga. App. 36, 47 S.E.2d 756 (1948).

"Mental competence" relates only to the ability of the defendant, at the time of the trial, to intelligently participate in the defendant's trial. Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979).

Cause of incompetency irrelevant. — Provision of O.C.G.A. § 17-7-130 authorizing transfer of defendant to the Department of Human Resources applied to the defendant whose incompetency was the result of traumatic brain injury; such transfers are not limited only to cases when incompetency is the result of mental illness or retardation. Georgia Dep't of Human Resources v. Drust, 264 Ga. 514, 448 S.E.2d 364 (1994).

One mentally competent at time crime committed is culpable. — Even if a habeas corpus petitioner was incompetent at the time of trial and is incompetent today, if the petitioner could be rendered competent in the future (even by forcing the petitioner to take medication), the petitioner could be lawfully tried, convicted, and sentenced to death once again because someone who is mentally competent (sane) when he or she commits a crime is culpable for that offense, even if his or her later incompetency prevents him or her (perhaps only temporarily) from being tried for the offense. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Insanity and competence to stand trial are separate issues. — Trial court erred in overruling the defendant's objection to the state's asking an expert witness whether the defendant was competent to stand trial because the defense of insanity and defendant's competence to stand trial are separate issues and the state made no showing that the expert's opinion as to defendant's competency to stand trial was relevant to the jury's decision on defendant's plea of not guilty by reason of insanity. Hudson v. State, 273 Ga. 124, 538 S.E.2d 751 (2000).

Duty of court to inquire into competency. — Constitutional guarantees require that a trial court inquire into competency, even when state procedures for raising competency are not followed, if evidence of incompetence comes to the court's attention. Baker v. State, 250 Ga. 187, 297 S.E.2d 9 (1982).

While the statutory right to a special jury under O.C.G.A. § 17-7-130 can be waived, the actual issue of present incompetence must be addressed if there is evidence of incompetence which manifests itself during the proceedings. Baker v. State, 250 Ga. 187, 297 S.E.2d 9 (1982).

Trial court must conduct, sua sponte, a competency hearing when the information known to the trial court at the time of the

General Consideration (Cont'd)

trial or plea bargain is sufficient to raise a bona fide doubt regarding the defendant's competence. White v. State, 202 Ga. App. 424, 414 S.E.2d 328 (1992).

Requirement of a competency hearing is applicable even when the doubt regarding a defendant's competency arises during the course of a trial. White v. State, 202 Ga. App. 424, 414 S.E.2d 328 (1992).

When the defendant was convicted of various crimes but the trial court committed harmful error by failing to conduct an adequate inquiry into the defendant's competency, upon remand, if the court decides that a meaningful competency determination is not possible, the defendant is entitled to a new trial on the offenses charged and the defendant may again raise the issue of incompetence by special plea pursuant to O.C.G.A. § 17-7-130. Brogdon v. State, 220 Ga. App. 31, 467 S.E.2d 598 (1996).

Trial court did not err by failing to sua sponte rule on the defendant's competency as the defendant exhibited no unusual behavior during the proceedings, understood the nature and object of the proceedings, participated in the proceedings, and assisted counsel with the defense; the defendant failed to show that being a 14-year-old, standing alone, rendered the defendant incapable of understanding and participating in the proceedings. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Part of judgment ordering the defendant's automatic detention for evaluation as to competency to stand trial under O.C.G.A. § 17-7-130(c) was vacated because it was necessary for the trial court to exercise the court's discretion in deciding whether the defendant should be committed into custody for evaluation or should be evaluated on an outpatient basis. McGouirk v. State, 303 Ga. 881, 815 S.E.2d 825 (2018).

Nature of relief afforded by plea. — Relief afforded by a plea of insanity, if sustained, is of the nature of the relief afforded by a plea in abatement, which can only operate to suspend or put off further proceedings, as distinguished from an absolute and final bar to further prosecution. Spell v. State, 120 Ga. App. 398, 170 S.E.2d 701 (1969).

Defense of not guilty by reason of insanity differs from capacity to make a rational defense in that it is a part of the general issue as made by the defendant in the defendant's plea of not guilty. Cronch v. State, 141 Ga. App. 851, 235 S.E.2d 40 (1977).

Retroactive determination of competency. — Superior court did not err by finding that the defendant's competency could be determined retroactively to the time of trial because the defendant expressly conceded, and indeed urged, that the defendant's competency at the time of trial could be retroactively determined and that there would be sufficient evidence for the superior court to make such determination; the defendant presented evidence at the competency hearing, and on which the defendant relied upon in the defendant's appeal, that the defendant was in fact incompetent at the time of the defendant's criminal trial; and the defendant waived the right to complain on appeal about hearing the issue of the defendant's competency. Tye v. State, 298 Ga. 474, 782 S.E.2d 10 (2016).

Directed verdict in competency trial. — Trial court did not err in denying the defendant's motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant's competency trial because the evidence on competency was in conflict; even though the defendant's expert witness opined that the defendant was not competent to stand trial, the state's expert testified that the defendant was competent to do so. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Cited in Scoggins v. State, 150 Ga. 72, 102 S.E. 520 (1920); Griffin v. State, 195 Ga. 368, 24 S.E.2d 399 (1943); Cardin v. Harmon, 217 Ga. 737, 124 S.E.2d 638 (1962); Roach v. Mauldin, 277 F. Supp. 54 (N.D. Ga. 1967); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1 (1968); Taylor v. State, 229 Ga. 536, 192 S.E.2d 249 (1972); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Myers v. State, 143 Ga. App. 195, 237 S.E.2d 662 (1977); Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309 (1980); Standridge v. State, 158 Ga. App.

482, 280 S.E.2d 850 (1981); Morrow v. State, 162 Ga. App. 183, 290 S.E.2d 137 (1982); Norris v. State, 250 Ga. 38, 295 S.E.2d 321 (1982); Brown v. State, 250 Ga. 66, 295 S.E.2d 727 (1982); Lindsey v. State, 252 Ga. 493, 314 S.E.2d 881 (1984); Davenport v. State, 170 Ga. App. 667, 317 S.E.2d 895 (1984); Edison v. State, 256 Ga. 67, 344 S.E.2d 231 (1986); Partridge v. State, 256 Ga. 602, 351 S.E.2d 635 (1987); Carter v. State, 257 Ga. 510, 361 S.E.2d 175 (1987); Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991); Callaway v. State, 208 Ga. App. 508, 431 S.E.2d 143 (1993); Colwell v. State, 273 Ga. 634, 544 S.E.2d 120 (2001); Trammel v. Bradberry, 256 Ga. App. 412, 568 S.E.2d 715 (2002); Wafford v. State, 283 Ga. App. 154, 640 S.E.2d 727 (2007); Brower v. State, 334 Ga. App. 262, 779 S.E.2d 32 (2015).

Procedure

Section provides right of inquiry into mental condition before pleading. — This section secured to a person charged with a crime the right to have the question of the person's mental condition at the time of the trial inquired into before being required to plead to the indictment. Baughn v. State, 100 Ga. 554, 28 S.E. 68, aff'd sub nom. Nobles v. Georgia, 168 U.S. 398, 18 S. Ct. 87, 42 L. Ed. 515 (1897); Martin v. State, 147 Ga. App. 173, 248 S.E.2d 235 (1978).

If it be contended that the defendant is insane at the time of the defendant's trial, defendant has the right to have the question of defendant's mental condition at that time inquired into before being required to plead to the indictment. Humphrey v. State, 46 Ga. App. 720, 169 S.E. 53 (1933).

Test as to whether due process violated by failure to hold hearing. — Courts focus on three factors in determining whether the trial court violated the defendant's procedural due process rights by failing to hold sua sponte a competency hearing: (1) evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial; and (3) prior medical opinion regarding the defendant's competence to stand trial. White v. State, 202 Ga. App. 424, 414 S.E.2d 328 (1992).

Trial court was not required to conduct a hearing to determine the defendant's competence to stand trial after the defendant withdrew the defendant's plea of mental incompetence, and nothing before the trial court raised any question about the defendant's competence to stand trial. Christenson v. State, 261 Ga. 80, 402 S.E.2d 41, cert. denied, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991).

Since the accused made no special plea pursuant to O.C.G.A. § 17-7-130 raising the issue of the accused's competency at the time of trial, and there was no evidence in the record raising sufficient doubt before or during the trial as to the accused competency, the due process requirement that the trial court conduct a competency hearing was not triggered. Huzzie v. State, 236 Ga. App. 192, 512 S.E.2d 5 (1999).

Trial court did not err in denying counsel's pretrial request for a competency evaluation of the defendant as the defendant did not engage in any irrational behavior prior to the start of the trial; the defendant's demeanor did not exhibit incompetency and the defendant responded appropriately to questions. Stodghill v. State, 351 Ga. App. 744, 832 S.E.2d 891 (2019).

Bench trial on competency required. — Based on the finding of incompetency, the trial court failed to follow the requisite procedure set forth in O.C.G.A. § 17-7-130 to later find the defendant competent because, after the court received the evaluation stating the defendant's competency was restored, the trial court briefly touched on the defendant's competency at the second Faretta hearing, but failed to hold a bench trial on competency as required by the statute. Beach v. State, 351 Ga. App. 237, 830 S.E.2d 565 (2019).

Competency hearing not mandated for juveniles tried as adults. — Defendant's request that a competency hearing be mandated for all children under 17 who faced trial in the Georgia Superior Court under O.C.G.A. § 15-11-28(b)(2)(B) was rejected as any changes to Georgia's statutory provisions for trying certain juvenile offenders as adults had to come from the Georgia legislature. Lewis v. State,

Procedure (Cont'd)

279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Trial court erred by failing to follow the procedure set forth in O.C.G.A. § 17-7-130(d) by not holding a hearing on the defendant's competency because once defense counsel informed the trial court that the defendant, who had a long history of psychotic episodes, could not communicate with counsel in complete sentences or otherwise, it was obligated to hold a hearing on the defendant's competency to stand trial. Crawford v. State, 844 S.E.2d 294, No. A20A0187, 2020 Ga. App. LEXIS 321 (2020).

Trial court did not err by failing to conduct a hearing sua sponte to determine the defendant's competence to stand trial since the defendant did not file a plea of incompetence to stand trial and the defendant's testimony and the court-ordered evaluation showed that the defendant understood the nature and object of the proceedings against the defendant and was capable of assisting the defendant's attorney with a defense. Meders v. State, 260 Ga. 49, 389 S.E.2d 320 (1990), cert. denied, 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992).

In a prosecution for felony murder and aggravated assault, neither the defendant's conduct at trial or before trial, nor any medical evidence, required the trial court, sua sponte, to conduct a hearing on the defendant's competency because there was no evidence of irrational behavior or unusual demeanor, nor was there any medical opinion about competence which would have caused the trial court to make further inquiry about competency. Traylor v. State, 280 Ga. 400, 627 S.E.2d 594 (2006).

After having considered a competency evaluation of the defendant, the trial court concluded, without further inquiry, that the defendant was competent, and absent evidence that counsel never filed a special plea of not guilty by reason of insanity or incompetence to stand trial, the appeals court found no additional inquiry was necessary; thus, given that the record did not demonstrate that the defendant's behavior at trial or medical history should have caused the trial court to, sua sponte, conduct a competency hearing, no error resulted from failing to hold a competency hearing. Freeman v. State, 282 Ga. App. 185, 638 S.E.2d 358 (2006).

Failure to order hearing held error. — When the defendant, who had an IQ of 49, was determined by the court to be mentally incompetent to waive a plea of not guilty, the trial court erred in not ordering a hearing on defendant's competence to stand trial. Holloway v. State, 257 Ga. 620, 361 S.E.2d 794 (1987).

In a motion for a new trial motion, which raised a substantive claim of incompetency and presented expert evidence, it was error for the trial court to require the defendant to prove incompetency by clear and convincing evidence before further hearing on the issue and a decision on the substantive claim was warranted as this claim could be raised in a new trial motion and the defendant's burden of proof was by a preponderance of the evidence. Traylor v. State, 280 Ga. 400, 627 S.E.2d 594 (2006).

With regard to a defendant's convictions for aggravated assault, terroristic threats, and burglary, the judgment of conviction was reversed and the case was remanded to the trial court since the trial court erred by failing to conduct a competency hearing. Although defense counsel never filed a written plea that the defendant was mentally incompetent to stand trial, based on defense counsel's detailed concerns regarding the defendant's competency and the defendant's absolute refusal to be evaluated, the trial court should have continued the matter and conducted a competency hearing. Phelps v. State, 296 Ga. App. 362, 674 S.E.2d 620 (2009).

Special trial on issue of sanity is in nature of a civil proceeding with the burden resting upon the defendant to show insanity. Henderson v. State, 157 Ga. App. 621, 278 S.E.2d 164 (1981).

Sub silentio determination of competency. — If the trial court made a sub silentio determination that the defendant was competent to stand trial, the court was authorized to accept the defendant's plea of guilty but mentally ill, although the better course of action would have

been for the trial court to make an explicit finding of competency to stand trial or for the defendant to have withdrawn the defendant's plea of mental incompetency, such specific findings were not legally required as long as some determination was made on the issue of competence. Hughes v. Hall, 276 Ga. 382, 578 S.E.2d 888 (2003).

Nature of issue raised by plea. — Issue raised by a special plea of insanity is whether the defendant is capable at the time of the trial of understanding the nature and object of the proceedings going on against the defendant and rightly comprehends the defendant's own condition in reference to such proceedings, and is capable of rendering the defendant's attorney such assistance as a proper defense to the indictment returned against the defendant demands. Brown v. State, 215 Ga. 784, 113 S.E.2d 618 (1960); Crawford v. State, 240 Ga. 321, 240 S.E.2d 824 (1977); Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980); Banks v. State, 246 Ga. 178, 269 S.E.2d 450 (1980).

Issue is not whether defendant can distinguish right and wrong. — Issue raised by a special plea of insanity at the time of trial is not whether the defendant can distinguish between right and wrong. Brown v. State, 215 Ga. 784, 113 S.E.2d 618 (1960); Crawford v. State, 240 Ga. 321, 240 S.E.2d 824 (1977).

Standard by which defendant evaluated. — Special plea of insanity at the time of trial raises the question of whether the defendant is mentally competent at that time to understand the nature and object of the proceedings against the defendant, whether the defendant comprehends the defendant's own condition in reference to the proceedings, and whether the defendant is capable of rendering the defendant's attorney proper assistance; the defendant must, in other words, be aware of the charge, aware of the charge's consequences, and able to communicate with the defendant's lawyer. Allanson v. State, 158 Ga. App. 77, 279 S.E.2d 316 (1981).

It is error for trial judge to submit in charge to the jury the "right and wrong" test as the proper basis for determining the competency of the defendant to stand trial on the indictment for murder on the issue made by the special plea of insanity. Brown v. State, 215 Ga. 784, 113 S.E.2d 618 (1960).

Only one pretrial issue relates to the ability or capacity of a defendant to participate in the defendant's trial; that issue was defendant's mental competence. Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979).

Whether the defendant is guilty or not guilty of the crime charged is not relevant at the trial of a special plea of insanity. Crawford v. State, 240 Ga. 321, 240 S.E.2d 824 (1977).

Test on a special plea of insanity is whether or not the movant is incompetent to stand trial at the particular time of the trial of the special plea and not whether or not the defendant has a lack of memory relating to some prior specific event. Banks v. State, 246 Ga. 178, 269 S.E.2d 450 (1980).

Test for delusional compulsion. — One is not criminally responsible when, though one has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, the will is overmastered and there is no criminal intent, provided that the act itself is connected with the peculiar delusion under which one is laboring. Hargroves v. State, 179 Ga. 722, 177 S.E. 561 (1934).

Essential allegations of plea and procedure. — Special plea of insanity provided by this section must allege that the accused was insane at the time of trial and the issue thus made must be tried by a special jury. If found to be true, the court would order the defendant to be delivered to the superintendent of the Milledgeville State Hospital (now Department of Human Resources). Bailey v. State, 210 Ga. 52, 77 S.E.2d 511 (1953).

Object of the plea of insanity (now mental incompetency) is to prevent a trial on the merits, and though it may cover insanity (now mental incompetency) at the time of the act, the plea's essence is that the prisoner is insane (now mentally incompetent) at the trial, and the plea must contain that allegation. Long v. State, 38 Ga. 491 (1868).

Procedure (Cont'd)

Mental incompetency at time offense committed is provable under the general issue. Danforth v. State, 75 Ga. 614 (1885); Carr v. State, 96 Ga. 284, 22 S.E. 570 (1895).

Cross-examination of defendant by the state. — Since this section was not a criminal sanction, and the proceeding was civil in nature, the state may call the defendant for purpose of cross-examination on the trial of the special plea of insanity. However, no question may be propounded to the accused or inquiry be made upon the hearing touching the matter of the defendant's guilt or innocence. Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), commented on in 18 Mercer L. Rev. 506.

No duty to impanel special jury absent plea. — Absent a special plea of insanity, there is no mandatory duty on the trial judge to impanel a special jury to determine the issue of mental incompetency or insanity. Ricks v. State, 240 Ga. 853, 242 S.E.2d 604 (1978).

If a special plea is not filed, then the court is not bound by the procedures set forth in O.C.G.A. § 17-7-130. Baker v. State, 250 Ga. 187, 297 S.E.2d 9 (1982).

Excusing jurors from competency hearing. — Trial court did not abuse the court's discretion by excusing a potential juror during jury selection for a competency hearing and by failing to excuse a second juror because the first juror expressed an inability to judge the defendant's competency on the merits, and after the second juror expressed a willingness to be fair, the trial court found that the juror had no fixed opinion about the defendant's guilt. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Due process requires procedures adequate to protect incompetent from standing trial. — Failure to observe procedures adequate to protect an accused's right not to be tried or convicted while incompetent to stand trial deprives the accused of the accused's due process right to a fair trial. Ricks v. State, 240 Ga. 853, 242 S.E.2d 604 (1978).

In addition to the common law and statutory rights of a defendant not to be tried while incompetent, the accused also has a constitutional right to not be put on trial while incompetent, and procedural due process requires the trial court to afford the accused an adequate hearing on the issue of competency. Baker v. State, 250 Ga. 187, 297 S.E.2d 9 (1982).

Raising issue of insanity if plea not filed. — If there is no special plea of insanity, this section, requiring a special trial of that issue when a special plea is filed, is not applicable and the issue of insanity can be raised and tried under the plea of general issue of not guilty. Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967).

Entering plea of not guilty by reason of insanity if plea of incompetency not entered. — If a defendant fails to enter a special plea of incompetency to stand trial, instead entering only a plea of not guilty by reason of insanity, the defendant puts in issue the defendant's sanity at the time of commission of the offense, not the defendant's competency to stand trial. Chenault v. Stynchcombe, 546 F.2d 1191 (5th Cir.), cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977).

Motion for psychiatric examination if special plea not filed. — If a motion is made to have the defendant's mental competency examined by a psychiatrist, but no special plea of insanity is filed, the trial court under such circumstance does not err in failing to have a judicial determination made of the defendant's sanity prior to the trial on the indictment. Coffee v. State, 230 Ga. 123, 195 S.E.2d 897 (1973).

If no special plea of insanity is filed, the granting of the motion for a psychiatric examination is within the sound discretion of the trial court. This rule attaches in probation revocation hearings as well as in criminal proceedings. Mann v. State, 154 Ga. App. 677, 269 S.E.2d 863 (1980).

Since no special plea was brought before the court, the trial court did not abuse the court's discretion in failing, sua sponte, to order a special hearing on mental competency on the basis of the testimony presented at trial. Dowdy v. State, 169 Ga. App. 14, 311 S.E.2d 184 (1983).

Motion for continuance to procure further psychiatric examination. — When a motion for a continuance to pro-

cure further psychiatric examination is based on evidence that reasonably indicates mental instability on the part of the defendant at the time of the offense or at the time of trial and when the motion is not made for the mere purpose of delay and avoidance of prosecution, the interests of justice might be better served if the trial court's discretion were exercised in favor of the defendant, even when no special plea of insanity has been filed by counsel. Morgan v. State, 135 Ga. App. 139, 217 S.E.2d 175, rev'd on other grounds, 235 Ga. 632, 221 S.E.2d 47, overruled on other grounds, Dent v. State, 136 Ga. App. 366, 221 S.E.2d 228, overruled on other grounds, Davis v. State, 136 Ga. App. 749, 222 S.E.2d 188 (1975).

State free to proceed with trial if plea not sustained. — If a plea of insanity is not sustained the law is silent as to further action, clearly implying that the state is free to proceed with the trial. Spell v. State, 120 Ga. App. 398, 170 S.E.2d 701 (1969).

Proceeding to trial upon decision on plea adverse to defendant. — After a special plea of insanity has been decided by a jury adversely to the party indicted, it is not error for the trial judge to proceed with the trial of the main case. Watson v. State, 229 Ga. 787, 194 S.E.2d 407 (1972).

Waiver of right to present expert testimony on insanity. — Defendant may invoke the defendant's privilege against self-incrimination, refuse to submit to an examination by an independent expert, and thereby forego the right to present expert testimony on the issue of insanity. Strickland v. State, 257 Ga. 230, 357 S.E.2d 85 (1987).

Questions going to guilt or innocence may be objectionable in a special proceeding to determine the sanity or insanity of a criminal defendant. Henderson v. State, 157 Ga. App. 621, 278 S.E.2d 164 (1981).

Motion for psychiatric examination if special plea not filed. — Since defense counsel did not file a special pretrial plea of insanity or mental incompetency to be tried pursuant to O.C.G.A. § 17-7-130, the trial court had no mandatory duty to impanel a special jury to determine that issue pursuant to defense counsel's midtrial motion for a psychiatric evaluation. Lightsey v. State, 188 Ga. App. 801, 374 S.E.2d 335 (1988).

Trial court need not have held a separate hearing on competency in the absence of a special plea of incompetency by a defendant when the trial court had been concerned enough about the issue of competency to independently order an evaluation of the defendant and when there had been testimony by two experts as to a defendant's competency. The fact that the court allowed the trial to go forward after testimony concerning defendant's competency was in effect a sub silentio finding that defendant was competent. Harris v. State, 256 Ga. 350, 349 S.E.2d 374 (1986).

Superior court has authority to civilly commit a pretrial detainee who is incompetent to stand trial as long as the court utilizes the criteria and procedures set forth in O.C.G.A. Ch. 3, T. 37 in making the court's decision. Department of Human Resources v. Long, 217 Ga. App. 763, 458 S.E.2d 914 (1995).

Procedural default when a failure to pursue competency. — Habeas court correctly concluded that the petitioner's claim that the petitioner was tried while incompetent was barred by procedural default under O.C.G.A. § 9-14-48(d) because the claim was not pursued to a conclusion at trial and was not raised on direct appeal; for purposes of determining whether the procedural default doctrine will apply, there is no meaningful distinction between the failure to exercise a defendant's right to have his or her competence determined in the trial court and the failure to exercise a defendant's additional right to have a competency determination evaluated on appeal, and substantive claims of incompetence to stand trial will continue to be subject to procedural default in Georgia. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Application

Refusal to provide defendant with psychiatrist for hearing on plea. — Hearing upon a special plea of insanity is a proceeding of a civil nature in which the

Application (Cont'd)

burden rests on the defendant to produce evidence of the defendant's insanity. Thus, the refusal of a trial court to provide for examination by and assistance to the accused by a competent psychiatrist selected by the accused, discloses no violation of due process or error for any other reason. May v. State, 146 Ga. App. 416, 246 S.E.2d 432 (1978).

When a defendant's "rap sheet" failed to disclose an earlier conviction and court order finding the defendant incompetent to stand trial, and the defendant did not inform the defendant's attorney of the fact, the trial court in this action had no reason to conduct an investigation of the defendant's competence sua sponte, and the court's denial of funds for an independent psychiatrist was not error. Baxter v. Kemp, 260 Ga. 184, 391 S.E.2d 754 (1990), cert. denied, 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991).

Denial of psychiatric examination at county expense when plea not entered at time of trial. — It is not error for a trial court to deny the defendant's motion requesting that the defendant be examined by a psychiatrist at county expense when the defendant has not entered a special plea of insanity at the time of trial. Huguley v. State, 120 Ga. App. 332, 170 S.E.2d 450 (1969), cert. denied, 400 U.S. 834, 91 S. Ct. 68, 27 L. Ed. 2d 66 (1970).

Psychiatric evaluation not required. — Trial court was not compelled to direct a psychiatric examination when there was no showing that the defendant would not be able to intelligently participate at trial or that the defendant's sanity would be a significant issue at trial. Johnson v. State, 209 Ga. App. 514, 433 S.E.2d 717 (1993).

Escapee from state institution seeking habeas corpus. — When a person charged with a criminal offense files a special plea of insanity under this section, and on such plea was found insane and committed to the Milledgeville State Hospital (now Department of Human Resources), and when after such commitment the person left the hospital without permission, and was later taken into custody by a sheriff for the purpose of being returned to such institution, the person cannot maintain a petition for the writ of habeas corpus on the ground that the person had regained sanity, without showing that the person pursued or attempted to pursue the statutory method of obtaining a release from the institution, or without alleging and proving some valid reason for the person's failure to invoke such remedy. Richardson v. Hall, 199 Ga. 602, 34 S.E.2d 888 (1945).

Evaluation by doctor not certified as psychiatrist. — Requirement that the defendant be given a psychiatric evaluation may be satisfied by evaluation by a doctor qualified to give such opinion who may not be a board certified psychiatrist; thus, under these circumstances there is no violation of due process in the refusal of the trial judge to appoint a psychiatrist to make a pretrial examination or otherwise assist an indigent accused even when there has been a special plea of insanity. Henderson v. State, 157 Ga. App. 621, 278 S.E.2d 164 (1981).

Presumption of competency raised by release. — Although prior adjudications by the probate court and the superior court raised a presumption of the defendant's mental incompetency, the defendant's administrative release by the Department of Human Resources under O.C.G.A. § 17-7-130 cancelled that presumption of incompetency and raised a presumption of competency. Newman v. State, 258 Ga. 428, 369 S.E.2d 902 (1988).

Verdict of guilty unauthorized if presumption overcome and no evidence of sanity introduced. — If the defendant pleads insanity at the time of the crime and as a defense introduces evidence sufficient to overcome the presumption of sanity, and there is no evidence that the defendant was sane at the time of the commission of the offense, a verdict of guilty is unauthorized. Brooks v. State, 157 Ga. App. 650, 278 S.E.2d 463, aff'd, 247 Ga. 744, 279 S.E.2d 649 (1981).

Admissibility of testimony on sanity by agent of Georgia Bureau of Investigation. — In special proceeding to determine sanity, it is not error for the trial court to allow an agent of the Georgia Bureau of Investigation to state underly-

ing reasons for the agent's opinion that the criminal defendant is sane, when the evidence is not offered for the purpose of showing criminal misconduct or to prove the truth of the defendant's admissions but, instead, is offered to indicate the defendant's degree of understanding and mental condition. Henderson v. State, 157 Ga. App. 621, 278 S.E.2d 164 (1981).

Remedying error in determination that defendant competent to stand trial. — When there was no meritorious claim of error in the trial itself, error in failure to provide a hearing on the issue of the defendant's competence to stand trial was not such an error as required a new trial on the question of guilt or innocence, but rather only required that the case be remanded for a determination of defendant's competence at the time of defendant's trial by holding a post-conviction hearing. Baker v. State, 250 Ga. 187, 297 S.E.2d 9 (1982).

Fact that the defendant gives way to emotional outbursts, is suicidal, or considers oneself insane is insufficient to demand reversal of the decision when the judgment against plea of insanity is being reviewed. Allanson v. State, 158 Ga. App. 77, 279 S.E.2d 316 (1981).

Finding of competence to stand trial affirmed. — It was apparent that the testimony of the state's expert witness, finding the defendant competent to stand trial, supported the special jury's verdict of competency. Because there was some evidence in support of that verdict of competent to stand trial, the verdict had to be affirmed. Sims v. State, 267 Ga. App. 572, 600 S.E.2d 613 (2004).

Evidence was sufficient to support a special jury's finding that a defendant was competent to stand trial. Extensive testimony of doctors and hospital staff showed that the defendant was a longtime alcoholic, did not have a major mental illness, understood the legal proceedings, and could assist counsel at trial. Hester v. State, 283 Ga. 367, 659 S.E.2d 600 (2008).

Defendant did not file a special plea of incompetence to stand trial. As the defendant's colloquy with the trial judge indicated that the defendant understood the charges, the possible punishment, and the trial process, and that the defendant was helping counsel to prepare the defense; and as the psychologist who conducted the first competency evaluation opined that the defendant was probably exaggerating symptoms of incompetency, the defendant was properly found competent to stand trial and was not entitled to a second competency evaluation. Wadley v. State, 295 Ga. App. 556, 672 S.E.2d 504 (2009), cert. denied, No. S09C0811, 2009 Ga. LEXIS 255 (Ga. 2009).

Testimony from the state's forensic psychology expert that the defendant understood in detail the nature and object of the proceedings and the defendant's role in the proceedings and that the defendant was able, if not always inclined, to assist counsel supported a finding that the defendant was competent to stand trial. Slaughter v. State, 292 Ga. 573, 740 S.E.2d 119 (2013).

Defendant's competency no basis to conduct hearing or issue ruling on new trial motion. — Trial court erred by refusing to conduct a hearing or to rule on the defendant's motion for a new trial based upon the court's finding that the defendant was, at that time, mentally incompetent and unable to assist counsel in challenging the conviction, as the defendant's current mental incompetence provided no logical basis to delay a post-conviction proceeding to address whether the defendant was incompetent at trial, whether the trial court should have been on notice of the incompetency and conducted a hearing during trial, or whether the trial counsel was ineffective for failing to timely raise the competency issue. Florescu v. State, 276 Ga. App. 264, 623 S.E.2d 147 (2005).

Burden of Proof

Relevance and proof of mental condition at time of offense. — To show the insanity of the accused at the time of the commission of the offense it is relevant to introduce testimony showing the mental condition of the accused at the time of the offense, and the accused's mental condition before and after the offense may be proved as tending to show the accused's condition at the time of the offense. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947), overruled on other grounds,

Burden of Proof (Cont'd)

Brooks v. State, 247 Ga. 744, 279 S.E.2d 649 (1981).

Burden of proof generally. — On the issue of insanity (now mental incompetency), the burden of proof rests upon the defendant who alleges the insanity. Carter v. State, 56 Ga. 463 (1876); Keener v. State, 97 Ga. 388, 24 S.E. 28 (1895).

Trial of a special plea of insanity is in the nature of a civil proceeding and the burden of producing evidence is on the defendant. Banks v. State, 246 Ga. 178, 269 S.E.2d 450 (1980).

In every case there is a presumption that the accused is sane. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947), overruled on other grounds, Brooks v. State, 247 Ga. 744, 279 S.E.2d 649 (1981).

Presumption of sanity may be overcome by a preponderance of the evidence. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947), overruled on other grounds, Brooks v. State, 247 Ga. 744, 279 S.E.2d 649 (1981).

Failure to prove incompetency. — Evidence was sufficient to conclude that the defendant failed to prove that the defendant was incompetent to stand trial because the state's expert witness found that, based on the defendant's exchanges during a police interview, the felony murder concept was explained to the defendant numerous times and the defendant's responses indicated that the defendant understood; the fact that the defendant did not think that the defendant should be held responsible for the victim's death did not mean that the defendant should not be held responsible or that it rendered the defendant incapable of understanding the situation; and there was no medical support for the conclusion that the defendant was not competent to stand trial in 2008. Tye v. State, 298 Ga. 474, 782 S.E.2d 10 (2016).

Obligations of Counsel

Counsel not ineffective for not raising issue. — Defendant failed to show that the defendant's counsel was ineffective in violation of U.S. Const., amend. 6 for failing to pursue a request for a psychological examination, an insanity defense under O.C.G.A. § 16-3-2, and asserting that the defendant was not competent to stand trial under O.C.G.A. § 17-7-130 in a criminal trial arising from multiple offenses, including murder, as there was nothing in the defendant's psychological history or in counsels' interactions with the defendant which suggested that there was a problem with the defendant's sanity or competency. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485 (2005).

Counsel's failure to raise issue deficient but not prejudicial. — Defendant's trial counsel performed deficiently in not seeking expert assistance in evaluating the defendant's mental condition at the time of the shooting and at the time of trial because the defendant was hospitalized in 1996 after stabbing the same man that the defendant murdered; and, in 1996, the defendant reported hearing a voice telling the defendant to kill for which the defendant received antipsychotic medication; however, counsel's deficient performance was not prejudicial as the defendant did not show that the jury would have returned a verdict of not guilty by reason of insanity because the defendant did not receive any diagnosis of or treatment for mental illness for more than a decade before the current crimes. Scott v. State, 301 Ga. 573, 802 S.E.2d 211 (2017).

Counsel was not ineffective for failing to seek continuance for competency evaluation. — Because the defendant did not demonstrate that the defendant was prejudiced by counsel's failure to reiterate a request for a competency evaluation, the defendant did not demonstrate that counsel was ineffective for failing to seek a continuance to pursue such a request. Stodghill v. State, 351 Ga. App. 744, 832 S.E.2d 891 (2019).

If insanity of the defendant is known to defendant's counsel, then counsel has a professional, moral, and legal duty to file a plea of insanity as provided by law. If unknown, then it can be raised by a ground of a motion for a new trial by a proper showing. Huguley v. State, 120 Ga. App. 332, 170 S.E.2d 450 (1969), cert. denied, 400 U.S. 834, 91 S. Ct. 68, 27 L. Ed. 2d 66 (1970).

Counsel may not be called to testify as to client's competency. — It is not legally permissible for the state to call the defendant's counsel as a witness for the purpose of extracting facts and counsel's opinion as to the client's competency which is gained from the counsel's participation in the attorney-client relationship with the defendant. Almond v. State, 180 Ga. App. 475, 349 S.E.2d 482 (1986).

Jury Instructions and Responsibilities

Better practice is not to charge the jury on the provisions of this section. Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975), rev'd on other grounds, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

Question of insanity is in province of jury. — Insanity is a question of fact, and not of law, and it is the exclusive province of the jury to determine all questions of fact. Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947), overruled on other grounds, Brooks v. State, 247 Ga. 744, 279 S.E.2d 649 (1981).

Jurors are not bound by opinions of either lay witnesses or expert witnesses as to question of sanity and jurors may rely on the basic presumption existing under Georgia law. Brooks v. State, 157 Ga. App. 650, 278 S.E.2d 463, aff'd, 247 Ga. 744, 279 S.E.2d 649 (1981).

There was insufficient reason for jury to disregard the unanimous opinions of psychiatric experts that the defendant, who suffered from schizophrenia, was incompetent to stand trial. Defendant was therefore denied due process of law when the defendant was tried. Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985).

If no question of competency to stand trial is ever raised, the failure to charge the jury on O.C.G.A. § 17-7-130 is not error. Kirk v. State, 168 Ga. App. 226, 308 S.E.2d 592 (1983), aff'd, 252 Ga. 133, 311 S.E.2d 821 (1984).

No error in declining to charge jury on insanity. — Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the defendant introduced no evidence of insanity, only lay witness testimony about generalized problems. McBride v. State, 314 Ga. App. 725, 725 S.E.2d 844 (2012).

Appeals

Appeal from judgment. — Plea of insanity at the time of trial is an interlocutory judgment and not subject to direct appeal without a timely certificate from the trial court. Spell v. State, 120 Ga. App. 398, 170 S.E.2d 701 (1969).

When a plea of insanity was granted and the defendant was transferred to the Department of Human Resources (DHR), the DHR could appeal directly without following the interlocutory appeal procedure. Georgia Dep't of Human Resources v. Drust, 264 Ga. 514, 448 S.E.2d 364 (1994).

Review of finding against special plea. — Indicted party has no right to direct review from a finding against the party's special plea of insanity without a certificate of the trial judge. Watson v. State, 229 Ga. 787, 194 S.E.2d 407 (1972).

When denial of plea set aside on appeal. — Court of Appeals will not set aside a verdict finding against such a plea unless the evidence demands a finding in its favor. Polk v. State, 19 Ga. App. 332, 91 S.E. 439 (1917).

Upon remand in a criminal case, on the issue of the defendant's competency, the burden first fell upon the state to show there was sufficient evidence to make a meaningful determination of competency at the time of trial, and if the court ruled that a determination of the defendant's competency at the time of trial was not presently possible, then a new trial had to be granted, but if the court decided such a determination was possible, the issue of competency to stand trial had to be tried and the defendant had the burden to show incompetency by a preponderance of the evidence; the sole issue to be presented to the fact-finder was that of mental competency; evidence as to guilt was irrelevant, and if the fact-finder found that the defen-

Appeals (Cont'd)

dant was not mentally competent at the time of trial, the verdict in the main case had to be set aside, but if the defendant failed by a preponderance of the evidence to prove incompetence at the time of trial, the verdict of guilty would stand. Traylor v. State, 280 Ga. 400, 627 S.E.2d 594 (2006).

Standard for review of a finding of competency to stand trial. — "Any evidence" standard of appellate review employed by the court of appeals was improper. The appropriate standard of appellate review is whether after reviewing the evidence in the light most favorable to the state, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant was incompetent to stand trial, overruling Stowe v. State, 272 Ga. 866, 536 S.E.2d 506 (2000), Pope v. State, 185 Ga. App. 547, 362 S.E.2d 123 (1987), and any other cases in conflict; therefore, the defendant's conviction was reversed. Sims v. State, 279 Ga. 389, 614 S.E.2d 73 (2005).

OPINIONS OF THE ATTORNEY GENERAL

Instructions to physician regarding insanity of one convicted of a capital felony. — In view of the fact that the inquiry under former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61) was directed to the alleged insanity occurring subsequent to the conviction, the definitions of insanity in former Code 1933, §§ 79A-9917 and 79A-9918 (see O.C.G.A. §§ 16-3-2 and 16-3-3) were inapplicable and should not be given in written instructions to physicians appointed pursuant to former Code 1933, § 27-2602. Those instructions should inform the physicians that the issue was the present sanity of the individual and should be determined on the basis of whether the individual is capable of presently understanding the nature and object of the proceedings going on against the individual and rightly comprehends the individual's own condition in reference to such proceedings, and was capable of rendering the individual's attorneys such assistance as a proper defense to the proceedings preferred against the individual demands. Since the basic issue is the individual's sanity at a time subsequent to conviction, or, in effect, the individual's present sanity, the appropriate test should be that as employed upon a special plea of insanity under former Code 1933, § 27-1502 (see O.C.G.A. § 17-7-130). 1976 Op. Att'y Gen. No. 76-123.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 50 et seq.

Am. Jur. Proof of Facts. — Defendant's Competency to Stand Trial, 40 POF2d 171.

Adequacy of Quasi-Miranda Warning Prior to Involuntary Civil Commitment, 40 POF2d 733.

Wrongful Confinement to a Mental Health or Developmental Disabilities Facility, 44 POF3d 217.

ALR. — Constitutionality of statutes relating to determination of plea of insanity in criminal case, 67 A.L.R. 1451.

Judicial declaration of sanity, made after alleged offense but before acquittal on ground of insanity at time of offense, as affecting duty of court to commit defendant to asylum for insane, 88 A.L.R. 1084.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 A.L.R. 1443.

Investigation of present sanity to determine whether accused should be put, or continue, on trial, 142 A.L.R. 961.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Counsel's right, in consulting with accused as client, to be accompanied by psychiatrist, psychologist, hypnotist, or similar practitioner, 72 A.L.R.2d 1120.

Release of one committed to institution as consequence of acquittal of crime on ground of insanity, 95 A.L.R.2d 54.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal, 50 A.L.R.3d 144.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense, 1 A.L.R.4th 884.

Modern status of test of criminal responsibility — state cases, 9 A.L.R.4th 526.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 A.L.R.4th 1043.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense, 17 A.L.R.4th 1274.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" — modern cases, 23 A.L.R.4th 493.

Mental or emotional disturbance as defense to or mitigation of charges against attorney in disciplinary proceeding, 26 A.L.R.4th 995.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" — modern state cases, 33 A.L.R.4th 1062.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Adequacy of defense counsel's representation of criminal client — issues of incompetency, 70 A.L.R.5th 1.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A.L.R.5th 109.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

Am. Jur. 2d. — 40 Am. Jur. 2d, Homicide, § 96 et seq.

42 Am. Jur. 2d, Infants, § 120 et seq.

17-7-130.1. Evidence as to defendant's sanity at time of offense; examination and testimony by psychiatrist or psychologist.

At the trial of a criminal case in which the defendant intends to interpose the defense of insanity, evidence may be introduced to prove the defendant's sanity or insanity at the time at which he is alleged to have committed the offense charged in the indictment or information. When notice of an insanity defense is filed, the court shall appoint at least one psychiatrist or licensed psychologist to examine the defendant and to testify at the trial. This testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony of any medical experts employed by the state or by the defense. The medical witnesses appointed by the court may be cross-examined by both the prosecution and the defense, and each side may introduce evidence in rebuttal to the testimony of such a medical witness.

History. — Code 1981, § 17-7-130.1, enacted by Ga. L. 1985, p. 637, § 1.

Administrative rules and regulations. — Disposition of guilty but men-

tally ill and guilty but mentally retarded offenders, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Services, Mental Health, Developmental Disabilities and Addictive Diseases, Chapter 290-4-8.

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006). For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

JUDICIAL DECISIONS

Section not applicable to sentencing assistance. — O.C.G.A. § 17-7-130.1 deals only with an insanity defense and does not apply to a defendant's motion for expert assistance for sentencing. Bright v. State, 265 Ga. 265, 455 S.E.2d 37, cert. denied, 516 U.S. 872, 116 S. Ct. 196, 133 L. Ed. 2d 131 (1995).

Court did not need to inquire sua sponte into defendant's competency. — Despite the defendant's contentions that the trial court erred in not ensuring the competency required to control the defense, nothing before the appellate court indicated that the defendant was incompetent to stand trial, nor was there any evidence that should have indicated to the trial court that a sua sponte inquiry into competency was required. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007).

Legislative intent. — Clear legislative intent of O.C.G.A. § 17-7-130.1 is that the factfinder should resolve the issue of sanity based upon the evidence before the factfinder, including expert testimony. Tolbert v. State, 260 Ga. 527, 397 S.E.2d 439 (1990), cert. denied, 500 U.S. 921, 111 S. Ct. 2025, 114 L. Ed. 2d 111 (1991).

"Fair warning" aspect of the void-for-vagueness doctrine is inapplicable to O.C.G.A. § 17-7-130.1, which is part of the statutory scheme for handling insanity defenses in criminal cases and provides, inter alia, for the examination of the defendant by a court-appointed psychiatrist or psychologist; and the statute sets forth sufficient guidelines to avoid the statute's arbitrary and discriminatory implementation, so the statute is not unconstitutionally vague. Lamar v. State, 278 Ga. 150, 598 S.E.2d 488 (2004).

Listing name of court-appointed expert not required. — When a court-appointed mental health expert was not called by the state but by the court itself in accordance with O.C.G.A. § 17-7-130.1, the expert's name was not required to be listed by the state in response to the defendant's demand under former law. Moore v. State, 220 Ga. App. 434, 469 S.E.2d 211 (1996).

Appointment of second expert not required. — Since the court appointed a mental health expert who was independent of either party and was impartial, the defendant was not entitled to have another expert appointed to examine the defendant and testify at trial after the defendant filed notice of an insanity defense. Moore v. State, 220 Ga. App. 434, 469 S.E.2d 211 (1996).

Authority to assert insanity defense. — O.C.G.A. §§ 16-3-2 and 16-3-3 provide the authority for any defendant to assert an insanity defense, and there is nothing in O.C.G.A. § 17-7-130.1 which limits that authority. Motes v. State, 256 Ga. 831, 353 S.E.2d 348 (1987).

Self-incrimination protection. — If the defendant wants to introduce expert testimony as to the defendant's mental state, the state must be allowed the same privilege, and the defendant, in light of the defendant's partial waiver of the right to remain silent, must cooperate by talking to the court-appointed expert. But if the defendant chooses to prove insanity by means other than expert testimony, the partial waiver does not arise, the case may proceed as any other, the defendant choosing whether or not to talk to the court appointed expert, and the court should not forbid the defendant's use of the insanity defense if the defendant refuses to submit to examination. Motes v. State, 256 Ga. 831, 353 S.E.2d 348 (1987).

It was not error to admit a defendant's statements to an expert appointed pursuant to O.C.G.A. § 17-7-130.1 to examine

the defendant upon the defendant's assertion of an insanity defense because: (1) the state had a statutory right, under O.C.G.A. § 17-7-130.1, to call the expert to rebut the testimony of the defendant's expert regarding the defendant's mental state at the time of the crimes charged; (2) the defendant had no Sixth Amendment right to counsel during the expert's examination or Fifth Amendment right requiring the repetition of the defendant's Miranda rights during the interview with the appointed expert; and (3) the defendant's counsel was aware of the psychiatric interview and chose not to attend. Walker v. State, 290 Ga. 467, 722 S.E.2d 72 (2012).

Court-appointed expert not agent of state. — Court-appointed medical expert cannot be classified as an agent of the state, but must be considered as an independent and impartial witness. The same rule applies to a medical expert, appointed prior to indictment, whose professional opinion might be needed so that the court is able to fashion a proper disposition of matters before the court. Tolbert v. State, 260 Ga. 527, 397 S.E.2d 439 (1990), cert. denied, 500 U.S. 921, 111 S. Ct. 2025, 114 L. Ed. 2d 111 (1991).

There were no violations of due process and separation of powers when a psychiatrist employed by a state hospital served as the court-appointed witness and was introduced to the jury by the trial court as the state's witness because the fact that the expert's opinion that the defendant was not insane when the defendant shot the victim supported the position of the state did not make the expert a witness for the prosecution. Danenberg v. State, 291 Ga. 439, 729 S.E.2d 315 (2012), cert. denied, 568 U.S. 1124, 133 S. Ct. 941, 184 L. Ed. 2d 726 (2013).

Patient-psychologist privilege does not apply when the defense is insanity and the statement in question is made during an evaluation by a court-appointed psychologist. The same is true if the examining psychologist is the state's psychologist. Harris v. State, 256 Ga. 350, 349 S.E.2d 374 (1986).

Cooperation with court's expert. — Defendant who obtains expert assistance to assist the defendant in the evaluation, preparation, and presentation of an insanity defense, and to initially prepare that defense in secret, need not submit to an examination of a state expert until the defendant has had an opportunity to decide whether to present expert testimony at trial; however, pursuant to the state's interest under O.C.G.A. § 17-7-130.1 to have an opportunity to rebut the defendant's expert testimony at trial, the defendant must cooperate with the court expert in time for the state to adequately prepare the state's evidence in response to the defendant's testimony. Bright v. State, 265 Ga. 265, 455 S.E.2d 37, cert. denied, 516 U.S. 872, 116 S. Ct. 196, 133 L. Ed. 2d 131 (1995).

Because O.C.G.A. § 17-7-130.1, which is part of the statutory scheme for handling insanity defenses in criminal cases and provides, inter alia, for the examination of the defendant by a court-appointed psychiatrist or psychologist, does not require a defendant to cooperate with the court's expert and provides no sanctions against a defendant who refuses to so cooperate the statute is not overbroad. Lamar v. State, 278 Ga. 150, 598 S.E.2d 488 (2004).

Medication of defendant during interview. — Trial court did not abuse the court's discretion in allowing a court-appointed psychologist to testify as to the defendant's mental condition at the time of the commission of the crime, even though the defendant was medicated during the defendant's interview but was not medicated during the commission of the crime. Frazier v. State, 216 Ga. App. 111, 452 S.E.2d 803 (1995).

Insanity defense inappropriate when defendant claimed sleep walking. — In a malice murder prosecution, as the defendant claimed he unintentionally killed his wife while sleepwalking, and expert testimony supported this claim, the trial court erred in classifying the defense as an insanity defense under O.C.G.A. § 17-7-130.1, and in instructing the jury on the defense of insanity, as this detracted from the defendant's primary defense that the defendant did not commit the acts in question voluntarily and with criminal intent. Smith v. State, 284 Ga. 33, 663 S.E.2d 155 (2008).

Ineffective assistance of counsel for failing to plead guilty but mentally retarded not found. — With regard to a defendant's convictions for kidnapping, aggravated sodomy, and aggravated sexual battery, the defendant was not rendered ineffective assistance of counsel as a result of the trial counsel's decision not to file a plea of guilty but mentally retarded and, instead, attacked the credibility of the victim as trial counsel's decision as to which theory of defense to pursue was a matter of trial strategy and tactics that was not unreasonable and thus did not constitute ineffective assistance. Hampton v. State, 294 Ga. App. 857, 670 S.E.2d 502 (2008).

Sentencing phase. — Since the defendant withdrew the defendant's notice of insanity as a defense prior to trial, but offered evidence as to the defendant's mental health during the sentencing phase, the tender of such evidence was not the assertion of an insanity defense, and O.C.G.A. § 17-7-130.1 does not apply to authorize the trial court to call a psychiatrist; however, such action was not an improper comment by the court on issues of mitigation since the court had discretion to summon and examine witnesses of the court's own choosing. Henry v. State, 265 Ga. 732, 462 S.E.2d 737 (1995).

Cited in Guilford v. State, 258 Ga. 253, 368 S.E.2d 116 (1988); Taylor v. State, 261 Ga. 287, 404 S.E.2d 255; Guillen v. State, 258 Ga. App. 465, 574 S.E.2d 598 (2002).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Insanity Defense, 41 POF2d 615.

ALR. — Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

17-7-131. Proceedings upon plea of insanity or mental incompetency at time of crime.

(a) For purposes of this Code section, the term:

(1) "Insane at the time of the crime" means meeting the criteria of Code Section 16-3-2 or 16-3-3. However, the term shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

(2) "Intellectual disability" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.

(3) "Mentally ill" means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. However, the term "mental illness" shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

(b)(1) In all cases in which the defense of insanity, mental illness, or intellectual disability is interposed, the jury, or the court if tried by it, shall find whether the defendant is:

(A) Guilty;

(B) Not guilty;

(C) Not guilty by reason of insanity at the time of the crime;

(D) Guilty but mentally ill at the time of the crime, but the finding of guilty but mentally ill shall be made only in felony cases; or

(E) Guilty but with intellectual disability, but the finding of intellectual disability shall be made only in felony cases.

(2) A plea of guilty but mentally ill at the time of the crime or a plea of guilty but with intellectual disability shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense or has intellectual disability to which the plea is entered.

(2.1) A plea of not guilty by reason of insanity at the time of the crime shall not be accepted and the defendant adjudicated not guilty by reason of insanity by the court without a jury until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, has held a hearing on the issue of the defendant's mental condition, and the court is satisfied that the defendant was insane at the time of the crime according to the criteria of Code Section 16-3-2 or 16-3-3.

(3) In all cases in which the defense of insanity, mental illness, or intellectual disability is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following:

(A) I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law.

(B) I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.

(C) I charge you that should you find the defendant guilty but with intellectual disability, the defendant will be placed in the

custody of the Department of Corrections, which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental Disabilities.

(c) In all criminal trials in any of the courts of this state wherein an accused shall contend that he or she was insane, mentally ill, or intellectually disabled at the time the act or acts charged against him or her were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty," the additional verdicts of "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but with intellectual disability."

(1) The defendant may be found "not guilty by reason of insanity at the time of the crime" if he or she meets the criteria of Code Section 16-3-2 or 16-3-3 at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

(2) The defendant may be found "guilty but mentally ill at the time of the crime" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and was mentally ill at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

(3) The defendant may be found "guilty but with intellectual disability" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is with intellectual disability. If the court or jury should make such finding, it shall so specify in its verdict.

(d) Whenever a defendant is found not guilty by reason of insanity at the time of the crime, the court shall retain jurisdiction over the person so acquitted and shall order such person to be detained in a state mental health facility, to be selected by the Department of Behavioral Health and Developmental Disabilities, for a period not to exceed 30 days from the date of the acquittal order, for evaluation of the defendant's present mental condition. Upon completion of the evaluation, the proper officials of the mental health facility shall send a report of the defendant's present mental condition to the trial judge, the prosecuting attorney, and the defendant's attorney, if any.

(e)(1) After the expiration of the 30 days' evaluation period in the state mental health facility, if the evaluation report from the Department of Behavioral Health and Developmental Disabilities indicates

that the defendant does not meet the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37, the trial judge may issue an order discharging the defendant from custody without a hearing.

(2) If the defendant is not so discharged, the trial judge shall order a hearing to determine if the defendant meets the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37. If such criteria are not met, the defendant must be discharged.

(3) The defendant shall be detained in custody until completion of the hearing. The hearing shall be conducted at the earliest opportunity after the expiration of the 30 days' evaluation period but in any event within 30 days after receipt by the prosecuting attorney of the evaluation report from the mental health facility. The court may take judicial notice of evidence introduced during the trial of the defendant and may call for testimony from any person with knowledge concerning whether the defendant is currently a mentally ill person in need of involuntary treatment, as defined by paragraph (12) of Code Section 37-3-1, or a person with a developmental disability, as defined in paragraph (8) of Code Section 37-1-1, who presents a substantial risk of imminent harm to himself or herself or others. The prosecuting attorney may cross-examine the witnesses called by the court and the defendant's witnesses and present relevant evidence concerning the issues presented at the hearing.

(4) If the judge determines that the defendant meets the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37, the judge shall order the defendant to be committed to the Department of Behavioral Health and Developmental Disabilities to receive involuntary treatment under Chapter 3 of Title 37 or to receive services under Chapter 4 of Title 37. The defendant is entitled to the following rights specified below and shall be notified in writing of these rights at the time of his or her admission for evaluation under subsection (d) of this Code section. Such rights are:

(A) A notice that a hearing will be held and the time and place thereof;

(B) A notice that the defendant has the right to counsel and that the defendant or his or her representatives may apply immediately to the court to have counsel appointed if the defendant cannot afford counsel and that the court will appoint counsel for the defendant unless he or she indicates in writing that he or she does not desire to be represented by counsel;

(C) The right to confront and cross-examine witnesses and to offer evidence;

(D) The right to subpoena witnesses and to require testimony before the court in person or by deposition from any person upon whose evaluation the decision of the court may rest;

(E) Notice of the right to have established an individualized service plan specifically tailored to the person's treatment needs, as such plans are defined in Chapter 3 of Title 37 and Chapter 4 of Title 37; and

(F) A notice that the defendant has the right to be examined by a physician or a licensed clinical psychologist of his or her own choice at his or her own expense and to have that physician or psychologist submit a suggested service plan for the patient which conforms with the requirements of Chapter 3 of Title 37 or Chapter 4 of Title 37, whichever is applicable.

(5)(A) If a defendant appears to meet the criteria for outpatient involuntary treatment as defined in Part 3 of Article 3 of Chapter 3 of Title 37, which shall be the criteria for release on a trial basis in the community in preparation for a full release, the court may order a period of conditional release subject to certain conditions set by the court. The court is authorized to appoint an appropriate community service provider to work in conjunction with the Department of Behavioral Health and Developmental Disabilities to monitor the defendant's compliance with these conditions and to make regular reports to the court.

(B) If the defendant successfully completes all requirements during this period of conditional release, the court shall discharge the individual from commitment at the end of that period. Such individuals may be referred for community mental health, developmental disabilities, or substance abuse services as appropriate. The court may require the individual to participate in outpatient treatment or any other services or programs authorized by Chapter 3, 4, or 7 of Title 37.

(C) If the defendant does not successfully complete any or all requirements of the conditional release period, the court may:

(i) Revoke the period of conditional release and return the defendant to a state hospital for inpatient services; or

(ii) Impose additional or revise existing conditions on the defendant as appropriate and continue the period of conditional release.

(D) For any decision rendered under subparagraph (C) of this paragraph, the defendant may request a review by the court of such decision within 20 days of the order of the court.

(E) The Department of Behavioral Health and Developmental Disabilities and any community services providers, including the employees and agents of both, providing supervision or treatment during a period of conditional release shall not be held criminally or civilly liable for any acts committed by a defendant placed by the committing court on a period of conditional release.

(f) A defendant who has been found not guilty by reason of insanity at the time of the crime and is ordered committed to the Department of Behavioral Health and Developmental Disabilities under subsection (e) of this Code section may only be discharged from that commitment by order of the committing court in accordance with the procedures specified in this subsection:

(1) Application for the release of a defendant who has been committed to the Department of Behavioral Health and Developmental Disabilities under subsection (e) of this Code section upon the ground that he or she does not meet the civil commitment criteria under Chapter 3 of Title 37 or Chapter 4 of Title 37 may be made to the committing court, either by such defendant or by the superintendent of the state hospital in which the said defendant is detained;

(2) The burden of proof in such release hearing shall be upon the applicant. The defendant shall have the same rights in the release hearing as set forth in subsection (e) of this Code section; and

(3) If the finding of the court is adverse to release in such hearing held pursuant to this subsection on the grounds that such defendant does meet the inpatient civil commitment criteria, a further release application by the defendant shall not be heard by the court until 12 months have elapsed from the date of the hearing upon the last preceding application. The Department of Behavioral Health and Developmental Disabilities shall have the independent right to request a release hearing once every 12 months.

(g)(1) Whenever a defendant is found guilty but mentally ill at the time of a felony or guilty but has intellectual disability, or enters a plea to that effect that is accepted by the court, the court shall sentence him or her in the same manner as a defendant found guilty of the offense, except as otherwise provided in subsection (j) of this Code section. A defendant who is found guilty but mentally ill at the time of the felony or guilty but has intellectual disability shall be committed to an appropriate penal facility and shall be evaluated then treated, if indicated, within the limits of state funds appropriated therefor, in such manner as is psychiatrically indicated for his or her mental illness or intellectual disability.

(2) If at any time following the defendant's conviction as a guilty but mentally ill or guilty but with intellectual disability offender it is

determined that a temporary transfer to the Department of Behavioral Health and Developmental Disabilities is clinically indicated for his or her mental illness or intellectual disability, then the defendant shall be transferred to the Department of Behavioral Health and Developmental Disabilities pursuant to procedures set forth in regulations of the Department of Corrections and the Department of Behavioral Health and Developmental Disabilities. In all such cases, the legal custody of the defendant shall be retained by the Department of Corrections. Upon notification from the Department of Behavioral Health and Developmental Disabilities to the Department of Corrections that hospitalization at a Department of Behavioral Health and Developmental Disabilities facility is no longer clinically indicated for his or her mental illness or intellectual disability, the Department of Corrections shall transfer the defendant back to its physical custody and shall place such individual in an appropriate penal institution.

(h) If a defendant who is found guilty but mentally ill at the time of a felony or guilty but with intellectual disability is placed on probation under the "State-wide Probation Act," Article 2 of Chapter 8 of Title 42, the court may require that the defendant undergo available outpatient medical or psychiatric treatment or seek similar available voluntary inpatient treatment as a condition of probation. Persons required to receive such services may be charged fees by the provider of the services.

(i) In any case in which the defense of insanity is interposed or a plea of guilty but mentally ill at the time of the felony or a plea of guilty but with intellectual disability is made and an examination is made of the defendant pursuant to Code Section 17-7-130.1 or paragraph (2) of subsection (b) of this Code section, upon the defendant's being found guilty or guilty but mentally ill at the time of the crime or guilty but with intellectual disability, a copy of any such examination report shall be forwarded to the Department of Corrections with the official sentencing document. The Department of Behavioral Health and Developmental Disabilities shall forward, in addition to its examination report, any records maintained by such department that it deems appropriate pursuant to an agreement with the Department of Corrections, within ten business days of receipt by the Department of Behavioral Health and Developmental Disabilities of the official sentencing document from the Department of Corrections.

(j)(1) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded, or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

(2) In the trial of any case in which the death penalty is sought which commences on or after July 1, 2017, should the judge find in accepting a plea of guilty but with intellectual disability, or the jury or court find in its verdict that the defendant is guilty of the crime charged but with intellectual disability, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

History. — Orig. Code 1863, § 1314; Code 1868, § 1395; Code 1873, § 1374; Code 1882, § 1374; Penal Code 1895, § 952; Penal Code 1910, § 977; Code 1933, § 27-1503; Ga. L. 1952, p. 205, § 1; Ga. L. 1972, p. 848, § 1; Ga. L. 1977, p. 1293, § 2; Ga. L. 1982, p. 1476, §§ 1, 2; Ga. L. 1984, p. 22, § 17; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 637, §§ 2-4; Ga. L. 1988, p. 1003, § 1; Ga. L. 1989, p. 14, § 17; Ga. L. 1991, p. 780, §§ 1-3; Ga. L. 1992, p. 1328, §§ 2, 3; Ga. L. 2006, p. 765, § 1/SB 398; Ga. L. 2009, p. 453, § 3-2/HB 228; Ga. L. 2011, p. 337, § 9/HB 324; Ga. L. 2013, p. 141, § 17/HB 79; Ga. L. 2017, p. 471, § 3/HB 343.

Cross references. — Mental capacity as it relates to culpability for criminal acts, § 16-3-2 et seq. Mental incompetency to be executed, § 17-10-60 et seq. Manner of service of petition for release of person detained in facility pursuant to court order under section, §§ 37-3-148, 37-4-108, 37-7-148.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, the term "and" was inserted after paragraph (f)(2).

Pursuant to Code Section 28-9-5, in 1988, punctuation was revised in the introductory language of subsection (c).

Pursuant to Code Section 28-9-5, in 1991, the parentheses enclosing "or she" following "he" in subparagraph (b)(3)(A) were deleted.

U.S. Code. — Defense of insanity, Federal Rules of Criminal Procedure, Rule 12.2.

Administrative rules and regulations. — Disposition of guilty but mentally ill and guilty but mentally retarded offenders, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Services, Mental Health, Developmental Disabilities and Addictive Diseases, Subject 290-4-8.

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For lecture on law and the unreasonable person, see 36 Emory L.J. 181 (1987). For survey of 1986 Eleventh Circuit cases on constitutional criminal procedure, see 38 Mercer L. Rev. 1141 (1987). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003). For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For annual survey on the death penalty, see 64 Mercer L. Rev. 109 (2012). For article, "Annual Survey of Georgia Law: June 1, 2015 — May 31, 2016: Special Contribution: Georgia's Safe Harbor Ruling for Affirmative Defenses in Criminal Cases Should Be Revisited," see 68 Mercer L. Rev. 35 (2016). For article, "An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases," see 33 Ga. St. U.L. Rev. 553 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

For note, "Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective," see 15 Ga. L. Rev. 1065 (1981). For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 121 (1992). For note, "Can't Do the Time, Don't Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia," see 22 Ga. St. U.L. Rev. 519 (2005).

For comment advocating legislative determination of parental liability for costs of institutional custody of child involun-

tarily committed to a mental health facility in response to criminal behavior in light of Treglown v. Department of Health & Social Servs., 38 Wis.2d 317, 156 N.W.2d 363 (1968), see 19 Mercer L. Rev. 457 (1968). For comment, "Capital Punishment: New Weapons in the Sentencing Process," see 24 Ga. L. Rev. 423 (1990).

JUDICIAL DECISIONS

Analysis

General Consideration
Constitutionality
"Insane," "Mentally Ill," "Intellectual Disability" Defined
Jury Charge

General Consideration

Application of section to persons charged with crimes committed before its enactment. — Provisions of this section that, in the event of an acquittal of a person accused of crime by reason of insanity, the jury shall so state in the jury's verdict, and that the accused shall thereafter be confined in the state hospital for the insane, would not be unconstitutional as being retroactive or ex post facto, when applied to the trial of a person charged with a crime committed prior to the date of its passage. Bailey v. State, 210 Ga. 52, 77 S.E.2d 511 (1953).

Timing of the guilt-innocence phase determines whether the burden of proof with regard to mental retardation is beyond a reasonable doubt or by the preponderance of the evidence; when the guilt-innocence phase of a trial occurred before the enactment of O.C.G.A. § 17-7-131 (j) and the sentencing phase occurred afterwards, the burden of proof was by the preponderance of the evidence. Stephens v. State, 270 Ga. 354, 509 S.E.2d 605 (1998).

The 1988 amendment of O.C.G.A. § 17-7-131 reflects a societal consensus against the execution of mentally retarded defendants, and does not violate due process and equal protection. Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989).

When a defendant who was tried before the effective date in O.C.G.A. § 17-7-131 (j) alleges in a petition for habeas corpus that he or she is mentally retarded, the habeas corpus court must first determine whether the petitioner has presented sufficient credible evidence, which must include at least one expert diagnosis of mental retardation, to create a genuine issue regarding the petitioner's retardation. If, after examining the evidence, the habeas corpus court finds that there is a genuine issue, a writ shall be granted for the limited purpose of conducting a trial on the issue of retardation only. Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989).

Prison warden was not properly a party to separate proceedings following the grant of a writ of habeas corpus pursuant to the procedure set out in Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989). Zant v. Foster, 261 Ga. 450, 406 S.E.2d 74 (1991), cert. denied, 503 U.S. 921, 112 S. Ct. 1297, 117 L. Ed. 2d 519 (1992).

Petitioner who was awarded a trial pursuant to Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989) had a right to appointed counsel, bore the burden of proving petitioner's mental retardation by a preponderance of the evidence, and had the right to have the jury selected in the same manner as a death-penalty criminal trial jury, including sequestration; and the court was required to exercise the court's discretion to determine which evidence could be excluded if the evidence's relevance were outweighed by the danger of unfair prejudice. Zant v. Foster, 261 Ga. 450, 406 S.E.2d 74 (1991), cert. denied, 503 U.S. 921, 112 S. Ct. 1297, 117 L. Ed. 2d 519, overruled on other grounds, State v. Patillo, 262 Ga. 259, 417 S.E.2d 139 (1992).

Standards set forth in Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989), are not applicable to mental retardation claims raised in cases tried after the effective date of O.C.G.A. § 17-7-131(c)(3) and (j). Zant v. Pitts, 263 Ga. 529, 436 S.E.2d 4 (1993); Turpin v. Hill, 269 Ga. 302, 498

S.E.2d 52, cert. denied, 525 U.S. 969, 119 S. Ct. 418, 142 L. Ed. 2d 340 (1998).

When petitioner, who was tried for murder prior to July 1, 1988, and was sentenced to death, initiated state habeas corpus proceedings seeking a jury trial on the issue of the petitioner's mental retardation, once the habeas corpus court found a genuine issue regarding the petitioner's mental retardation, the issue had to be thoroughly reviewed and passed upon by a jury under the definition of mental retardation in O.C.G.A. § 17-7-131 and was no longer subject to waiver; thus, the trial court erred in finding that the petitioner waived the right to a jury trial on the issue by later denying mental retardation and asking for the trial proceeding to be dismissed. Rogers v. State, 276 Ga. 67, 575 S.E.2d 879 (2003).

Defendant has burden of proving mental retardation beyond reasonable doubt. Williams v. State, 265 Ga. 351, 455 S.E.2d 836 (1995).

Trial court erred in determining that a petitioner who claimed that the petitioner was guilty but mentally retarded was required to prove the petitioner's claim of retardation by a preponderance of the evidence. Georgia's requirement in O.C.G.A. § 17-7-131 that retardation be proved beyond a reasonable doubt was constitutional. Stripling v. State, 289 Ga. 370, 711 S.E.2d 665 (2011).

Burden of proof determined by states. — Because Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) left it for the states to develop the standard of proof as to mental retardation, a federal habeas court could not find a Georgia Supreme Court decision — that O.C.G.A. § 17-7-131's reasonable doubt standard did not violate the Eighth Amendment — was an "unreasonable application" of "clearly established" federal law; thus, denial of habeas relief to petitioner death row inmate was proper. Georgia's process as to the mentally retarded and the death penalty, when evaluated as a whole, contained substantial procedural protections as § 17-7-131(c)(3) allowed a defendant to raise the issue of mental retardation in the guilt phase of the defendant's criminal trial and permitted a jury to find a defendant guilty but mentally retarded, which had two significant advantages: the jury did not hear the criminal history that was allowed in the penalty phase, and the jury was not informed that a guilty but mentally retarded verdict would preclude the death penalty. Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011), cert. denied, 566 U.S. 1041, 132 S. Ct. 2727, 183 L. Ed. 2d 80 (2012).

Issue raised by a special plea of insanity at the time of trial is not whether the defendant can distinguish between right and wrong, but is, whether the defendant is capable at the time of the trial of understanding the nature and object of the proceedings going on against the defendant and rightly comprehends the defendant's own condition in reference to such proceedings, and is capable of rendering the defendant's attorneys such assistance as a proper defense to the indictment preferred against the defendant demands. Smalls v. State, 153 Ga. App. 254, 265 S.E.2d 83 (1980).

Death penalty. — Defendant, who was not found by the jury to be mentally ill, was not entitled to have the death sentence vacated on mental illness grounds as O.C.G.A. § 17-7-131 did not preclude a death sentence on mental illness grounds, and there was no constitutional prohibition under U.S. Const., amend. 8 or Ga. Const. 1983, Art. I, Sec. I, Para. XVII against a death sentence for a competent but mentally ill defendant. Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Habeas court did not err by failing to address in a defendant's ineffective assistance claim whether potential mental health evidence could have supported a verdict of guilty but mentally ill because O.C.G.A. § 17-7-131 did not preclude a death sentence if the defendant would have obtained a verdict of guilty but mentally ill. Therefore, the habeas court did not err in failing to address the merits of the defendant's claim beyond addressing the role that potential mental health evidence might have played as mitigating evidence in the sentencing phase. Schofield v. Cook, 284 Ga. 240, 663 S.E.2d 221 (2008).

General Consideration (Cont'd)

In a 28 U.S.C. § 2254 case in which a death penalty inmate moved for reconsideration of a district court's finding that the inmate was not mentally retarded under Georgia law, the district court remained unconvinced that it should apply the Flynn Effect to reduce the inmate's IQ scores, and even if the full four point reduction requested was applied, the inmate had credible IQ scores of 73 and 75, which were still above the score of 70 that was generally considered to demonstrate significantly subaverage intellectual functioning under Georgia law. Ledford v. Head, No. 1:02-cv-1515-JEC, 2014 U.S. Dist. LEXIS 24835 (N.D. Ga. Feb. 26, 2014).

In a 28 U.S.C. § 2254 case in which a death penalty inmate moved for reconsideration of a district court's finding that the inmate was not mentally retarded under Georgia law, the case law cited by the inmate did not alter the court's perception of the evidence presented in the case, nor the court's ultimate conclusion that the inmate failed to meet the inmate's burden of proving that the inmate had adaptive deficits in two or more of the relevant areas. Ledford v. Head, No. 1:02-cv-1515-JEC, 2014 U.S. Dist. LEXIS 24835 (N.D. Ga. Feb. 26, 2014).

Inmate was not entitled to a writ of habeas corpus that arose from the inmate's sentence to death for kidnapping and murder related to the inmate's wife and/or sister-in-law as the inmate failed to show that the inmate was intellectually disabled for purposes of being ineligible for the death penalty as the inmate did not sufficiently prove that the inmate suffered from significant deficiencies in the inmate's adaptive behavior. Tharpe v. Warden, 834 F.3d 1323 (11th Cir. 2016).

Death row inmate was not found intellectually disabled, and thus ineligible for execution, because the inmate did not show any of the three elements required under the Georgia statute to establish intellectual disability; the federal district court applied correct legal standards in making that court's findings of fact and conclusions of law. Conner v. GDCP Warden, 784 F.3d 752 (11th Cir. 2015), cert. denied, 136 S. Ct. 1246, 194 L. Ed. 2d 190 (U.S. 2016).

Acquittal by reason of insanity contains implicit finding that defendant committed the act. — Implicit within a verdict of acquittal by reason of insanity is a finding that the state has carried the state's burden of proof beyond a reasonable doubt that the defendant did commit the criminal act for which defendant was tried, although there was no criminal culpability. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

"Good cause" defined. — "Good cause" means a showing that there is reasonable cause to believe that the defendant presently meets the criteria for civil commitment. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Nature of hearing and burden of proof generally. — Hearing upon a special plea of insanity is a proceeding of a civil nature, in which the burden rests on the defendant to produce evidence of the defendant's insanity. Smalls v. State, 153 Ga. App. 254, 265 S.E.2d 83 (1980).

Rights of insane acquittee as to civil commitment hearing. — When there is a hearing on the question of whether a person acquitted of a crime by reason of insanity meets the criteria for civil commitment, equal protection requires that the following rights, which are extended to other people in civil commitment proceedings, be extended to the insanity acquittee: (1) notice of the right to the hearing; (2) notice of the right to counsel and the right to have counsel appointed if the person cannot afford counsel; (3) the right to confront and cross-examine witnesses and to offer evidence; (4) the right to subpoena witnesses and to require testimony be given in person or by deposition from any physician upon whose evaluation the decision may rest; (5) notice of the right to have established some sort of individualized plan specifically tailored to the person's treatment needs; (6) notice of the right to be examined by a physician of the acquittee's own choosing at the acquittee's own expense; and (7) a right to have representatives or guardian ad litem appointed in the acquittee's behalf. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Commitment procedures need not be identical to those for civil commitment. — Procedures for commitment after acquittal by reason of lack of mental competence need not be absolutely identical in every respect with the procedures for civil commitment. It suffices that the civil commitment criteria are to be applied in both instances. Skelton v. Slaton, 243 Ga. 426, 254 S.E.2d 704 (1979).

For case in which criteria for civil commitment are met, see Pitts v. State, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

It is permissible to require judicial approval before an insanity acquittee can be released, even though other persons cannot be involuntarily committed unless a team of medical experts so recommends. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Presumption of continuing insanity at time of release hearing. — If defendant in a release hearing has been examined three separate times to determine mental competency in relation to a criminal trial, and there has been a judicial determination that the defendant was not mentally responsible for the defendant's crimes and apparently not competent to stand trial, there exists a continuing presumption of insanity at the time of the release hearing. Pitts v. State, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

If a defendant who has been acquitted of a crime by reason of insanity is ordered committed to a mental hospital and files an application for release, there is a continuing presumption of insanity at the time of the release hearing. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

There is a presumption of continued existence of a mental state once proved to exist. Thus, when a defendant who has been acquitted of a crime by reason of insanity is ordered committed to a mental hospital and files application for release, there is a continuing presumption of insanity at the time of the release hearing. Williams v. State, 185 Ga. App. 559, 365 S.E.2d 141 (1988).

Superior court, in deciding applications for release of persons committed upon a plea of insanity, may rely on the presumption of continued insanity (see O.C.G.A. § 24-14-21) and is not bound by the opinions of either lay or expert witnesses. The court also may take judicial notice of the evidence at trial under O.C.G.A. § 17-7-131(e). Butler v. State, 258 Ga. 344, 369 S.E.2d 252 (1988).

Presumption of continued need for inpatient involuntary treatment overcome. — Trial court erred in denying a recommendation filed by the Department of Behavioral Health with Developmental Disabilities that a patient be moved to a group home for outpatient involuntary treatment because the preponderance of the evidence supported a finding that the patient overcame the presumption under former O.C.G.A. § 24-4-21 (see O.C.G.A. § 24-14-21) of a continued need for inpatient involuntary treatment, and there was no evidence to support the trial court's finding that under O.C.G.A. § 37-3-1(9.1), the patient posed a substantial risk of imminent harm to the patient or others or was so unable to care for the patient's own physical health and safety as to create an imminently life-endangering crisis; the group home would have only two other suitable patient occupants, both of whom would be under the supervision of live-in supervisors and would have little opportunity to pressure the patient into misconduct, the patient would not be permitted to leave the group home unsupervised, the manager of the group home testified that as soon as patients were admitted into the group home and evaluated, an individualized service plan was created, and there was no statutory requirement that a plan exist prior to release. Nelor v. State, 309 Ga. App. 165, 709 S.E.2d 904 (2011).

Motion for continuance to procure further psychiatric examination. — When a motion for a continuance to procure further psychiatric examination is based on evidence that reasonably indicates mental instability on the part of the defendant at the time of the offense or at the time of trial and when the motion is not made for the mere purpose of delay and avoidance of prosecution, the interests of justice might be better served if the trial court's discretion were exercised in favor of the defendant, even when no special plea of insanity has been filed by counsel. Morgan v. State, 135 Ga. App.

General Consideration (Cont'd)

139, 217 S.E.2d 175, rev'd on other grounds, 235 Ga. 632, 221 S.E.2d 47, overruled on other grounds, Dent v. State, 136 Ga. App. 366, 221 S.E.2d 228, overruled on other grounds, Davis v. State, 136 Ga. App. 749, 222 S.E.2d 188 (1975).

Plea of guilty but mentally retarded. — Trial court could accept a plea of guilty but mentally retarded if the state agreed and the trial court found a factual basis for the plea. If the state objected, the trial court was required to reject the plea and hold a trial. Stripling v. State, 289 Ga. 370, 711 S.E.2d 665 (2011).

Defendant's motion to withdraw a guilty plea was not a proper vehicle to pursue the defendant's claim of dissatisfaction with treatment the defendant received for the defendant's mental illness. Boyette v. State, 217 Ga. App. 593, 458 S.E.2d 397 (1995).

Appellate court was not persuaded that the defendant was entitled to withdraw a plea of guilty but mentally ill due to the trial court's failure to follow the procedures in O.C.G.A. § 17-7-131(b)(2) because the defendant failed to prove that withdrawal of the plea was necessary to correct a manifest injustice, having presented no evidence the defendant was harmed by entry of the plea. Poole v. State, 326 Ga. App. 243, 756 S.E.2d 322 (2014).

Burden and standard of proof when insanity made part of general plea of not guilty. — If the defense of insanity is made under the general plea of not guilty, the burden rests upon the defendant, under the presumption of sanity, to show by a preponderance of the evidence, but not beyond a reasonable doubt, that the defendant was not mentally responsible at the time of the alleged crime. Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962).

Burden and standard of proof when general plea of insanity filed. — If a defendant in a criminal case files a general plea of insanity, that is, the defendant argues that the defendant is not guilty of the crime by reason of being insane at the time of the crime's commission, the burden is on the defendant to establish by a preponderance of the evidence that the defendant was insane. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Prosecutor is entitled to argue vigorously that defendant is guilty, although the disputed issue at trial is not defendant's guilt but defendant's mental illness. Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984), cert. denied, 469 U.S. 1132, 105 S. Ct. 816, 83 L. Ed. 2d 809 (1985).

Insanity ordinarily a jury question. — Ordinarily, the question of insanity at the time of commission of the act is one for the determination of the jury. Brand v. State, 123 Ga. App. 273, 180 S.E.2d 579 (1971).

Discussion of law in closing argument. — Trial court erred by prohibiting the defendant during closing arguments from discussing the law regarding the different ramifications and dispositions associated with verdicts of "guilty but mentally ill," and not guilty by reason of insanity; however, this error did not contribute to the "guilty but mentally ill" verdict in this case, and thus was harmless. Minter v. State, 266 Ga. 73, 463 S.E.2d 119 (1995).

Effect of "guilty but mentally ill" verdict. — As for the issue of "mental illness," it is apparent from O.C.G.A. § 17-7-131(g) that such a verdict has the same force and effect as any other guilty verdict, with an additional provision that the Department of Corrections or other incarcerating authority provide mental health treatment for a person found "guilty but mentally ill." Logan v. State, 256 Ga. 664, 352 S.E.2d 567 (1987).

Informing a jury that the jury could return a verdict of "guilty but mentally ill" does not deprive a defendant of the defense of insanity on the basis that the alternative affords the jury a "palatable verdict" of simultaneously holding a defendant responsible for the defendant's actions by finding the defendant guilty, yet mitigating that finding by also finding the defendant mentally ill, when the jury is clearly informed of the jury's task of determining the validity of the defendant's defense of insanity, and of the requirement to find the defendant not guilty by reason of insanity should the jury accept that defense. Mitchell v. State, 187

Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

"Guilty but mentally ill" verdict does not conflict with general verdict requirement. — Verdict of "guilty but mentally ill" under O.C.G.A. § 17-7-131 does not conflict with the requirement of a general verdict as provided by O.C.G.A. § 17-9-2. Mitchell v. State, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

Applying "guilty but mentally ill" provision retrospectively. — Since the bank robberies were committed before July 1, 1982, and a verdict of guilty was authorized by the evidence, the application of the "guilty but mentally ill" provision was not an unconstitutional application of an ex post facto law. Kirkland v. State, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

Since the defendant did not seek a jury determination of the defendant's alleged mental retardation, as defined by O.C.G.A. § 17-7-131(a)(3), at the defendant's criminal trial for murder, that issue was procedurally defaulted pursuant to O.C.G.A. § 9-14-48(d); however, the court reviewed the issue under the miscarriage of justice standard and determined that Ring v. Arizona, 536 U.S. 584 (2002) did not have a retroactive effect in the defendant's collateral review proceeding instituted after the appeals from the original trial were completed. Head v. Hill, 277 Ga. 255, 587 S.E.2d 613 (2003).

Procedural requirements not retroactive. — Since the defendant pled "guilty but mentally ill" to the offense of malice murder in 1983, the plea was tendered and accepted under the original provisions of O.C.G.A. § 17-7-131, which contained no specific procedural requirements for the entry of such a plea, and the trial court was not bound by the provisions of (b)(2) as those provisions were not enacted until 1985. Logan v. State, 256 Ga. 664, 352 S.E.2d 567 (1987).

Evaluation report. — While the failure to file the statutorily required written evaluation report of the appellant's present mental condition does not rise to the level of procedural due process, nevertheless the statute does expressly require that the report be made and tendered to the trial court and counsel, and the proper remedy is to direct compliance with the statute. Williams v. State, 185 Ga. App. 559, 365 S.E.2d 141 (1988).

Effect of presenting "guilty but mentally ill" defense on insanity defense. — When the defendant's counsel acquiesced in presenting the "guilty but mentally ill" verdict option to the jury, the defendant was estopped from contending on appeal that the option infringed on the defendant's defense of insanity. Milam v. State, 255 Ga. 560, 341 S.E.2d 216 (1986).

Verdict of not guilty by reason of insanity reflected two crucial factual determinations. First, such verdict indicated a determination beyond a reasonable doubt by the finder of fact that the defendant committed the crime in question. Secondly, this verdict indicated a finding that it has been demonstrated by a preponderance of the evidence that the defendant, at the time the criminal act was committed, met the criteria for civil commitment. Under former O.C.G.A. § 24-4-21 (see O.C.G.A. § 24-14-21), this mental state was presumed to continue so that the burden of proof in a release proceeding under O.C.G.A. § 17-7-131 rests on the insanity acquittee. Whitfield v. State, 158 Ga. App. 660, 281 S.E.2d 643 (1981).

"Guilty but mentally ill" plea knowingly entered. — In a malice murder case, a review of the record of the "guilty but mentally ill" plea, as well as of the collateral proceedings, revealed that the plea was knowingly and voluntarily entered by the defendant with a full understanding of the defendant's waiver of rights and the consequences of the entry of the plea. Logan v. State, 256 Ga. 664, 352 S.E.2d 567 (1987).

Establishing career offender with plea of "guilty but mentally ill." — Felony conviction for a crime of violence based on a plea of "guilty but mentally ill" under O.C.G.A. § 17-7-131 qualified as a predicate offense to establish career offender status under the federal sentencing guidelines. United States v. Bankston, 121 F.3d 1411 (11th Cir. 1997), cert. denied, 522 U.S. 1067, 118 S. Ct. 735, 139 L. Ed. 2d 672 (1998).

General Consideration (Cont'd)

Plea of not guilty by reason of insanity is a plea of confession and avoidance. It admits the facts pled in the indictment, but avoids conviction because of the condition of insanity of the defendant at the time of the offense. Moses v. State, 167 Ga. App. 556, 307 S.E.2d 35 (1983), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993).

Plea of not guilty by reason of insanity is a plea of confession and avoidance, which admits the facts pled in the indictment, but avoids conviction because of the condition of insanity of the defendant at the time of the offense. Kelley v. State, 235 Ga. App. 177, 509 S.E.2d 110 (1998).

Jurisdiction afforded committing courts pursuant to O.C.G.A. § 17-7-131 is not limited to the rendition of the initial commitment order and final release decision, but also encompasses the authority to render all other decisions necessary for the treatment of the insanity acquittee as well as those decisions necessary to ensure both the acquittee's safety and the safety of the community. O'Neal v. State, 185 Ga. App. 838, 365 S.E.2d 894 (1988).

Pursuit of treatment outside treating facility. — Committing court has the authority to allow an insanity acquittee to pursue treatment, educational, or other goals outside the confines of the treating facility. O'Neal v. State, 185 Ga. App. 838, 365 S.E.2d 894 (1988).

Availability of state funding need not be mentioned. — Provisions of O.C.G.A. § 17-7-131(g)(1) merely specify the respective obligations of the trial court and the penal facility following a conviction based on a verdict of guilty but mentally ill, and the trial court is not obligated to instruct the jury that any required treatment would be dependent upon the availability of state funding. Summerlin v. State, 339 Ga. App. 148, 793 S.E.2d 477 (2016).

Court retains jurisdiction after plea of insanity is accepted. — If the defendant enters a plea of not guilty by reason of insanity, which is accepted, and the court commits the defendant to a hospital for treatment, the committing court retains jurisdiction of the acquitted-committed defendant. Moses v. State, 167 Ga. App. 556, 307 S.E.2d 35 (1983), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993).

Rejection of expert testimony as to sanity. — Jury is free to reject expert testimony as to sanity and may find an accused sane even without positive testimony as to sanity. Brooks v. State, 247 Ga. 744, 279 S.E.2d 649 (1981).

Trial judge, as the finder of fact, is not bound by the opinions of either lay or expert witnesses as to sanity and may rely upon the basic presumptions permitted by law. Haugebrooks v. State, 196 Ga. App. 5, 395 S.E.2d 348 (1990).

Jurors are not bound by the opinions of expert witnesses regarding a defendant's sanity; instead, jurors may rely on the presumption of sanity in O.C.G.A. § 16-2-3 unless the proof of insanity is overwhelming. Vanderpool v. State, 244 Ga. App. 804, 536 S.E.2d 821 (2000), cert denied, 532 U.S. 996, 121 S. Ct. 1658, 149 L. Ed. 2d 640 (2001).

Criminal accountability not relieved by proof of multiple personalities. — In every circumstance, including the existence of multiple personalities, the law is justified in governing accountability when at the time of the criminal act the person had mental capacity to distinguish between right and wrong in relation to such act and was not acting because of a delusional compulsion as to such act which overmastered the person's will to resist committing the crime, which delusion would, if true, have justified the act. If these elements are found to be present in a case, the law will not inquire whether the individual possesses other personalities, fugues, or even moods in which the person would not have performed the act or perhaps did not even know the act was being performed. Kirkland v. State, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

Verdict of guilty but mentally ill proper when multiple personalities showing. — Since the trial judge accepted that the defendant suffered from a multiple personality disorder, but ruled that the personality who robbed the banks did so with rational, purposeful criminal

intent and with knowledge that the robbery was wrong, there was no error in the judge's finding that the defendant was guilty but mentally ill. Kirkland v. State, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

Investigation not required prior to sentencing mentally retarded defendant. — Trial court did not err in sentencing the defendant, after a finding of guilty but mentally retarded, as contrary to the defendant's assertion, neither the current nor former version of O.C.G.A. § 17-7-131 required a trial court to have an investigation conducted prior to sentencing a mentally retarded defendant. Moreover, contrary to the defendant's argument, the statutory and regulatory framework demonstrated that the required evaluation was an administrative rather than a judicial function that occurred post-sentencing. Chauncey v. State, 283 Ga. App. 217, 641 S.E.2d 229 (2007).

Verdicts not inconsistent. — Verdicts of not guilty by reason of insanity pursuant to O.C.G.A. § 17-7-131(a)(1) of malice murder and guilty but mentally ill of other related offenses, including felony murder, were not mutually exclusive, and any claim that the verdicts were inconsistent was not relevant because the inconsistent verdict rule had been previously abolished. Shepherd v. State, 280 Ga. 245, 626 S.E.2d 96 (2006), overruled on other grounds by McElrath v. State, 2020 Ga. LEXIS 127 (Ga. 2020).

Separate trial not authorized. — Defendant charged with capital murder was properly denied a separate trial on the question of defendant's mental retardation because the jury in a capital trial determines "at the time of the trial on guilt or innocence" whether the defendant is mentally retarded. Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994).

Defendant in a capital trial is not entitled to a separate trial on the issue of mental retardation; O.C.G.A. § 17-7-131(c)(3) requires the jury to determine mental retardation during the guilt/innocence phase. Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502, cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

Sentencing instructions. — Since the defendant acknowledged the defendant could not prove the defendant's tendered insanity defense, and the defendant requested and received an instruction on the guilty but mentally ill verdict, the defendant was not entitled to an instruction on the sentencing options of that verdict, as that would have no bearing on the defendant's guilt or innocence. Cranford v. State, 186 Ga. App. 862, 369 S.E.2d 50 (1988).

Maximum punishment for mentally retarded. — Prospective juror's opinion of whether a mentally retarded defendant should receive a harsher punishment than a person of normal intelligence is irrelevant since a defendant found by the jury to be mentally retarded cannot be executed and automatically receives a life sentence. Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997), cert. denied, 523 U.S. 1127, 118 S. Ct. 1815, 140 L. Ed. 2d 953 (1998).

Amendment of guilty verdict to guilty but mentally ill not permitted. — Because the jury was instructed on possible verdicts of guilty and guilty but mentally ill and returned a verdict of guilty, amendment of the verdict from guilty to guilty but mentally ill would constitute an impermissible substantive change. Hollis v. State, 215 Ga. App. 35, 450 S.E.2d 247 (1994).

Verdict of guilty but mentally ill supported by evidence. — When a social worker who examined the defendant testified that, although the defendant suffered from mental illness, the defendant knew the difference between right and wrong at the time of the crime, any rational trier of fact could have found from the evidence presented at trial that the defendant was guilty of the crime charged beyond a reasonable doubt, albeit mentally ill at the time of the crime. Jackson v. State, 166 Ga. App. 477, 304 S.E.2d 560 (1983). See also Awtrey v. State, 175 Ga. App. 148, 332 S.E.2d 896 (1985).

Defendant was properly found guilty, but mentally ill, pursuant to O.C.G.A. § 17-7-131(c)(2), since expert testimony allowed the jury to conclude that the defendant knew the difference between right and wrong, planned the killings, intended for the defendant's victims to die, knew that the defendant was ending their lives, appreciated the finality of the defendant's

General Consideration (Cont'd)

own actions, knew the defendant had done a terrible thing, was remorseful, and knew some people would view the defendant's actions as illegal. Boswell v. State, 275 Ga. 689, 572 S.E.2d 565 (2002).

Verdict of guilty but mentally ill was not demanded since there was evidence that the defendant's mental illness was characterized by periods of normalcy, and that the defendant's criminal acts on the day in question were not motivated by the delusions from which the defendant suffered. Lebbage v. State, 244 Ga. App. 596, 536 S.E.2d 282 (2000).

"Guilty but mentally ill" plea properly accepted. — Since psychological evaluations were ordered by the court and defense counsel and the findings from both, which were consistent, were read into the record for the court's consideration at the plea hearing, the requirements of O.C.G.A. § 17-7-131 (b)(2) were satisfied. Cullers v. State, 247 Ga. App. 155, 543 S.E.2d 763 (2000).

Evidence did not support finding of insanity. — See Stephens v. State, 258 Ga. 320, 368 S.E.2d 754 (1988); Tarver v. State, 186 Ga. App. 905, 368 S.E.2d 828 (1988).

"Insanity" and "mentally ill" verdicts not inseparable. — Verdicts of "not guilty by reason of insanity at the time of the crime" and "guilty but mentally ill at the time of the crime" are not inseparable; when the jury is instructed as to "guilty but mentally ill," the jury need not also be instructed as to "not guilty by reason of insanity" when there is no evidence to support a charge on insanity. State v. Ball, 251 Ga. 840, 310 S.E.2d 516 (1984).

Repeated charges and examples. — When proper charge concerning delusional compulsion had been given twice, there was no harmful error in judge providing jury with example of delusional compulsion. Camp v. State, 250 Ga. 228, 297 S.E.2d 26 (1982).

When insanity presumption ends. — Any presumption of insanity raised by a finding that a person is a "mentally ill person requiring involuntary treatment" pursuant to O.C.G.A. § 37-3-1(12) ends when the person's involuntary commitment or hospitalization ends. Nelson v. State, 254 Ga. 611, 331 S.E.2d 554 (1985).

Dismissal of defendant's petition to correct a void judgment was proper when the procedural requirements of O.C.G.A. § 17-7-131(b)(2) were fulfilled when the defendant's plea of guilty but mentally ill was taken and a factual basis for the plea was established. Barber v. State, 240 Ga. App. 156, 522 S.E.2d 528 (1999).

Court, not institution, controls release. — Ultimate power to order the release from a mental institution of an insanity acquittee is one which rests, not in the institution, but in the trial court. Loftin v. State, 180 Ga. App. 613, 349 S.E.2d 777 (1986).

Exhaustion of remedies not required before seeking habeas relief. — Because an involuntary detainee is specifically granted the right to seek habeas relief "at any time" by O.C.G.A. § 37-3-148, exhaustion of remedies is not required before a person involuntarily committed to a mental health facility following an acquittal by reason of insanity may seek habeas relief. Hogan v. Nagel, 273 Ga. 577, 543 S.E.2d 705 (2001); Hogan v. Nagel, 276 Ga. 197, 576 S.E.2d 873 (2003).

Release from not guilty by reason of insanity verdict. — Trial court erred by not releasing the defendant from the not guilty by reason of insanity verdict because the defendant rebutted the presumption of insanity and the need for continued involuntary outpatient commitment; the treating psychiatrist testified that the defendant had good insight into the defendant's condition, was coping well, was compliant, independently cared for oneself, and could be responsible for complying with treatment without the aid of an involuntary order. Coogler v. State, 324 Ga. App. 796, 751 S.E.2d 584 (2013).

Court authorized to deny mental patient's application for release. — Although the hospital physician and nurses testified that in their opinion a mental patient, involuntarily committed after being found not guilty of murdering the patient's brother by reason of insanity, did not presently meet the criteria for civil

commitment and should have been released, based upon the evidence presented, including relapses suffered in the past after the patient ceased to take the patient's medication, during one of which the patient killed the patient's brother, the court was authorized to deny the application for release. Cox v. State, 171 Ga. App. 550, 320 S.E.2d 611 (1984).

It was within the court's discretion to reject conclusions reached by a patient's professional witnesses and the patient's mere promise that the patient would continue to take the patient's medication upon conditional release. Butler v. State, 225 Ga. App. 288, 483 S.E.2d 385 (1997).

Denial of release from involuntary confinement held proper. — Trial judge did not err in denying the release of a mental patient found not guilty of murder by reason of insanity from involuntary confinement despite the mental health professionals' support for the patient's release since the professional's recommendations were based on the professional's conclusions that the patient was no longer a danger to self or others because the patient's mental condition was controlled by medication, which the patient would continue to take if the patient were released; the patient was under medication at the time the patient committed the murder, but quit taking the medication because the patient decided that the patient no longer needed the medication; the patient stated the patient believed the medication was beneficial, but the patient did not believe the patient needed to take the medication to function in society; the patient also expressed other irrational beliefs about another's ability to throw "hates" at the patient; having acted upon numerous earlier requests concerning the patient's custody, the trial judge was very familiar with the defendant's mental condition and case history; and the judge's order denying release was well documented. Crawford v. State, 202 Ga. App. 653, 415 S.E.2d 300 (1992).

Trial court did not err in denying mental health patient's motion for release when the record evinced that the patient remained highly delusional and capable of acting on those delusions to the injury of oneself or others. Gross v. State, 210 Ga. App. 125, 435 S.E.2d 496 (1993).

Rational trier of fact could have found that the appellant failed to prove by a preponderance of the evidence that the appellant was no longer insane and should be released from civil commitment when experts testified that the appellant became violently "psychotic" when the appellant engaged in substance abuse and that, although the appellant might not exhibit violently "psychotic" behavior so long as the appellant underwent the regimen of "forced abstinence" in a hospital setting, there was nothing to show that, once released from that setting and regimen, the appellant would not again engage in substance abuse and commit yet another violent "psychotic" act. Nagel v. State, 264 Ga. 150, 442 S.E.2d 446 (1994).

Trial court did not err in denying the defendant's petition for release from inpatient involuntary treatment under O.C.G.A. § 17-7-131(f) because the defendant continued to meet the statutory inpatient involuntary treatment criteria under O.C.G.A. § 37-3-1(9.1), and the defendant failed to rebut the presumption of continuing insanity and that inpatient involuntary treatment was still required; the defendant's experts testified that the defendant had physical altercations with patients and had relapsed and experienced an auditory hallucination after the trial court denied the defendant's prior request for release, which led to an increase in medications. Newman v. State, 314 Ga. App. 99, 722 S.E.2d 911 (2012).

Trial court was authorized to find that the defendant failed to prove that the defendant should be conditionally released to outpatient treatment in a group home based on the defendant's long history of substance abuse and mental illness, lack of personal support, high level of intelligence and education, the defendant's family's adamant opposition, and the expert's opinion that the defendant may not take the illness seriously and may not appreciate the gravity of the offenses. Gibson v. State, 335 Ga. App. 569, 782 S.E.2d 472 (2016).

Detainee should have treatment plan for release. — Trial court did not exceed the court's authority by granting a writ of habeas corpus, pursuant to O.C.G.A. § 9-14-19, to an involuntary de-

General Consideration (Cont'd)

tainee who had been committed to a state hospital upon a finding of not guilty by reason of insanity in the deaths of the detainee's grandparents and ordering that the state hospital officials prepare a plan for supervision and outpatient services upon the detainee's release; the detainee was entitled to seek relief by that route, pursuant to O.C.G.A. § 37-3-148(a), or by seeking a release petition pursuant to O.C.G.A. § 17-7-131(f). Hogan v. Nagel, 276 Ga. 197, 576 S.E.2d 873 (2003).

Extension of involuntary outpatient treatment. — When an insanity acquittee has successfully completed a conditional release program order under O.C.G.A. § 17-7-131(e), the trial court is required to discharge the acquittee from the order requiring involuntary inpatient treatment, but is authorized to require that the acquittee participate in involuntary outpatient treatment. Sikes v. State, 268 Ga. 19, 485 S.E.2d 206 (1997).

"Traumatic brain injury" exclusion in O.C.G.A. § 37-3-1 did not preclude the defendant's involuntary treatment since the defendant was adjudicated mentally ill as defined in O.C.G.A. § 17-7-131. Sikes v. State, 221 Ga. App. 595, 472 S.E.2d 101 (1996).

Defendant failed to prove sanity. — Defendant failed to prove that the defendant was not insane when the evidence indicated, inter alia, that the defendant had multiple fixed delusions, including believing to be a secret service agent and owning the hospital where the defendant was committed. Gross v. State, 262 Ga. App. 328, 585 S.E.2d 671 (2003).

Defendant failed to carry the defendant's burden of showing by a preponderance of the evidence that the defendant was sane after the defendant was found not guilty by reason of insanity on two stalking charges and was ordered into a civil commitment to a mental health facility; the verdict of not guilty by reason of insanity established both that the defendant committed the criminal offense and that the defendant did so becaue of a mental illness, and once the defendant was ruled insane, a presumption existed under former O.C.G.A. § 24-4-21 (see O.C.G.A. § 24-14-21) that the insanity existed thereafter, and the defendant put on very little evidence to the contrary. Bonney v. State, 295 Ga. App. 706, 673 S.E.2d 102 (2009).

Court did not need to inquire sua sponte into defendant's competency. — Despite the defendant's contentions that the trial court erred in not ensuring the competency required to control the defense, nothing before the appellate court indicated that the defendant was incompetent to stand trial, nor was there any evidence that should have indicated to the trial court that a sua sponte inquiry into competency was required. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007).

Trial court did not err by failing to sua sponte order that the defendant submit to a mental health evaluation to determine the defendant's sanity, or by failing to instruct the jury that the jury was entitled to reach a verdict of guilty but mentally ill as the defendant made no request, motion, or other affirmative attempt to demonstrate to the trial court that the defendant had an insanity defense. Perkins v. State, 328 Ga. App. 508, 759 S.E.2d 626 (2014).

No error in finding lack of mental retardation. — Habeas court did not err in finding that an inmate failed to prove mental retardation, in light of the conflicting evidence, including expert and lay testimony and non-testimonial evidence. Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56, cert. denied, 552 U.S. 1070, 128 S. Ct. 728, 169 L. Ed. 2d 569 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Determinations of mental competency. — In light of Georgia's statutory bar under O.C.G.A. § 17-7-131(j) against executing mentally retarded individuals and the U.S. Supreme Court's holding that executing mentally retarded individuals was unconstitutional, a federal habeas court concluded that an evidentiary hearing under 28 U.S.C. § 2254(e) was necessary to determine whether it was unreasonable for a prisoner's attorneys to fail to investigate or raise the issue of mental retardation at the prisoner's capital murder trial and whether the prisoner was, in fact, mentally retarded because: (1) in determining that counsels' decision

not to raise or investigate the issue of mental retardation was not unreasonable, the state habeas court relied entirely on the opinions and testimony of two experts, neither of whom specifically addressed the statutory factors relevant to mental retardation under O.C.G.A. § 17-7-131(a)(3); and (2) the basis for the state habeas court's determination that the prisoner was not mentally retarded was unclear. Ledford v. Head, No. 1:02-CV-1515-JEC, 2006 U.S. Dist. LEXIS 76612 (N.D. Ga. Oct. 13, 2006).

Denial of the death-row inmate's petition for writ of habeas corpus was affirmed because the district court's finding that the inmate was not intellectually disabled was supported by the record since the inmate failed to demonstrate significant or substantial deficits in adaptive behavior in two adaptive skill areas as the inmate's work problems resulted from the inmate's substance abuse, rather than a limitation in an "adaptive skill area". Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600 (11th Cir. 2016), cert. denied, 137 S. Ct. 1432, 197 L. Ed. 2d 650 (U.S. 2017).

Procedure for opening statements and closing arguments. — Trial of a habeas corpus petitioner's claim of mental retardation should be regarded as a completion of the guilt/innocence phase of the petitioner's original trial and, therefore, the state was entitled under Ga. Unif. Super. Ct. R. 10.2 to make an opening statement before the petitioner. Under O.C.G.A. § 17-8-71, the state was entitled to make an initial closing argument, the petitioner could then make the petitioner's closing argument, and the state was entitled to make a final closing argument. Stripling v. State, 289 Ga. 370, 711 S.E.2d 665 (2011).

Ineffective assistance of counsel for failing to plead guilty but mentally retarded not found. — With regard to a defendant's convictions for kidnapping, aggravated sodomy, and aggravated sexual battery, the defendant was not rendered ineffective assistance of counsel as a result of trial counsel's decision not to file a plea of guilty but mentally retarded and, instead, attack the credibility of the victim as trial counsel's decision as to which theory of defense to pursue was a matter of trial strategy and tactics that was not unreasonable and thus did not constitute ineffective assistance. Hampton v. State, 294 Ga. App. 857, 670 S.E.2d 502 (2008).

Counsel's failure to raise issue deficient but not prejudicial. — Defendant's trial counsel performed deficiently in not seeking expert assistance in evaluating the defendant's mental condition at the time of the shooting and at the time of trial because the defendant was hospitalized in 1996 after stabbing the same man that the defendant murdered; and, in 1996, the defendant reported hearing a voice telling the defendant to kill for which the defendant received antipsychotic medication; however, counsel's deficient performance was not prejudicial as the defendant did not show that the jury would have returned a verdict of not guilty by reason of insanity because the defendant did not receive any diagnosis of or treatment for mental illness for more than a decade before the current crimes. Scott v. State, 301 Ga. 573, 802 S.E.2d 211 (2017).

Cited in Davis v. State, 216 Ga. 110, 114 S.E.2d 877 (1960); Chandler v. State, 219 Ga. 105, 131 S.E.2d 762 (1963); Massey v. State, 222 Ga. 143, 149 S.E.2d 118 (1966); Roach v. Mauldin, 277 F. Supp. 54 (N.D. Ga. 1967); Taylor v. State, 229 Ga. 536, 192 S.E.2d 249 (1972); Pierce v. State, 231 Ga. 731, 204 S.E.2d 159 (1974); Saylor v. Terminal Transp. Co., 132 Ga. App. 760, 209 S.E.2d 133 (1974); Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975); Nunnally v. State, 235 Ga. 693, 221 S.E.2d 547 (1975); Wessner v. State, 236 Ga. 162, 223 S.E.2d 141 (1976); Graham v. State, 236 Ga. 378, 223 S.E.2d 803 (1976); Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976); Myers v. State, 143 Ga. App. 195, 237 S.E.2d 662 (1977); White v. State, 143 Ga. App. 315, 238 S.E.2d 247 (1977); Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978); Dubose v. State, 148 Ga. App. 9, 251 S.E.2d 15 (1978); Pennewell v. State, 148 Ga. App. 611, 251 S.E.2d 832 (1979); Bell v. State, 244 Ga. 211, 259 S.E.2d 465 (1979); Cantwell v. State, 153 Ga. App. 717, 266 S.E.2d 354 (1980); Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309 (1980); Mullins v. Belcher, 159 Ga.

General Consideration (Cont'd)

App. 520, 284 S.E.2d 35 (1981); Clayton v. State, 160 Ga. App. 908, 288 S.E.2d 621 (1982); Gates v. State, 167 Ga. App. 353, 306 S.E.2d 411 (1983); Murray v. State, 253 Ga. 90, 317 S.E.2d 193 (1984); Pope v. State, 172 Ga. App. 396, 323 S.E.2d 268 (1984); Heaton v. State, 175 Ga. App. 735, 334 S.E.2d 334 (1985); Roberts v. Grigsby, 177 Ga. App. 377, 339 S.E.2d 633 (1985); Edison v. State, 256 Ga. 67, 344 S.E.2d 231 (1986); Caldwell v. State, 256 Ga. 10, 354 S.E.2d 124 (1987); Holloway v. State, 257 Ga. 620, 361 S.E.2d 794 (1987); Waldrop v. Evans, 681 F. Supp. 840 (M.D. Ga. 1988); Jacobs v. Taylor, 190 Ga. App. 520, 379 S.E.2d 563 (1989); Jones v. State, 191 Ga. App. 561, 382 S.E.2d 612 (1989); Ledbetter v. Cannon, 192 Ga. App. 392, 384 S.E.2d 875 (1989); Watkins v. State, 259 Ga. 648, 386 S.E.2d 132 (1989); Zant v. Beck, 259 Ga. 756, 386 S.E.2d 349 (1989); Stripling v. State, 261 Ga. 1, 401 S.E.2d 500 (1991); Lawrence v. State, 201 Ga. App. 7, 410 S.E.2d 136 (1991); Snyder v. State, 201 Ga. App. 66, 410 S.E.2d 173 (1991); Stephens v. State, 201 Ga. App. 744, 412 S.E.2d 571 (1991); Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993); Mathis v. Zant, 851 F. Supp. 1572 (N.D. Ga. 1994); Palmer v. State, 271 Ga. 234, 517 S.E.2d 502 (1999); Spivey v. Head, 207 F.3d 1263 (11th Cir. 2000); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000); Brown v. State, 246 Ga. App. 60, 539 S.E.2d 545 (2000); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000); Trammel v. Bradberry, 256 Ga. App. 412, 568 S.E.2d 715 (2002); Hall v. Brannan, 284 Ga. 716, 670 S.E.2d 87 (2008); Hall v. Lance, 286 Ga. 365, 687 S.E.2d 809 (2010); Brower v. State, 334 Ga. App. 262, 779 S.E.2d 32 (2015); McElrath v. State, 308 Ga. 104, 839 S.E.2d 573 (2020).

Constitutionality

Procedures established under this section were constitutional. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

O.C.G.A. § 17-7-131 is not unconstitutionally vague and does not deny due process; the statute is sufficiently worded to inform a jury as to the meaning of a verdict of "mentally ill." Worthy v. State, 253 Ga. 661, 324 S.E.2d 431 (1985); Wilson v. State, 257 Ga. 444, 359 S.E.2d 891 (1987).

While the definition of "mentally ill" in O.C.G.A. § 17-7-131 is not a model of specificity, the definition is sufficient to inform the jury of the meaning of a verdict of guilty but mentally ill and is not so vague as to violate due process. Cooper v. State, 253 Ga. 736, 325 S.E.2d 137 (1985).

Definition of "mentally ill" is not unconstitutionally vague. Keener v. State, 254 Ga. 699, 334 S.E.2d 175 (1985); Salter v. State, 257 Ga. 88, 356 S.E.2d 196 (1987).

Section does not constitute cruel and unusual punishment. — Simply because O.C.G.A. § 17-7-131 provides that a defendant convicted as guilty but mentally ill will be treated with funds to be appropriated, and there may exist a possibility that funds may run out or not be appropriated, there is no violation of constitutional guarantees against cruel and unusual punishment. Cooper v. State, 253 Ga. 736, 325 S.E.2d 137 (1985).

Section is not unconstitutional application of ex post facto law. — Verdict of guilty but mentally ill under O.C.G.A. § 17-7-131 was not an unconstitutional application of an ex post facto law merely because the crime occurred before the enactment of that section. Nelson v. State, 254 Ga. 611, 331 S.E.2d 554 (1985).

This section afforded a person due process of law prior to a final commitment order. Skelton v. Slaton, 243 Ga. 426, 254 S.E.2d 704 (1979).

Person is entitled to due process even if the person is committed temporarily to a state mental institution for evaluation. Skelton v. Slaton, 243 Ga. 426, 254 S.E.2d 704 (1979).

Due process must be afforded in sanity inquiry. — Inquiry into the sanity of the person at the time of acquittal must be conducted so as to afford the person due process of law. Skelton v. Slaton, 243 Ga. 426, 254 S.E.2d 704 (1979).

Due process requires only that the insanity acquittee be given a right to a hearing, which can be waived if the insanity acquittee, or the acquittee's appointed representative or guardian ad litem, declines to file an application for

release. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Proving mental retardation does not violate due process. — Requirement that mental retardation must be proved beyond a reasonable doubt does not violate due process. Mosher v. State, 268 Ga. 555, 491 S.E.2d 348 (1997).

Inmate required to prove mental retardation. — Since O.C.G.A. § 17-7-131 was previously held to be constitutional, the inmate was required to bear the burden of proving the inmate's alleged mental retardation beyond a reasonable doubt. Head v. Stripling, 277 Ga. 403, 588 S.E.2d 226 (2003).

Constitutionality of provisions regarding release. — Provisions of this section disallowing the filing of another application for release until one year has elapsed from the denial of the last preceding application and allowing release only upon court order do not offend current concepts of due process or equal protection of the laws. Skelton v. Slaton, 243 Ga. 426, 254 S.E.2d 704 (1979).

O.C.G.A. § 17-7-131 is not violative of due process through the statute's requirement of judicial approval for the release of insanity acquittees not convicted of dangerous crimes, the statute's presumption of continuing insanity at the release hearing, or the statute's placement of the burden of proof on the insanity acquittee at the release hearing. Benham v. Ledbetter, 785 F.2d 1480 (11th Cir. 1986).

Provision in O.C.G.A. § 17-7-131(f)(3) that a court, after rendering an adverse release decision in a release hearing, may not hear a further release application by the insanity acquittee until 12 months have elapsed, is not violative of due process, since insanity acquittees may, during the interval, bring habeas corpus petitions challenging the legality of their detention. Benham v. Ledbetter, 785 F.2d 1480 (11th Cir. 1986).

Constitutionality of guilty but mentally ill category. — Creation of the category of guilty but mentally ill is not unconstitutionally vague and thus lacking in due process. Dimauro v. State, 185 Ga. App. 524, 364 S.E.2d 900 (1988).

Constitutionality of burden of proof of fitness for release. — Insanity acquittee is not denied equal protection of the law, if the acquittee is required to bear the burden of proving the acquittee's fitness for release while other civil committees are not. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Prohibition against execution of mentally retarded. — O.C.G.A. § 17-7-131 does not wholly erode the constitutional prohibition against execution of the mentally retarded. Ferrell v. Head, 398 F. Supp. 2d 1273 (N.D. Ga. 2005).

Constitutionality of differing treatment. — Judgment of acquittal by reason of insanity provides the state a rational reason for treating "insanity acquittees" differently from other persons involuntarily committed to state health facilities. Specifically, insanity acquittees have no right to be free of the burden of proof in commitment and release hearings. Also, it is not unreasonable to presume continued mental illness based on a judgment of not guilty by reason of insanity. Benham v. Ledbetter, 609 F. Supp. 125 (N.D. Ga. 1985), aff'd, 785 F.2d 1480 (11th Cir. 1986).

Life imprisonment and civil commitment did not constitute double jeopardy. — Civil commitment, following finding that the defendant was not guilty by reason of insanity of malice murder, and a sentence of life imprisonment based on convictions for felony murder, with a finding of guilty but mentally ill, did not violate the defendant's double jeopardy rights under U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, as the civil commitment procedure under O.C.G.A. § 17-7-131 was not punitive in nature. Shepherd v. State, 280 Ga. 245, 626 S.E.2d 96 (2006), overruled on other grounds by McElrath v. State, 2020 Ga. LEXIS 127 (Ga. 2020).

"Insane," "Mentally Ill," "Intellectual Disability" Defined

What constitutes "mental illness." — Person who is insane, that is, who is not legally responsible for the person's own actions because the person cannot distinguish between right and wrong is mentally ill under this definition. Clark v. State, 151 Ga. App. 853, 261 S.E.2d 764

"Insane," "Mentally Ill," "Intellectual Disability" Defined (Cont'd)

(1979), aff'd, 245 Ga. 629, 266 S.E.2d 466 (1980).

What constitutes delusional compulsion. — One is not criminally responsible when, though one has reason sufficient to distinguish between right and wrong, as to a particular act about to be committed, yet, in consequence of some delusion, the will is overmastered and there is no criminal intent, provided that the act itself is connected with the peculiar delusion under which the person is laboring. Hargroves v. State, 179 Ga. 722, 177 S.E. 561 (1934).

Intermittent insanity is no excuse or justification for crime, unless the defendant was incapable of knowing right from wrong at the time the act was committed. Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962).

Weakmindedness alone is not a defense to crime. Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962).

Mental abnormality alone is not a defense to crime. Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962).

Mentally irresponsible at time of offense. — Mental abnormality is not a defense unless the accused was, at the time of the commission of the offense, mentally irresponsible under the test recognized by law in this state. The only exception to this is delusional insanity. Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962).

Test of mental irresponsibility. — Test is whether the accused had reason sufficient to distinguish between right and wrong in relation to the particular offense committed. Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962).

Defense of drug-caused mania or insanity. — Defense of mania or insanity, caused by the use of a drug, permanent and fixed in character, so as to destroy the knowledge of right and wrong as to the act, with the person laboring under such infirmity not responsible for the person's crime, must amount to a plea of insanity at the time of the commission of the act under this section. Brand v. State, 123 Ga. App. 273, 180 S.E.2d 579 (1971).

Mental retardation definition not met. — Defendant's motion for a new trial on the basis that the verdict was contrary to the evidence was properly denied when the defendant's interaction with others, defendant's letter writing, newspaper reading, and sports activities all indicated that the defendant did not meet the statutory definition of mental retardation in O.C.G.A. § 17-7-131(a)(3). Foster v. State, 272 Ga. 69, 525 S.E.2d 78, cert. denied, 531 U.S. 890, 121 S. Ct. 214, 148 L. Ed. 2d 151 (2000).

In a death penalty case, a habeas court did not err in considering habeas corpus petitioner's claim, raised for the first time in the habeas petition, that the petitioner was mentally retarded; the habeas court properly found that the petitioner's intelligence test scores and school records failed to prove that the petitioner met the definition of mentally retarded under O.C.G.A. § 17-7-131(a)(3). Head v. Ferrell, 274 Ga. 399, 554 S.E.2d 155 (2001).

In a death penalty case, the habeas corpus court correctly held that the defendant was not mentally retarded, and could thus be executed, when the evidence demonstrated that the defendant committed other crimes, one punishable by death, which required a certain degree of planning and intelligence, the defendant's school records were devoid of any indication that the defendant was retarded, and crime scene photographs supported the state's version of the crime scene and illustrated the resourcefulness displayed by the defendant to accomplish the defendant's illustrated purpose. Morrison v. State, 276 Ga. 829, 583 S.E.2d 873 (2003), cert. denied, 541 U.S. 940, 124 S. Ct. 1662, 158 L. Ed. 2d 363 (2004), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Inmate was denied habeas corpus relief on a claim that the defendant was ineligible for the death penalty because the defendant was mentally retarded because the defendant failed to offer any evidence that the state habeas court and the state supreme court's conclusions were based on an unreasonable determination of the facts in light of the evidence presented; the state habeas court noted that the

inmate provided no concrete evidence to demonstrate that the defendant fell within the scope of the definition of mental retardation under O.C.G.A. § 17-7-131, and the state supreme court rejected the claim citing numerous tests and records indicating that the inmate's mental function, while below average, did not render the defendant mentally retarded. Ferrell v. Head, 398 F. Supp. 2d 1273 (N.D. Ga. 2005).

In a habeas corpus proceeding with regard to a defendant's conviction for murder and receiving the death sentence, a jury's determination that the defendant was not mentally retarded was upheld as a rational trier of fact could have found that the defendant failed to meet the burden of proof that the defendant was mentally retarded by a preponderance of the evidence since the evidence showed that the jury heard evidence regarding six intelligence quotient (IQ) tests administered to the defendant during the defendant's lifetime, with scores of 78, 84, 85, 68, 66 (which, due to a mathematical error, should have been 70), and 89; expert testimony established that IQ scores between 70 and 84, while indicating borderline intellectual functioning, did not indicate mental retardation; and there was testimony that the defendant checked out prison library books on a regular basis and was able to use the computer. Further, three state experts who examined the defendant opined that the defendant was not mentally retarded and three experts for the defendant disagreed and, although evidence was adduced indicating that the defendant exhibited brain dysfunction, the defendant's own expert testified that there was no way to determine what caused the dysfunction and that a person can have brain dysfunction without being mentally retarded, with that expert also testifying that the use of drugs and alcohol can have a significant impact on brain function and that the defendant had reported using drugs and alcohol. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747, reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Jury Charge

No "guilty but mentally ill" verdict for misdemeanor. — Trial court erred in permitting the jury to consider a verdict of guilty but mentally ill on a misdemeanor count of making harassing telephone calls as that verdict is available only in felony cases. Converting, on appeal, the verdict to guilty would have constituted an impermissible substantive change in the verdict, violative of O.C.G.A. § 17-9-40, and therefore the verdict had to be reversed. Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

When jury charge as to insanity mandatory. — This section made it mandatory for the trial judge to instruct the jury in line with the statute's provisions. Bailey v. State, 210 Ga. 52, 77 S.E.2d 511 (1953).

When a defendant pleads not guilty by reason of insanity, it is mandatory that the trial judge shall instruct the jury in line with the provisions of this section. Sanford v. State, 217 Ga. 825, 125 S.E.2d 478 (1962).

When the evidence makes insanity at the time of the commission of an alleged offense an issue, it is mandatory for the trial judge to charge the provisions of this section. Morgan v. State, 224 Ga. 604, 163 S.E.2d 690 (1968).

It was mandatory to charge the first part of this section relating to the form of the jury's verdict in a case involving insanity at the time of the commission of the act. Hulsey v. State, 233 Ga. 261, 210 S.E.2d 797 (1974).

Once the issue of insanity at the time of the commission of the alleged offense is raised by the evidence it is mandatory upon the trial judge to charge the jury under the provisions of this section relating to the form of the verdict in case the jury should find the defendant not guilty by reason of insanity. Williams v. State, 237 Ga. 399, 228 S.E.2d 806 (1976); Moore v. State, 142 Ga. App. 145, 235 S.E.2d 577 (1977).

O.C.G.A. § 17-7-131 requires that in all criminal trials when an accused contends that the accused was insane or mentally incompetent at the time the acts charged against the accused were committed that the trial judge instruct the jury that in

Jury Charge (Cont'd)

case of acquittal on such contention to specify in the jury's verdict that an acquittal on account thereof is because of mental incompetence or insanity at the time of the commission of the act. Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991).

O.C.G.A. § 17-7-131 mandates that the charge set forth in subparagraph (b)(3)(B) shall be given and the trial court erred by failing to give the charge. Spraggins v. State, 258 Ga. 32, 364 S.E.2d 861 (1988).

Trial court did not err in giving the instructions mandated by O.C.G.A. § 17-7-131(b)(3), as such ensured that the jury did not improperly concern itself with the lesser-known punishments associated with an insanity defense. Foster v. State, 306 Ga. 587, 832 S.E.2d 346 (2019).

Erroneous but harmless charge. — Since mental illness is not an element of the underlying offense, the burden of persuasion as to that issue is on the defendant. Further, the statutory requirement that mental illness be proved beyond a reasonable doubt is not constitutionally infirm. When the trial court instructs the jury that the court would be authorized to find the defendant guilty but mentally ill if the jury believed beyond a reasonable doubt that the defendant was guilty, but believed by a preponderance of the evidence that the defendant was mentally ill at the time of the commission of the offense, such a charge, while erroneous, has the effect of reducing the burden the defendant bears of showing mental illness, is beneficial, and does not require reversal. Hood v. State, 187 Ga. App. 88, 369 S.E.2d 348 (1988).

Trial court's instruction that if the jury believed beyond a reasonable doubt that the defendant was guilty and if the jury also believed by a preponderance of the evidence that the defendant was mentally ill at the time of the offense, then the jury would be authorized to find the defendant guilty but mentally ill, was erroneous, but harmless. Mitchell v. State, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

Even though the charge did not adequately instruct the jury concerning the alternative verdict of not guilty by reason of insanity, the error was harmless because no evidence was presented to support such a verdict. McDuffie v. State, 210 Ga. App. 112, 435 S.E.2d 452 (1993).

Even though the verdict form had erroneously provided the option of "guilty but mentally ill" instead of "guilty but mentally retarded," the court's curative actions were sufficient to render the error harmless. Lyons v. State, 271 Ga. 639, 522 S.E.2d 225 (1999).

Though the trial court erred in charging the jury in defendant's murder trial by including the language in the Standard Pattern Jury Instruction on mental retardation that improperly added "at the time of the commission of the offense," no reversible error occurred because the trial court also included the requirement that the impairments in adaptive behavior had to manifest during defendant's developmental period. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

O.C.G.A. § 17-7-131 does not unconstitutionally shift the burden of proof. Because mental illness is not an element of the underlying offense, the defendant bears the burden of persuasion on that issue; and because a state may constitutionally require a criminal defendant to prove an insanity defense beyond a reasonable doubt, the provision in O.C.G.A. § 17-7-131(c)(2) that mental illness be proved beyond a reasonable doubt is not constitutionally infirm. Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984), cert. denied, 469 U.S. 1132, 105 S. Ct. 816, 83 L. Ed. 2d 809 (1985); Hood v. State, 187 Ga. App. 88, 369 S.E.2d 348 (1988).

Statute places no burden on a defendant to prove that the defendant is not mentally ill, or that the defendant is guilty but mentally ill. The burden is on the state to prove that the defendant is guilty of the crime charged, including the requisite element of intent, beyond a reasonable doubt. The burden is on the defendant to prove defendant is not guilty by reason of insanity by a preponderance of the evidence. This latter requirement is

constitutional. Keener v. State, 254 Ga. 699, 334 S.E.2d 175 (1985).

If the defendant pleads insanity, has placed the defendant's mental health in issue, and presumably has introduced evidence of the defendant's mental illness, this does not constitute impermissible burden shifting for the court to charge the jury that it may consider a verdict of guilty but mentally ill. Cooper v. State, 253 Ga. 736, 325 S.E.2d 137 (1985).

Failure to give such mandatory instruction is error. Sanford v. State, 217 Ga. 825, 125 S.E.2d 478 (1962).

Failure to give a charge to the jury when required by O.C.G.A. § 17-7-131 (3)(b) is reversible error. Guilford v. State, 258 Ga. 253, 368 S.E.2d 116 (1988).

Giving a summary rather than a complete charge on insanity and mental illness as required by O.C.G.A. § 17-7-131 (3) was error. Moore v. State, 217 Ga. App. 207, 456 S.E.2d 708 (1995).

Failure to instruct on "guilty but retarded" was harmless error. — Charge on the guilty but mentally retarded option under O.C.G.A. § 17-7-131(c) was mandatory, but failure to charge was harmless beyond a reasonable doubt, since the psychiatrist testified that the defendant was highly articulate, well-spoken and very bright, and that the defendant was so articulate and coherent that the psychiatrist had no reason to suspect mental retardation and the defendant presented no evidence to the contrary. Roberts v. State, 257 Ga. App. 296, 570 S.E.2d 708 (2002).

Failure to instruct on "guilty but mentally retarded" reversible error. — When the defendant's primary defense alleged mental incompetence, and expert testimony advanced that the defendant was mentally retarded, the trial court's failure to instruct the jury that the jury could consider a verdict of guilty but mentally retarded in addition to verdicts of guilty, not guilty, not guilty by reason of insanity, and guilty but mentally ill was reversible error. Mack v. State, 206 Ga. App. 402, 425 S.E.2d 671 (1992).

Failure to properly instruct jury requires grant of new trial. Bailey v. State, 210 Ga. 52, 77 S.E.2d 511 (1953).

Instruction at sentencing phase not authorized. — In a prosecution for malice murder, the trial court did not err in refusing to charge at the sentencing phase that the jury could not return a death sentence if the jury found by a preponderance of the evidence that the defendant was mentally retarded; the procedure to foreclose the execution of mentally retarded defendants had been followed at the guilt-innocence phase of the trial when the jury rejected a "guilty but mentally retarded" verdict and, at the sentencing phase, the issue of the defendant's purported mental retardation was no longer conclusive as to the defendant's sentence, but was merely one of the mitigating factors which the jury would be authorized to consider. Burgess v. State, 264 Ga. 777, 450 S.E.2d 680 (1994), cert. denied, 515 U.S. 1133, 115 S. Ct. 2559, 132 L. Ed. 2d 813 (1995).

If there is no evidence to support a charge on insanity under O.C.G.A. §§ 16-3-2 and 16-3-3, then a charge under O.C.G.A. § 17-7-131, with regard to the defense of insanity, never arises. Shirley v. State, 149 Ga. App. 194, 253 S.E.2d 787 (1979).

Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the defendant introduced no evidence of insanity, only lay witness testimony about generalized problems. McBride v. State, 314 Ga. App. 725, 725 S.E.2d 844 (2012).

Defendant's ineffective assistance of counsel claim failed based on the defense attorney not requesting a jury charge of not guilty by reason of insanity because the attorney testified at the hearing on the motion for a new trial that the attorney considered it but found no evidence to support such a defense theory; thus, it was reasonable trial strategy. Hosley v. State, 322 Ga. App. 425, 746 S.E.2d 133 (2013).

Counsel not ineffective for not raising issue of defendant's mental health. — Because the defendant pro-

Jury Charge (Cont'd)

duced no expert testimony at the motion for new trial showing that a psychological evaluation would have aided an insanity defense, the defendant's claim that counsel was ineffective for failing to investigate and raise the issue of the defendant's mental health rested on speculation and failed for lack of demonstrated prejudice. Perkins v. State, 328 Ga. App. 508, 759 S.E.2d 626 (2014).

If the defendant did not admit to committing the act charged. — If the defendant did not admit to committing any act that constitutes aggravated assault on a peace officer, the defendant did not establish the evidentiary foundation necessary for charging the jury on the affirmative defense of insanity. Kelley v. State, 235 Ga. App. 177, 509 S.E.2d 110 (1998).

It was mandatory to charge the first part of former Code 1933, § 27-1503 (see O.C.G.A. § 17-7-131) relating to the form of the jury's verdict. Printup v. State, 142 Ga. App. 42, 234 S.E.2d 840 (1977).

Jury charge as to form of verdict is only mandatory charge. — Only portion of this section which was mandatory for the judge to charge is that part dealing with the form of the verdict. Albert v. State, 152 Ga. App. 708, 263 S.E.2d 685 (1979).

Charging entire language of section. — While inappropriate, it was not harmful error when the court charges the entire language of this section. Printup v. State, 142 Ga. App. 42, 234 S.E.2d 840 (1977).

Trial court did not err when the court substituted the words "became clear" for "manifested" with regard to the statutory definition of mental retardation contained within O.C.G.A. § 17-7-131(a)(3) because the terms "manifested" and "became clear" are synonymous under those circumstances. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

Charging of provisions relating to consequences of acquittal for insanity. — It was inappropriate to charge the part of former Code 1933, § 27-1503 (see O.C.G.A. § 17-7-131) relating to the consequences of a verdict of acquittal for insanity by the jury, but charging the latter part of that section and Ga. L. 1969, p. 505 (see O.C.G.A. § 37-3-85) in such a case, though inappropriate, does not amount to harmful error requiring a reversal of the judgment. Hulsey v. State, 233 Ga. 261, 210 S.E.2d 797 (1974).

Charging the part of former Code 1933, § 27-1503 (see O.C.G.A. § 17-7-131) and Ga. L. 1969, p. 505 (see O.C.G.A. § 37-3-85), relating to the consequences of acquittal for insanity, though inappropriate, does not amount to harmful error requiring a reversal of the judgment. Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975), rev'd on other grounds, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

If the substance of former Code 1933, § 27-1503 (see O.C.G.A. § 17-7-131) was sufficiently charged, it was not necessary to charge that section in haec verba. Johnston v. State, 232 Ga. 268, 206 S.E.2d 468 (1974).

Not including mandatory language not reversible error. — Court's failure to charge the mandatory language of O.C.G.A. § 17-7-131(b)(3)(A) (proceedings upon plea of insanity), by failing to include the phrase "if ever" when explaining when the court is allowed to release the defendant from a mental health facility, was not reversible error, nor did the statute deprive the defendant of a fair trial or effective assistance of counsel. The charge given specified that the court would retain control over the defendant's release and did not imply that the court would be required at some point to order the defendant's release. Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Although exclusion of the words "if ever" is harmless error in certain contexts, the better practice is to give the charge exactly as provided in O.C.G.A. § 17-7-131. Griffin v. State, 267 Ga. 586, 481 S.E.2d 223 (1997).

Subsequent disposition of the prisoner need not be explained to the jury. Biddy v. State, 138 Ga. App. 4, 225 S.E.2d 448 (1976).

Informing jury of consequences of verdict. — Absent exceptional circum-

stances not present here, witnesses in a trial on the issue of the defendant's mental retardation should not be examined or cross-examined in such a manner as to inject sentencing issues into the case, and the jury should not be informed that if the jury finds the defendant mentally retarded, the defendant's death sentence will be vacated. State v. Patillo, 262 Ga. 259, 417 S.E.2d 139 (1992).

Because the prosecutor did not inform the jury that the defendant could not receive a death sentence if found to be guilty but mentally retarded, and the trial court correctly charged the jury on the sentencing consequences of such a verdict, no reversible error occurred as a result of the district attorney stating during the guilt-innocence phase of closing argument that the defendant was not mentally retarded and couldn't hide behind it. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

Omitting statutory language in jury charge. — If the charge as given by the trial court provided sufficient and proper guidelines for determining the defendant's guilt or innocence with regard to the defense of insanity, there was no error in the trial court's omission of O.C.G.A. § 17-7-131 from the court's charge. Taylor v. State, 174 Ga. App. 323, 329 S.E.2d 625 (1985).

Charge held proper. — Trial court correctly charged the jury that the defendant's inability to evaluate the quality and consequences of the defendant's acts to the same degree as a normal or average person would not excuse the defendant if the defendant was able to distinguish between right and wrong. Adams v. State, 254 Ga. 481, 330 S.E.2d 869 (1985).

Improper charge held reversible error. — Reversal was required when the trial court, in charging under O.C.G.A. § 17-7-131, failed to define "mentally ill" and "mentally retarded" and failed to state that the defendant would be incarcerated if the defendant were found to be guilty but mentally ill or guilty but mentally retarded. The court could not conclude that the jury was not misled or confused. Foster v. State, 283 Ga. 47, 656 S.E.2d 838 (2008).

Instruction adequate regarding charge of "guilty but mentally ill." — See Ellis v. State, 176 Ga. App. 384, 336 S.E.2d 281 (1985).

Instruction when both defense of insanity and guilty but mentally ill raised. — When the trial court charges the jury on the defense of insanity at the time of the crime, O.C.G.A. §§ 16-3-2 and 16-3-3, and on guilty but mentally ill at the time of the crime, O.C.G.A. § 17-7-131, the trial court must make clear to the jury in the court's charge that if the jury finds the defendant did not have the mental capacity to distinguish between right and wrong (or acted because of delusional compulsion), the jury must find the defendant not guilty by reason of insanity and must not find the defendant guilty but mentally ill. Keener v. State, 254 Ga. 699, 334 S.E.2d 175 (1985).

Charge stating that a verdict of "guilty but mentally ill" could be based upon a finding that defendant "committed the act alleged" and was mentally ill, was only a partially correct statement of the law; in addition to a finding that the defendant "committed the act alleged" and was mentally ill, a verdict of "guilty but mentally ill" must also be based upon a finding that the defendant was not legally insane and that the act was, therefore, a "crime" for which the defendant could be found "guilty." Foote v. State, 265 Ga. 58, 455 S.E.2d 579 (1995).

Instruction ambiguous on custody and control. — Instruction to jury that a verdict of not guilty by reason of insanity would discharge the defendant from the offense charged, and the defendant "would be committed to the Department of Human Resources until he is no longer a danger to himself or others" was ambiguous with regard to the crucial issue of who would have custody and control of the defendant, and therefore constituted reversible error. Prophitt v. State, 183 Ga. App. 332, 358 S.E.2d 892 (1987).

Although the defendant suffered organic brain damage from an auto accident, the defendant was not deprived of defendant's Sixth Amendment right to defend oneself and develop substantive evidence at trial by the court's refusal to

Jury Charge (Cont'd)

allow the defense to present evidence pertaining to the defendant's mental faculties, relevant to the issue of intent and the defendant's defenses of entrapment and coercion, and by a charge to the jury on guilty but mentally ill. Holder v. State, 194 Ga. App. 790, 391 S.E.2d 808 (1990).

Counsel not ineffective for failing to pursue affirmative defenses of insanity or mental illness. — Defendant's counsel was not ineffective for failing to request a jury instruction on insanity or mental illness because the record indicated that trial counsel actually requested a charge on guilty but mentally ill that tracked O.C.G.A. § 17-7-131, although the record did not indicate why the charge was not given; and, even assuming trial counsel withdrew the request or waived the charge, counsel testified at the motion for new trial hearing that counsel made a strategic decision not to pursue the affirmative defenses of insanity or mental illness as the defendant maintained that the defendant did not commit the murder; and the evaluator had not concluded that the defendant was insane at the time of the murder. Smith v. State, 306 Ga. 556, 832 S.E.2d 379 (2019).

OPINIONS OF THE ATTORNEY GENERAL

Department's authority to transfer patients. — This section authorized the Department of Human Resources to make intrastate hospital transfers of persons found not guilty by reason of insanity. Only when such proposed transfers were to be out of this state must the permission of the superior court be obtained. 1979 Op. Att'y Gen. No. 79-44.

When the contemplated transfer will be to a hospital in another state, out of the jurisdiction of the courts of this state, the superior court needs to be consulted so that the court can issue appropriate orders relative to retention of jurisdiction, discharge procedures, and other pertinent matters. 1979 Op. Att'y Gen. No. 79-44.

Scope of court supervision of discharge of criminally-committed patients. — This section gave the court more supervision over the final discharge of criminally-committed patients than over civilly-committed patients by requiring the criminally-committed patient to petition the committing court for the patient's release. This discharge supervision was not diminished by the authority of the Department of Human Resources to select the hospital to which criminally-committed patients were initially committed. Similarly, there was no further diminution of the court's role by granting to the department the authority to select the hospital to which the patient was later transferred so long as the second hospital was within the state. 1979 Op. Att'y Gen. No. 79-44.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 33 et seq., 43 et seq.

ALR. — Constitutionality of statutes relating to determination of plea of insanity in criminal case, 67 A.L.R. 1451.

Constitutionality of statute relating to insanity as defense to crime, 74 A.L.R. 265.

Jurisdiction of proceedings for restoration to competency of one who has allegedly regained sanity after an adjudication of incompetency, 121 A.L.R. 1509.

Right of appeal in proceeding for restoration to competency, 122 A.L.R. 541.

Investigation of present sanity to determine whether accused should be put, or continue, on trial, 142 A.L.R. 961.

Irresistible impulse as excuse for crime, 173 A.L.R. 391.

Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 A.L.R.2d 703.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Requirement of unanimity of verdict in

proceedings to determine sanity of one accused of crime, 42 A.L.R.2d 1468.

Counsel's right, in consulting with accused as client, to be accompanied by psychiatrist, psychologist, hypnotist, or similar practitioner, 72 A.L.R.2d 1120.

Release of one committed to institution as consequence of acquittal of crime on ground of insanity, 95 A.L.R.2d 54.

Instructions in criminal case in which defendant pleads insanity as to his hospital confinement in the event of acquittal, 11 A.L.R.3d 737.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal, 50 A.L.R.3d 144.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital records, 55 A.L.R.3d 551.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense, 1 A.L.R.4th 884.

Validity of conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity, 2 A.L.R.4th 934.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 A.L.R.4th 1043.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" — modern cases, 23 A.L.R.4th 493.

Mental or emotional disturbance as defense to or mitigation of charges against attorney in disciplinary proceeding, 26 A.L.R.4th 995.

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Power of state trial court in criminal case to change venue on its own motion, 74 A.L.R.4th 1023.

Right of state prison authorities to administer neuroleptic or antipsychotic drugs to prisoner without his or her consent—state cases, 75 A.L.R.4th 1124.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Propriety of imposing capital punishment on mentally retarded individuals, 20 A.L.R.5th 177.

Propriety of transferring patient found not guilty by reason of insanity to less restrictive confinement, 43 A.L.R.5th 777.

Adequacy of defense counsel's representation of criminal client — issues of incompetency, 70 A.L.R.5th 1.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A.L.R.5th 109.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

Extended commitment of one committed to institution as consequence of acquittal of crime on ground of insanity, 52 A.L.R.6th 567.

Part 3

Change of Venue

Cross references. — Venue generally, Ga. Const. 1983, Art. VI, Sec. II and § 17-2-2.

Law reviews. — For article, "Rule of Law Doesn't Just Happen," see 16 (No. 2) Ga. St. B.J. 24 (2010).

JUDICIAL DECISIONS

Discretion of court in ruling on venue motions. — Grant or denial of motions for change of venue in criminal cases lies largely within the discretion of

the trial judge. The exercise of that discretion will not be reversed on appeal unless it is made to appear that there has been an abuse of discretion. Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 504 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ALR. — Dismissal, nolle prosequi, or mistrial after change of venue in criminal case, as affecting jurisdiction or power of courts of respective districts as to subsequent proceedings, 18 A.L.R. 714.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed, 76 A.L.R. 1034.

Change of venue by state in criminal case, 46 A.L.R.3d 295.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice, 50 A.L.R.3d 760.

Power or duty of prosecuting attorney to proceed with prosecution after change of venue, 60 A.L.R.3d 864.

17-7-150. Procedures for change of venue; transfer of case; appeal from denial of change of venue.

(a)(1) The defendant, in any criminal case in which a trial by jury is provided, may move in writing for a change of venue, whenever, in the defendant's or defense counsel's judgment, an impartial jury cannot be obtained in the county where the crime is alleged to have been committed. Upon the hearing of the motion it shall not be necessary to examine all persons in the county liable to serve on juries, but the judge shall hear evidence by affidavit or oral testimony in support of or against the motion. If, from the evidence submitted, the judge is satisfied that an impartial jury cannot be obtained to try the case, the judge shall grant a change in venue; the judge shall transfer the case to any county that may be agreed upon by the prosecuting attorney and the defendant or the defense counsel, to be tried in the county agreed upon. The judge has the discretion to reject any county agreed upon; if a county is not thus agreed upon, or if the judge, in the exercise of discretion, rejects a county agreed upon, the judge shall select such county as in the judge's judgment will afford a fair and impartial jury to try the case and have it transferred accordingly.

(2) In the exercise of such discretion, the judge shall consult with the chief superior court judge of the circuit in which a county of transfer lies and consider the following factors:

(A) The existing criminal and civil trial calendars of the transfer county;

(B) The frequency of use as a transfer county;

(C) The estimated length of trial;

(D) The proposed date of trial;

(E) Whether or not the jury is to be sequestered;

(F) Which county shall be responsible for court security, prisoner security, bailiffs, jailers, and clerks of court personnel;

(G) Jury transportation;

(H) Securing hotel accommodations in the event of jury sequestration;

(I) Securing of meals for jurors and other court personnel;

(J) Which county will guarantee and pay vendors for services rendered;

(K) The necessity for deposit or prepayment of expenses by the county of the crime venue; and

(L) All other matters which reasonably may affect the orderly administration of justice in the transfer county. In the event of disagreement between the trial judge and the chief judge of the transfer circuit, the district administrative judge for the proposed transfer of venue shall have final responsibility for resolving the dispute.

(3) Either by the agreement of the defense counsel, the prosecuting attorney, and the judge or by the exercise of discretion by the judge the trial jury may be selected from qualified jurors of the transfer county, although the trial of the criminal case may take place in the county of the venue of the alleged crime. In the exercise of discretion, to select the jury in the transfer county but to try the case in the county of venue of the alleged crime, the judge shall consult with the chief superior court judge of the circuit in which the county of transfer lies and consider all of the factors provided in subparagraphs (A) through (L) of paragraph (2) of this subsection as well as the following factors:

(A) The hardship of sequestration a distance from home on the jurors;

(B) The comparison of court space available;

(C) The comparison of security, jail, clerical, and support staff;

(D) The costs to conduct the trial in each place;

(E) The impact of trial on the orderly administration of justice in each county;

(F) The impact on witnesses;

(G) The availability of hotel accommodations and meals for jurors in each county;

(H) The effect on the prosecuting attorney and defense counsel in each county; and

(I) All other matters which would afford a fair trial and the orderly administration of justice.

In the event of disagreement between the trial judge and the chief judge of the transfer circuit, the district administrative judge for the proposed transfer of venue shall have final responsibility for resolving the dispute.

(b) The judge of the court in whose jurisdiction a crime is alleged to have been committed may change the venue for trial of the case on his own motion whenever, in his judgment, there is danger of violence being committed on the defendant, if carried back to, or allowed to remain in the county where the crime is alleged to have been committed. If a motion is made by the defendant for a change of venue, the judge shall hear the motion at such time and place as the judge may direct. If the evidence submitted shall reasonably show that there is probability or danger of violence, it shall be mandatory on the judge to change the venue to such other county as, in his judgment, will reasonably avoid violence.

(c) Notwithstanding other laws, the denial of a motion to change venue shall be appealable immediately only with a certificate of immediate review. Otherwise, the denial shall be appealed with the merits of the case.

History. — Ga. L. 1895, p. 70, § 2; Penal Code 1895, § 939; Penal Code 1910, § 964; Ga. L. 1911, p. 74, § 1; Code 1933, § 27-1201; Code 1933, §§ 27-1201, 27-1202, enacted by Ga. L. 1972, p. 536, § 1; Ga. L. 1995, p. 1292, § 12.

Editor's notes. — Ga. L. 1995, p. 1292, § 14, not codified by the General Assembly, provides that the amendment to this Code section is applicable to all criminal cases in which the county of transfer has not been designated by court order.

Cross references. — Change of venue in criminal grand jury investigation, § 15-12-82. Payment of costs and expenses when venue changed, § 17-11-5. Procedure for transfer of person in custody of sheriff upon change of venue, § 42-4-11.

Law reviews. — For article, "Criminal Venue and Related Problems," see 2 Ga. St. B.J. 331 (1966). For article, "Rule of Law Doesn't Just Happen," see 16 (No. 2) Ga. St. B.J. 24 (2010).

For case note, "Coleman v. Kemp: The Problem of Pretrial Publicity and its Effect on the Alday Murder Cases," see 38 Mercer L. Rev. 1477 (1987).

JUDICIAL DECISIONS

Analysis

General Consideration
Juror Impartiality
Danger of Violence to Defendant
Appellate Review

General Consideration

Constitutionality — O.C.G.A. § 17-7-150 (a)(3) is not unconstitutional. Pruitt v. State, 270 Ga. 745, 514 S.E.2d 639, cert. denied, 528 U.S. 1006, 120 S. Ct. 502, 145 L. Ed. 2d 388 (1999).

Conflicting Superior Court Rule unenforceable. — Because Uniform Superior Court Rule 19.2(B) conflicts with O.C.G.A. § 17-7-150(a), a trial court may not return jurors from the county of venue to the original county for trial. Hardwick v. State, 264 Ga. 161, 442 S.E.2d 236 (1994).

Venue determination reserved for trier of fact. — Trial court erred by making a per se determination of venue and granting the defendant's motion to transfer the case to a different county within the response to the defendant's motion to suppress because a determination of venue was reserved for the finder of fact at trial. State v. Hasson, 334 Ga. App. 1, 778 S.E.2d 15 (2015).

To establish that a change of venue is warranted, a defendant must show either circumstances which are prejudicial to the defendant's right to an impartial trial or actual jury partiality. Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983).

Change of venue in death penalty cases. — Trial courts will order a change of venue for death penalty trials in those cases in which a defendant can make a substantive showing of the likelihood of prejudice by reason of extensive publicity. Jones v. State, 261 Ga. 665, 409 S.E.2d 642 (1991).

To prevail on a motion for change of venue, a defendant must show either that the setting of the trial was inherently prejudicial or that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. Cheeks v. State, 203 Ga. App. 47, 416 S.E.2d 336, cert. denied, 203 Ga. App. 905, 416 S.E.2d 336 (1992).

Change of venue is in court's discretion. — Question as to whether venue should be changed addresses itself to the sound discretion of the trial court. Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978); Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978).

Grant or denial of a motion for change of venue lies largely within the discretion of the trial court. Attaway v. State, 149 Ga. App. 693, 256 S.E.2d 94 (1979).

Because the granting of the defendant's motion for a change of venue had been based solely on the consent of the parties and there was no finding by the trial court that an impartial jury could not be obtained in the county and no transfer county had ever been designated, the court did not err by ordering an evidentiary hearing, and the court had the discretion to order that venue remain in the county. Morrow v. State, 272 Ga. 691, 532 S.E.2d 78 (2000), cert. denied, 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed. 2d 350 (2001).

Trial court did not abuse the court's discretion in moving Bibb County jurors to Chatham County and in sequestering the jurors because local media coverage necessitated the jury's sequestration; the defendant had no legal right to demand that the jurors be instructed that the jurors had been brought to Chatham County over the defendant's objection. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

In a murder case wherein the defendant killed the defendant's father and brother and was involved with the defendant's brother's wife, the trial court did not abuse the court's discretion by denying the defendant's motion for a change of venue because the defendant only alleged that there was a lot of gossip, rumor, and innuendo about the defendant's affair with the defendant's sister-in-law, but the defendant did not claim that the stories about the affair were untrue or even disputed at trial, and the defendant failed to show that the pretrial publicity was inflammatory or created a hostile atmosphere. Heidt v. State, 292 Ga. 343, 736 S.E.2d 384 (2013).

Counsel was not ineffective in failing to move for change of venue when the record showed that the decision was based on sound trial strategy and, even if the parties had agreed to change venue to a particular county, the trial court would have had to determine venue. Hammond v. State, 264 Ga. 879, 452 S.E.2d 745, cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

General Consideration (Cont'd)

Since the parties could not agree as to when the case should be transferred upon the defendant's first motion for change of venue and the judge exercised judicial discretion in selecting the county for trial of the case, and, then, when the defendant made no effort to question prospective jurors about the jurors' prior knowledge of the case, it was not an abuse of discretion for the trial court to deny the defendant's second motion to change venue. Taylor v. State, 219 Ga. App. 475, 465 S.E.2d 473 (1995).

Trial court did not abuse the court's discretion under O.C.G.A. § 17-7-150(a)(1) in transferring venue since: (1) the parties could not agree on a transfer county; (2) the new venue was in the same judicial circuit as the county in which the defendant committed the crime; (3) the new county had a similar population and racial breakdown; and (4) the main newspaper of the county in which the defendant committed the crime had a limited circulation in the new county. Terrell v. State, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Court's rejection of parties' agreement. — O.C.G.A. § 17-7-150(a) does not preclude the trial court from exercising the court's discretion to reject the parties' agreement regarding venue and to order venue in another county. Hardwick v. State, 264 Ga. 161, 442 S.E.2d 236 (1994).

Time for ruling on change of venue in death penalty cases. — Upon hearing a motion for change of venue, the trial court may reserve ruling until after voir dire responses. Jones v. State, 261 Ga. 665, 409 S.E.2d 642 (1991).

Order for change of venue is a judgment to that effect. — Order of the Supreme Court directing a change of venue is substantially a judgment to that effect. Graham v. State, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

County from which venue transferred loses jurisdiction. — When venue is changed, the county from which the case is transferred loses all jurisdiction to try the accused for the offense concerned. Johnston v. State, 118 Ga. 310, 45 S.E. 381 (1903).

County retains power to compel obedience of county's judgment changing venue. — Power of the court from which the case is thus transferred to compel obedience to the court's judgment so changing the venue is neither lost nor impaired. Ruffin v. State, 28 Ga. App. 40, 110 S.E. 311 (1921).

Jurisdiction under subsequent indictment for different offense is unimpaired. — When a subsequent indictment charges a different offense, the jurisdiction of the court of the county where the indictment is found is unimpaired by the change of venue under the former indictment. Ruffin v. State, 28 Ga. App. 40, 110 S.E. 311 (1921).

Petitioner bound by change of venue once obtained. — If a judgment of the superior court refusing to grant a change of venue is excepted to by the petitioner, and is reversed by the Supreme Court, and the change granted, the petitioner is bound by the decree and may not then demand to be tried in the original venue. Graham v. State, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

Procedure upon denial of motion. — If the accused moves for a change of venue and the motion is denied, the proper procedure is to except to the overruling of the accused's motion. Williford v. State, 121 Ga. 173, 48 S.E. 962 (1904).

Consideration of motions pending when new judge takes office. — When the term of office of a judge expires and a successor takes office pending a motion for a change of venue, the incoming judge should pass upon the motion in the light of the record presented to that judge. Marshall v. State, 20 Ga. App. 416, 93 S.E. 98 (1917).

Motion as evidence on trial of issues raised by motion. — Motion for change of venue, though sworn to, is not evidence on the trial of the issues raised by the motion unless it is formally introduced in evidence. Rawlings v. State, 33 Ga. App. 825, 127 S.E. 881, cert. denied, 33 Ga. App. 829 (1925).

This section makes no specific provision for the filing of an answer to a petition for change of venue, but does provide for a hearing on the issues. Robinson v. State, 86 Ga. App. 375, 71 S.E.2d 677 (1952).

Timeliness of state's response to petition. — Since there is no time set for the filing of an answer to such motion, the defendant cannot complain that a pleading, reducing the contentions of the state to writing and filed within 48 hours, is filed too late. Robinson v. State, 86 Ga. App. 375, 71 S.E.2d 677 (1952).

Standard of proof for petition to change venue. — If there is a greater weight of evidence in support of the petition for a change of venue than to the contrary, if the evidence inclines the mind to belief but leaves some room for doubt, and yet is sufficient to incline a reasonable and impartial mind to the movant's side of the issue rather than to the other, the motion for change of venue should be granted. It does not mean that the judge's mind shall be free from uncertainty and doubt. Johns v. State, 47 Ga. App. 58, 169 S.E. 688 (1933); Geer v. State, 54 Ga. App. 216, 187 S.E. 601 (1936).

Proof requirements for likelihood of violence and for jury fairness compared. — Requirement for showing a likelihood or probability of violence is considerably less stringent than that relative to the matter of whether a fair and impartial jury can be obtained. Whitus v. State, 112 Ga. App. 29, 143 S.E.2d 649 (1965).

Applicant for a change of venue on the ground that a fair and impartial jury cannot be obtained must show such by clear and convincing evidence. As to the ground of personal danger the showing required is much less stringent and if a feeling emerges, after considering all the evidence, that something untoward is likely to happen the application should be granted. In both instances, it is the duty of the trial judge to hear the evidence and find the facts of the matter. The judgment may not be disturbed unless it appears that the judge has manifestly violated the judge's duty. Pierce v. State, 125 Ga. App. 490, 188 S.E.2d 181 (1972).

Ineffective assistance of counsel not established. — Defendant's claim that counsel was ineffective with regard to a motion for a change of venue failed; the defendant had not shown that the jury was tainted and had not shown how live evidence or a citizen survey could have accomplished any more than the introduction in evidence of existing pretrial publicity or voir dire. Harvey v. State, 284 Ga. 8, 660 S.E.2d 528 (2008).

No evidence supporting change in venue. — See White v. State, 221 Ga. App. 860, 473 S.E.2d 539 (1996).

Trial court properly denied murder defendant's motion for change of venue under O.C.G.A. § 17-7-150(a) based on a 1983 manslaughter conviction; trial counsel acknowledged that no potential juror indicated that he or she was aware of the 1983 homicide. Harvey v. State, 284 Ga. 8, 660 S.E.2d 528 (2008).

Trial court did not abuse the court's discretion in refusing to transfer venue of a defendant's trial on a felony murder charge because the defendant failed to show that the setting of the trial was inherently prejudicial due to inflammatory or incorrect pretrial publicity, and the defendant failed to demonstrate that the defendant could not receive a fair trial due to the prejudice of individual jurors. Edmond v. State, 283 Ga. 507, 661 S.E.2d 520 (2008).

Cited in Gunn v. State, 245 Ga. 359, 264 S.E.2d 862 (1980); Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984); Devier v. State, 250 Ga. 604, 323 S.E.2d 150 (1984); Blanks v. State, 254 Ga. 420, 330 S.E.2d 575 (1985); Whitehead v. State, 255 Ga. 526, 340 S.E.2d 885 (1986); Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (1994); Glean v. State, 268 Ga. 260, 486 S.E.2d 172 (1997); Torres v. State, 272 Ga. 389, 529 S.E.2d 883 (2000); Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001); EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006).

Juror Impartiality

Determination of impartiality generally. — On the hearing of evidence regarding the possibility of obtaining an impartial jury, the fair trial issue relates to a future thing. Being an issue which only the future can determine absolutely, it is necessarily a matter of opinion at the time when the testimony is being heard. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

Discretion of trial judge regarding decision as to whether impartial jury can be obtained. — Motion for a change

Juror Impartiality (Cont'd)

of venue based upon the ground that an impartial jury cannot be obtained in the county where the crime was allegedly committed is addressed to the sound discretion of the presiding judge and will not be disturbed unless an abuse of discretion is shown. Grenoble v. State, 41 Ga. App. 663, 154 S.E. 304 (1930); Ledford v. State, 107 Ga. App. 244, 129 S.E.2d 555 (1963).

The decision as to whether or not the accused can obtain an impartial jury in the county in which the indictment was presented is essentially within the discretion of the trial judge and, unless this discretion is abused and the decision reached manifestly erroneous, the decision will not be reversed. Garrett v. State, 80 Ga. App. 118, 55 S.E.2d 672 (1949).

Test as to prejudicial publicity. — Test as to whether pretrial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to the guilt or innocence of the accused from the pretrial publicity. Wilkes v. State, 238 Ga. 57, 230 S.E.2d 867 (1976); Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979); Shinholster v. State, 150 Ga. App. 221, 257 S.E.2d 342 (1979); Cochran v. State, 151 Ga. App. 478, 260 S.E.2d 391 (1979); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983); Waters v. State, 248 Ga. 355, 283 S.E.2d 238 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983); Ponder v. State, 194 Ga. App. 446, 390 S.E.2d 869 (1990).

Test as to whether newspaper publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such newspaper articles. Welch v. State, 237 Ga. 665, 229 S.E.2d 390 (1976); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978).

Test as to whether unfavorable newspaper publicity had so prejudiced a case against one accused of a crime that a fair trial cannot be had is whether the jurors summoned to try the case have formed fixed opinions as to the guilt or innocence of the accused from reading such unfavorable newspaper publicity. Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976), cert. denied, 431 U.S. 909, 97 S. Ct. 1707, 52 L. Ed. 2d 394 (1977).

Test to determine if a change of venue is appropriate is whether the prospective jurors have formed fixed opinions as to appellant's guilt or innocence based upon reports in the media. Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980).

Test is whether jurors can lay aside their impressions and opinions. — Test for determining whether adverse pretrial publicity has so affected the community that the defendant cannot receive a fair trial is whether the prospective jurors summoned to try the case can lay aside the jurors' impressions and opinions and render a verdict based on the evidence presented at trial. Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976), cert. denied, 431 U.S. 909, 97 S. Ct. 1707, 52 L. Ed. 2d 394 (1977); Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978).

Publicity is not grounds in itself for change of venue. — Widespread or even adverse publicity of a criminal incident is not in itself grounds to grant a change of venue. Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976), cert. denied, 431 U.S. 909, 97 S. Ct. 1707, 52 L. Ed. 2d 394 (1977); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Prejudice resulting from news publicity. — Inference of prejudice requiring a change of venue is not to be drawn from the fact alone that newspapers published in the vicinity have contained articles descriptive of the offense or editorials denunciatory of the accused. Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954).

From the fact that two local newspapers gave a large amount of publicity to the case, it does not follow that such prejudice existed in the whole county as to make a fair and impartial trial impossible. Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954).

Mere fact that newspapers carried items and editorials stating that the defendant confessed to the crime for which the defendant stood indicted, or had pub-

lished articles in regard to the defendant which were inflammatory in nature, would not of itself be sufficient to establish the fact that a fair and impartial trial could not be had in the county in question, without further alleging that the jurors who had been summoned to try the case had read the articles and formed a fixed opinion as to the guilt or innocence of the defendant from reading such articles. Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954).

When the transcript revealed that although the defendant asked the jurors whether the jurors had heard of arrests of drug dealers, the defendant did not inquire whether the jurors could render an impartial decision despite whatever knowledge the jurors had gleaned from the media, the defendant failed to demonstrate the required prejudice, and the trial court did not err by denying the motion for a change of venue. Cheeks v. State, 203 Ga. App. 47, 416 S.E.2d 336, cert. denied, 203 Ga. App. 905, 416 S.E.2d 336 (1992).

Defendant's motion for a change in venue was properly denied as the trial court reviewed the media coverage of the case and properly determined that the coverage would not affect the jurors' ability to remain impartial. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Trial court did not abuse the court's discretion in denying a defendant's motion for change of venue based upon pretrial publicity because the defendant failed to show that the pretrial publicity created an inherently prejudicial atmosphere or affected the jurors' ability to be fair and impartial. Holmes v. State, 284 Ga. 330, 667 S.E.2d 71 (2008).

Mere reference to the defendant in a newspaper article does not demand a finding that a need for change of venue exists. Miller v. State, 141 Ga. App. 382, 233 S.E.2d 460 (1977).

Remoteness of time between trial and adverse pretrial publicity is one factor in determining whether change of venue is required. Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685, cert. denied, 459 U.S. 981, 103 S. Ct. 317, 74 L. Ed. 2d 293 (1982).

Effect of publicity regarding defendant's escape. — Courts will generally be less likely to closely scrutinize the prejudicial effect of publicity upon a defendant's trial in cases where that publicity is created by the defendant's escape attempt than in cases where the publicity stems from other sources. Goodman v. State, 255 Ga. 226, 336 S.E.2d 757 (1985).

Qualified jurors need not be totally ignorant of the facts and issues involved in order to guarantee that a defendant has a panel of impartial, indifferent jurors. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979).

Defendant is entitled to a panel of impartial jurors, but this does not require that the jurors be totally ignorant of the facts and issues involved. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

If no evidence of considerable publicity surrounding the incident to be tried has been shown to the court, the motion for change of venue is properly denied. Futch v. State, 151 Ga. App. 519, 260 S.E.2d 520 (1979).

If no showing is made that the veniremen have formed fixed opinions as to the guilt or innocence of the defendants from exposure to pretrial publicity, the trial court does not abuse the court's discretion in overruling a motion for change of venue. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980).

Juror sufficiently impartial if juror can lay aside impression or opinion. — Mere existence of a preconceived notion as to the guilt or innocence of an accused, without more, is not sufficient to rebut the presumption of a prospective juror's impartiality. Rather, a juror's impartiality is sufficient if the juror can lay aside the juror's impression or opinion and render a verdict based on the evidence presented in court. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Juror's assurances that juror is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality. Mooney v. State, 243 Ga. 373, 254 S.E.2d

Juror Impartiality (Cont'd)

337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

If 20 percent of veniremen are excused for partiality regarding guilt, a change of venue is not required due to jury prejudice regarding the guilt-innocence phase. Collier v. State, 244 Ga. 553, 261 S.E.2d 364, cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1979), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

When of the 89 prospective jurors who underwent voir dire, 17 were excused for bias and prejudice, three others were excused because those jurors had participated in the establishment of or had contributed to a reward fund with respect to the case, and these 20 jurors constituted only 22 percent of the entire panel, this percentage corroborated the absence of such prejudicial publicity as would require the grant of a motion for change of venue. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

If there is no reason to presume prejudice, the trial court does not abuse the court's discretion in refusing a pre-voir dire motion to change venue. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

If there is no evidence that any juror has formed a fixed and unchangeable opinion as to the guilt or innocence of the defendant such as would not yield readily to the testimony, it cannot be said that the trial court abused the court's discretion in denying the motion for change of venue. Hopkins v. Hopper, 234 Ga. 236, 215 S.E.2d 241 (1975).

If the evidence greatly preponderates that an impartial jury can be obtained to try the case, it is not an abuse of discretion by the trial court to deny a motion based upon this ground. Pinkston v. State, 80 Ga. App. 268, 55 S.E.2d 877 (1949).

Relevance of opinion evidence. — If opinion evidence is relevant to show that the defendant may obtain a fair trial, opinion evidence is also relevant when offered to show that the defendant may not obtain a fair trial when the facts upon which the opinion is based are stated. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

If the evidence in support of a motion consists of the opinions of witnesses of the county where venue has been laid, unsupported by facts upon which the opinions are based, the trial judge is not bound, in the absence of a showing to the contrary, to grant the change when in the judge's opinion the change of venue is not required in order for the defendant to procure a fair trial. Ponder v. Williams, 80 Ga. App. 145, 55 S.E.2d 668 (1949).

Allegation of bias and prejudice of trial court does not address itself to change of venue. — In a criminal case, a change of venue is predicated upon the determination of the trial judge that an impartial jury cannot be obtained in the county where the crime is alleged to have been committed. That ground of a motion for change of venue which alleges bias and prejudice on the part of the trial court does not address itself to a change of venue, but addresses itself to the disqualification of the trial judge. Wyciskala v. State, 147 Ga. App. 518, 249 S.E.2d 329 (1978).

Superior court judge lacks the authority to grant a change of venue on the judge's own motion in a criminal case and over defense objection, on the ground that a fair and impartial jury cannot be obtained in the county where the crime was allegedly committed. Patterson v. Faircloth, 256 Ga. 489, 350 S.E.2d 243 (1986), disapproving dicta in Wheeler v. State, 42 Ga. 306 (1871).

When motion asserting systematic exclusion of groups insufficient for appeal. — If counsel does not move to quash the indictments but rather on the morning the trial begins files a motion for change of venue complaining of systematic exclusion of blacks and women, such a motion is insufficient to preserve for appeal an assertion of error on the ground that the trial court erred in failing to quash the indictment or, in the alterna-

tive, failed to grant counsel a delay of the trial so counsel might have sufficient opportunity to prove counsel's claim of systematic exclusion of blacks and women from grand and petit jury. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

Danger of Violence to Defendant

Right of defendant and witnesses to freedom from intimidation and violence generally. — Any defendant is entitled to have the venue of the defendant's case laid in a county where the defendant and the defendant's witnesses are free from intimidation and violence, and when the defendant has the right to expect protection on behalf of oneself and the defendant's witnesses from all law enforcement agencies. Yancey v. State, 98 Ga. App. 797, 107 S.E.2d 265 (1959).

What constitutes violence. — Violence referred to in this section meant not only that physical violence threatened by mobs or other lawless elements, but also violence to the defendant's fundamental right to a fair trial. Yancey v. State, 98 Ga. App. 797, 107 S.E.2d 265 (1959).

This section was sufficiently broad to include danger or probability of violence to the defendant's attorney. Ferguson v. State, 104 Ga. App. 215, 121 S.E.2d 338 (1961).

"Probability" defined. — Probability is defined as likelihood or appearance, a resemblance of truth founded upon reason. Johns v. State, 47 Ga. App. 58, 169 S.E. 688 (1933).

Degree of evidence which would be sufficient to establish a danger of violence to the accused is a question of much difficulty, and which must necessarily vary so greatly with the circumstances of each case that it would be impossible to define its limits with exactitude. The danger may be obvious in some cases and latent in others and may be more threatening because the danger is unannounced. Pinkston v. State, 80 Ga. App. 268, 55 S.E.2d 877 (1949).

When the evidence fails to reasonably show the probability or danger of lynching or other violence, it is not error on the part of the judge to refuse to change the venue. Grenoble v. State, 41 Ga. App. 663, 154 S.E. 304 (1930); Goumas v. State, 44 Ga. App. 210, 160 S.E. 682 (1931); Morakis v. State, 72 Ga. App. 790, 35 S.E.2d 155 (1945), aff'd, 201 Ga. 425, 40 S.E.2d 120 (1946).

Duty of trial judge when probability of violence shown. — If the evidence reasonably shows that there is a probability of violence, then it shall be mandatory upon the judge to change the venue. Johns v. State, 47 Ga. App. 58, 169 S.E. 688 (1933); Pinkston v. State, 80 Ga. App. 268, 55 S.E.2d 877 (1949); Ledford v. State, 107 Ga. App. 244, 129 S.E.2d 555 (1963).

Under former Code 1933, § 27-1201 (see O.C.G.A. § 17-7-150), it was the duty of the trial judge, upon the judge's own motion or upon it being shown at a hearing on a motion for change of venue, that there is probability or danger of lynching, or other violence, to grant a change of venue. This provision was mandatory. Griffin v. State, 59 Ga. App. 333, 1 S.E.2d 41 (1939); Crane v. State, 94 Ga. App. 63, 93 S.E.2d 667 (1956), appeal dismissed, 213 Ga. 386, 98 S.E.2d 903 (1957); Ferguson v. State, 104 Ga. App. 215, 121 S.E.2d 338 (1961).

Georgia Laws 1911, p. 74, § 1, which amended Ga. L. 1895, p. 70, § 2, showed that the General Assembly was unwilling to leave change of venue, as it stood before that amendment, to the general determination of the judge as to whether a fair and impartial trial could be obtained. It passed this additional Act which did not merely confer upon the judge a power or discretionary right but placed upon the judge a solemn and mandatory duty. A reading of this amendment will show the imperative nature of the duty placed upon the judge if the evidence reasonably shows that there is a probability or danger of lynching or other violence. The judge's mind does not necessarily have to be free from uncertainty or doubt but if there exists in the judge's mind a probability that personal violence will be done the accused the judge should change the venue. Avery v. State, 83 Ga. App. 700, 64 S.E.2d 589 (1951), aff'd, 209 Ga. 116, 70 S.E.2d 716 (1952).

After all of the evidence is considered, if the mind of a reasonable man is left with the feeling that something untoward is likely to happen in the event of a trial of

Danger of Violence to Defendant (Cont'd)

the defendants in the county where the crime was committed, the judge ought to move the trial by granting the motion. Whitus v. State, 112 Ga. App. 29, 143 S.E.2d 649 (1965).

State and county also have interest in removing threat of armed violence. — When there is doubt as to the threat of future armed violence, the welfare of the state, as well as that of the citizens of the county in which the alleged crime was committed, demands no less than the welfare of the individual defendant that such doubt should be removed. This can only be accomplished by a change of venue by which the state's case is in no way prejudiced and the society of this state as a whole in no way suffers. It is the province and duty of the courts, not only to punish lawlessness, but insofar as possible to guard against lawlessness, and a reasonable doubt as to the safety of the defendant, in the event of acquittal, should be resolved in the defendant's favor for the welfare of society as a whole by laying the venue in a county disassociated from the turbulence and rancor of the disturbances. Pinkston v. State, 80 Ga. App. 268, 55 S.E.2d 877 (1949).

Withdrawal or waiver of change of venue, once obtained, is not permitted. — When the accused has obtained, on the accused's motion, a change of venue from the county where the crime was alleged to have been committed to another county, on the ground that there was a probability or danger of violence to the accused, the accused cannot subsequently withdraw or waive the change of venue and demand a trial in the county of the offense. Geer v. State, 58 Ga. App. 424, 198 S.E. 829 (1938).

Determination of probability of violence is primarily a question for the judge. — While it is mandatory upon the judge to whom a petition for a change of venue is presented to change the venue if the evidence submitted reasonably shows that there is a probability of danger, of lynching or other violence, it is primarily a question for the judge, upon the hearing of such petition, to determine from the evidence whether or not such probability or danger of lynching or other violence exists. Wilburn v. State, 140 Ga. 138, 78 S.E. 819 (1913); Graham v. State, 141 Ga. 812, 82 S.E. 282 (1914); Nix v. State, 22 Ga. App. 136, 95 S.E. 534 (1918); Davis v. State, 23 Ga. App. 223, 98 S.E. 111 (1919); Broxton v. State, 24 Ga. App. 31, 99 S.E. 635 (1919); Ruffin v. State, 28 Ga. App. 40, 110 S.E. 311 (1921); Wilson v. State, 28 Ga. App. 574, 112 S.E. 295, cert. denied, 28 Ga. App. 820 (1922); Grenoble v. State, 41 Ga. App. 663, 154 S.E. 304 (1930); Goumas v. State, 44 Ga. App. 210, 160 S.E. 682 (1931); Griffin v. State, 59 Ga. App. 333, 1 S.E.2d 41 (1939); Morakis v. State, 72 Ga. App. 790, 35 S.E.2d 155 (1945), aff'd, 201 Ga. 425, 40 S.E.2d 120 (1946); Barronton v. State, 80 Ga. App. 44, 55 S.E.2d 252 (1949); Crane v. State, 94 Ga. App. 63, 93 S.E.2d 667 (1956), appeal dismissed, 213 Ga. 386, 98 S.E.2d 903 (1957); McGruder v. State, 96 Ga. App. 874, 102 S.E.2d 54 (1958).

Judge's discretion is coupled with a duty, and the Supreme Court may remedy the abuse of such discretion. Kennedy v. State, 141 Ga. 314, 80 S.E. 1012 (1914).

Appellate Review

Issue on review generally. — In determining whether the trial court erred in denying a change of venue, the reviewing court asks whether it was too clear and certain to admit of dispute that the court erred in refusing to change the venue, or whether it manifestly appears that the lower court erred in the court's judgment under the evidence. Geer v. State, 54 Ga. App. 216, 187 S.E. 601 (1936).

Test on appeal for reversal of trial court's decision. — Decision to grant a motion for a change of venue is largely within the trial court's discretion and the court's decision will be reversed on appeal only for an abuse of discretion. Allen v. State, 235 Ga. 709, 221 S.E.2d 405 (1975).

Decision to grant a change of venue motion lies within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. Welch v. State, 237 Ga. 665, 229 S.E.2d 390 (1976); Watson v. State, 147 Ga. App. 847, 250 S.E.2d 540 (1978); Shinholster v. State, 150 Ga. App. 221, 257 S.E.2d 342

(1979); Cochran v. State, 151 Ga. App. 478, 260 S.E.2d 391 (1979); Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980); Waters v. State, 248 Ga. 355, 283 S.E.2d 238 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

Fair trial issue is in the judge's discretion, and the judge's ruling will not be reversed unless manifestly abused. Miller v. State, 141 Ga. App. 382, 233 S.E.2d 460 (1977).

Test on appeal of a trial judge's order refusing a change of venue is whether the trial judge abused the judge's discretion in denying the change of venue. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Overruling of motion is not appealable absent a certificate of review. — Overruling of the motion for change of venue is an interlocutory order which is not an appealable judgment absent a certificate of review. Butler v. State, 127 Ga. App. 386, 193 S.E.2d 641 (1972).

In the absence of a certificate for immediate review, the denial of a motion for a change of venue under former Code 1933, § 27-1201 (see O.C.G.A. § 17-7-150) standing alone was not an appealable judgment under Ga. L. 1965, p. 18 (see O.C.G.A. T. 5, C. 6, Art. 2). Brooks v. State, 229 Ga. 593, 194 S.E.2d 256 (1972).

Appellant must exhaust peremptory challenges before overruling of motion is reversed on appeal. The general rule is that appellate courts will not reverse the trial court's overruling of a motion for change of venue when the appellant has not exhausted the appellant's peremptory challenges. Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976), cert. denied, 431 U.S. 909, 97 S. Ct. 1707, 52 L. Ed. 2d 394 (1977); Cochran v. State, 151 Ga. App. 478, 260 S.E.2d 391 (1979).

Review of the trial judge's finding should not be merely perfunctory, and simply because any citizen or county official states that the individual has not heard of any intended violence or expresses the opinion that the individual thought there was no danger, the reviewing court should not, as a matter of course, affirm the judgment denying a change of venue. Johns v. State, 47 Ga. App. 58, 169 S.E. 688 (1933).

Reversal requires showing that discretion was abused. — Granting of the change of venue is within the discretion of the court, and the Supreme Court will not control that discretion unless the discretion has been plainly and manifestly abused. Rawlins v. State, 124 Ga. 31, 52 S.E. 1 (1905), aff'd, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906).

If after hearing evidence, the trial court is satisfied that a fair and impartial jury may be had in the county where the crime is alleged to have been committed, the court on appeal will not reverse the court's judgment refusing to change the venue unless it is made to appear that there has been an abuse of discretion. Grenoble v. State, 41 Ga. App. 663, 154 S.E. 304 (1930); Goumas v. State, 44 Ga. App. 210, 160 S.E. 682 (1931).

Before the Court of Appeals is authorized to reverse the judgment of the lower court in a proceeding to change venue, it must appear that such discretion was abused. Hartley v. State, 76 Ga. App. 390, 46 S.E.2d 71 (1948).

Trial court's finding that a defendant can receive a fair trial in the county in which the crime was committed must be upheld if not manifestly erroneous. Cheeks v. State, 203 Ga. App. 47, 416 S.E.2d 336, cert. denied, 203 Ga. App. 905, 416 S.E.2d 336 (1992).

Jurisdiction on review. — Jurisdiction on review of all venue cases not involving capital convictions has been vested in the Court of Appeals and not the Supreme Court, provided no constitutional question was raised in the lower court. Humphrey v. State, 175 Ga. 666, 165 S.E. 587 (1932).

Finality of finding and judgment when evidence conflicts. — When the evidence is conflicting upon the issue as to whether or not upon the petition such a case for a change of venue is made as requires the judge to grant the motion, the judge hearing the motion passes upon the issues that are to be determined upon evidence, and the judge's finding and judgment is final and controlling, unless manifestly erroneous. Butler v. State, 56 Ga. App. 126, 192 S.E. 238 (1937).

Reversal of denial of motion when evidence conflicts. — If the evidence

Appellate Review (Cont'd)

upon the issue of violence conflicts, the judgment denying the defendant's motion to change the venue will not be reversed, unless manifestly erroneous. Grenoble v. State, 41 Ga. App. 663, 154 S.E. 304 (1930); Goumas v. State, 44 Ga. App. 210, 160 S.E. 682 (1931) Griffin v. State, 59 Ga. App. 333, 1 S.E.2d 41 (1939); Morakis v. State, 72 Ga. App. 790, 35 S.E.2d 155 (1945), aff'd, 201 Ga. 425, 40 S.E.2d 120 (1946); Barronton v. State, 80 Ga. App. 44, 55 S.E.2d 252 (1949); Crane v. State, 94 Ga. App. 63, 93 S.E.2d 667 (1956), appeal dismissed, 213 Ga. 386, 98 S.E.2d 903 (1957); McGruder v. State, 96 Ga. App. 874, 102 S.E.2d 54 (1958); Ledford v. State, 107 Ga. App. 244, 129 S.E.2d 555 (1963).

Venue change based on opinion evidence. — When the evidence upon the issue of violence is based upon opinion evidence without specific facts or acts upon which to base a judgment changing venue, a judgment denying the defendant's motion for such change will not be reversed. Crane v. State, 94 Ga. App. 63, 93 S.E.2d 667 (1956), appeal dismissed, 213 Ga. 386, 98 S.E.2d 903 (1957); McGruder v. State, 96 Ga. App. 874, 102 S.E.2d 54 (1958).

Denial of motion for change of venue not abuse of discretion. — Because only 12 potential jurors were dismissed on account of their inability to be impartial based on their prior knowledge of the case, the excusal rate was only 23%, which was not indicative of such prejudice that the trial court's denial of the defendant's motion for a change of venue was an abuse of discretion. Moss v. State, 305 Ga. 878, 828 S.E.2d 309 (2019).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 504 et seq., 521, 527, 532, 537.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ALR. — Propriety or effect of denial of application for change of venue in criminal prosecution predicated upon local prejudice as affected by the fact that trial jury was obtained from another county or district, 136 A.L.R. 1405.

Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstituted, 85 A.L.R.2d 993.

Pretrial publicity in criminal case as ground for change of venue, 33 A.L.R.3d 17.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like, 34 A.L.R.3d 804.

Change of venue by state in criminal case, 46 A.L.R.3d 295.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

17-7-151. Transfer upon change of venue of evidence, list of witnesses, and papers; issuance of subpoenas to witnesses and others by clerk of court selected to try case.

Whenever a change of venue is made, the clerk of the court from which the case has been transferred shall send to the court to which the case has been transferred a transcript of the order for the change of venue, the evidence before the court of inquiry, a list of all the witnesses subpoenaed in the case, and all other papers connected with the case. The clerk of the court selected to try the case shall issue subpoenas to the witnesses and such others as may be applied for by either party.

History. — Ga. L. 1895, p. 70, § 4; Penal Code 1895, § 940; Penal Code 1910, § 965; Code 1933, § 27-1202; Code 1933, § 27-1203, enacted by Ga. L. 1972, p. 536, § 1.

Cross references. — Transfer of prisoner upon change of venue, § 42-4-11.

U.S. Code. — Transfer of trials, Federal Rules of Criminal Procedure, Rule 21(c).

JUDICIAL DECISIONS

Sending of copies of order to court acquiring venue. — Certified copy of the order granting the change of venue may be sent to the county acquiring venue, but other papers transmitted must be the originals. Graham v. State, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 535 et seq.

17-7-152. Subsequent changes of venue.

If, on motion, the judge presiding in the court to which a case has been transferred is satisfied that a fair and impartial jury cannot be obtained therein, he shall, in the manner prescribed in subsection (a) of Code Section 17-7-150, transfer the case to some other county where a fair and impartial jury can be obtained.

History. — Ga. L. 1895, p. 70, § 5; Penal Code 1895, § 941; Penal Code 1910, § 966; Code 1933, § 27-1203; Code 1933, § 27-1204, enacted by Ga. L. 1972, p. 536, § 1.

U.S. Code. — Transfer of trials because of prejudice against defendant, and annotations pertaining thereto, Federal Rules of Criminal Procedure, Rule 21(a).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 504 et seq., 527 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ARTICLE 7

DEMAND FOR TRIAL; ANNOUNCEMENT OF READINESS FOR TRIAL

Law reviews. — For comment, "The Right to a Speedy Trial," see 13 Ga. St. B.J. 197 (1977).

JUDICIAL DECISIONS

Mistrial does not satisfy speedy trial requirements. — Mistrial based on the jury's inability to reach a verdict does not satisfy the speedy trial requirements, at least when the defendant could have been retried before the expiration of the term. Orvis v. State, 237 Ga. 6, 226 S.E.2d 570 (1976).

Request for final disposition of detainers is not demand for trial. — Request for final disposition of detainers on a prisoner's record (see O.C.G.A. § 42-6-1 et seq.) is not the equivalent of a demand for trial and the failure to try the inmate at the term at which such request is made or at the next succeeding term does not authorize the inmate's discharge and acquittal of the offense charged in the pending indictment, accusation, or information. Spurlin v. State, 228 Ga. 2, 183 S.E.2d 765 (1971).

Cited in Horne v. State, 212 Ga. 421, 93 S.E.2d 356 (1956).

17-7-170. Demand for speedy trial; service; discharge and acquittal for lack of prosecution; expiration; reversal on direct appeal; mistrial and retrial; special pleas of incompetency.

(a) Any defendant against whom a true bill of indictment or an accusation is filed with the clerk for an offense not affecting the defendant's life may enter a demand for speedy trial at the court term at which the indictment or accusation is filed or at the next succeeding regular court term thereafter; or, by special permission of the court, the defendant may at any subsequent court term thereafter demand a speedy trial. In either case, the demand for speedy trial shall be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned or, if the case is not assigned, upon the chief judge of the court in which the case is pending. A demand for speedy trial filed pursuant to this Code section shall be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. Such demand shall clearly be titled "Demand for Speedy Trial"; reference this Code section within the pleading; and identify the indictment number or accusation number for which such demand is being made. The demand for speedy trial shall be binding only in the court in which the demand for speedy trial is filed, except where the case is transferred from one court to another without a request from the defendant.

(b) If the defendant is not tried when the demand for speedy trial is made or at the next succeeding regular court term thereafter, provided that at both court terms there were juries impaneled and qualified to try the defendant, the defendant shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation. For purposes of computing the term at which a misdemeanor must be tried under this Code section, there shall be excluded any civil term of court in a county in which civil and criminal terms of court are designated; and for purposes of this Code section it shall be as if such civil term was not held.

(c) Any demand for speedy trial filed pursuant to this Code section shall expire at the conclusion of the trial or upon the defendant entering a plea of guilty or nolo contendere.

(d) If a case in which a demand for speedy trial has been filed, as provided in this Code section, is reversed on direct appeal, a new demand for speedy trial shall be filed within the term of court in which the remittitur from the appellate court is received by the clerk of court or at the next succeeding regular court term thereafter.

(e) If the case in which a demand for speedy trial has been filed as provided in this Code section results in a mistrial, the case shall be tried at the next succeeding regular term of court.

(f) If a defendant files a special plea of incompetency to stand trial pursuant to Code Section 17-7-130 or if the court, pursuant to Code Section 17-7-129, conducts a trial on the competency of the defendant, the period of time during which such matter is pending shall not be included in the computation of determining whether a demand for speedy trial has been satisfied.

History. — Ga. L. 1859, p. 60, § 1; Code 1863, § 4534; Code 1868, § 4554; Code 1873, § 4648; Code 1882, § 4648; Penal Code 1895, § 958; Penal Code 1910, § 983; Code 1933, § 27-1901; Ga. L. 1985, p. 637, § 5; Ga. L. 1987, p. 841, § 1; Ga. L. 2003, p. 154, § 3; Ga. L. 2006, p. 893, § 1/HB 1421; Ga. L. 2011, p. 372, § 3/HB 421.

Cross references. — Requests by inmates for final disposition of indictments or accusations pending against them, § 42-6-3. Filing and processing, caption, Uniform Superior Court Rules, Rule 36.3.

Law reviews. — For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005); 58 Mercer L. Rev. 83 (2006).

JUDICIAL DECISIONS

Analysis

General Consideration
Timing
Procedure
Role of Clerk
Qualified Jury
Demand
Waiver
Impact of Motions for Mistrials
Discharge and Acquittal
Application
Appeals

General Consideration

This section was known as the demand statute. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

This section was imperative and admits of no exceptions. Consequently, trial or acquittal are the only alternatives. Hunley v. State, 105 Ga. 636, 31 S.E. 543 (1898); Harris v. State, 84 Ga. App. 1, 65 S.E.2d 267 (1951).

This section conferred a right upon the defendant, in aid of the constitutional guarantee of speedy trial, which does not admit of an implied exception in the case of a mistrial which is the result of an inevitable accident. Rider v. State, 103 Ga. App. 184, 118 S.E.2d 749 (1961).

General Consideration (Cont'd)

This section was jurisdictional. E.S. v. State, 134 Ga. App. 724, 215 S.E.2d 732 (1975).

Strict construction of section necessary. — Because the penalty imposed by O.C.G.A. § 17-7-170 against the state is so great, the statute must be strictly construed. Day v. State, 187 Ga. App. 175, 369 S.E.2d 796 (1988).

Protection conferred. — Defendant's demand for a speedy trial was premature when it was filed before the solicitor (now district attorney) filed the accusation and citations, because the protection conferred by O.C.G.A. § 17-7-170 attaches with the formal indictment or accusation and the clock starts running on the time for the accused to make a speedy trial demand on the date an accusation or indictment is filed with the clerk of court. State v. Bloodsworth, 241 Ga. App. 840, 528 S.E.2d 285 (2000).

Attachment upon arrest. — Unlike the statutory protections conferred by O.C.G.A. § 17-7-170 that attach with a formal indictment or accusation, a defendant's constitutional speedy trial right attaches upon arrest and can be asserted thereafter; likewise, the procedural bar created by the specific time deadlines found in the speedy trial statute do not apply to constitutional claims. Nusser v. State, 275 Ga. App. 896, 622 S.E.2d 105 (2005).

Purpose is to implement constitutional speedy trial provisions. — This section was framed to carry into effect that provision of the Constitution which declares that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Stripland v. State, 115 Ga. 578, 41 S.E. 987 (1902); Bishop v. State, 11 Ga. App. 296, 75 S.E. 165 (1912).

Purpose of this section was to make effective the provision of the Constitution providing that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. Dickerson v. State, 108 Ga. App. 548, 134 S.E.2d 51 (1963).

O.C.G.A. § 17-7-170 was enacted to implement the constitutional provision for a speedy trial. Hubbard v. State, 254 Ga. 694, 333 S.E.2d 827 (1985).

O.C.G.A. § 17-7-170 applies to outright dereliction by the state in failing to provide a speedy trial if one could have been had; the statute does not operate to force the state to impanel a jury for one defendant who makes a late demand. West v. State, 193 Ga. App. 117, 387 S.E.2d 44 (1989).

Section is in aid and implementation of state constitutional right. — Since the right of a speedy trial became a guarantee under the state constitution, this section was to be regarded as an aid and implementation of the state constitutional right and to secure to a defendant in a criminal case the defendant's right thereunder. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

No distinction between constitutional and statutory right. — There is no distinction between the constitutional right to a speedy trial under the U.S. Const., amend. 6 and the statutory right to a speedy trial under O.C.G.A. § 17-7-170 as the statutory provision is obviously analogous in its purpose to the constitutional right to a speedy trial; as the concept of double jeopardy is closely implicated in both provisions, a defendant may directly appeal from the pretrial denial of either a constitutional or statutory speedy trial claim. Callaway v. State, 258 Ga. App. 118, 572 S.E.2d 751 (2002).

Constitutional right is broader than statutory right. — Unlike the statutory protections conferred by O.C.G.A. §§ 17-7-170 and 17-7-171 that attach with formal indictment or accusation, the Sixth Amendment provides constitutional protection over and above the statutory provisions and under that amendment, the right to a speedy trial attaches upon arrest and can be asserted thereafter; a trial court properly denied the defendant's statutory speedy trial demand when no indictment was filed, but improperly overlooked or failed to consider defendant's constitutional speedy trial demand and, thus, the trial court's judgment was vacated and the case was remanded with direction to the trial court to address the defendant's constitutional claims. Smith v. State, 266 Ga. App. 529, 597 S.E.2d 414 (2004).

Statute affords guidelines as to state, but not federal, right to speedy trial. — This section was not regarded as affording guidelines in relation to the federal constitutional provisions guaranteeing the right to a speedy trial, being limited to and in a proper case applicable only to the state right. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Section originally enacted to implement common-law right to speedy trial. — This section as originally enacted was doubtless in aid of and to implement the common-law right to a speedy trial existing in Georgia at least prior to 1861. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Right to speedy trial may be implemented by a demand for trial. — Defendant's rights under U.S. Const., amend. 6 to a speedy trial may be implemented by a written demand for trial. Underhill v. State, 129 Ga. App. 65, 198 S.E.2d 703 (1973).

Demand simply a factor in determining violation of right to speedy trial. — United States Const., amend. 6 is an independent guarantee of the right to a speedy trial, and the defendant's assertion or failure to assert the defendant's statutory right is simply one of the factors to be considered in determining whether the right under U.S. Const., amend. 6 has been impinged. Sanders v. State, 132 Ga. App. 580, 208 S.E.2d 597 (1974).

Demand not required when constitutional issue. — Although the defendant did not file a statutory demand for speedy trial pursuant to O.C.G.A. § 17-7-170, the defendant was not required to do so in order to prevail on a constitutional speedy trial claim. Miller v. State, 313 Ga. App. 552, 722 S.E.2d 152 (2012).

Duty of courts to uphold right to speedy trial. — Since the purpose of this section was to secure to defendants the rights to a speedy and public trial, the courts should seek to uphold rather than whittle away by judicial construction this and other provisions of the Bill of Rights, which secure the guarantees of freedom upon which this country is founded. Rider v. State, 103 Ga. App. 184, 118 S.E.2d 749 (1961).

Duty to bring the defendant to trial following arrest and accusation rests upon the court, the prosecutor, and the clerk of court, not the defendant. Klinetob v. State, 194 Ga. App. 52, 389 S.E.2d 551 (1989).

Defendant's duty to demand trial to alleviate pretrial stress. — Although it is true that an accused who suffers emotional stress while awaiting the disposition of the charges against the defendant is inherently prejudiced, the defendant has some obligation to attempt to alleviate this stress by requesting a speedy trial or filing a statutory demand for trial pursuant to this section. Cravey v. State, 147 Ga. App. 29, 248 S.E.2d 13 (1978).

O.C.G.A. § 17-7-170 did not require that defendant answer readily when the defendant's case was called for trial. Riley v. State, 212 Ga. App. 519, 442 S.E.2d 7 (1994).

This section applied to the offense only for which the demand for trial was made; not an offense nominally the same but substantially different. Brown v. State, 85 Ga. 713, 11 S.E. 831 (1890).

Filing of accusation brings right to demand trial. — This section applied to any person against whom a true bill of indictment is found and also to cases in which an accusation has been filed. Fisher v. State, 143 Ga. App. 493, 238 S.E.2d 584 (1977).

Right to make a demand for trial applies equally when a defendant is charged by accusation, rather than a bill of indictment. Frank v. State, 145 Ga. App. 678, 244 S.E.2d 619 (1978).

Rights to demand trial and to have demand entered on minutes. — It is the right of the defendant to demand a trial at the term of the court in which the indictment is returned and to have that demand entered on the minutes of the court. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

Counsel's notice of conflicts. — Since the filing of a notice of conflicts is mandatory under Uniform Superior Court Rules, Rule 17.1, it cannot be evidence that the defendant consented to have the defendant's case tried at a later term. Fisher v. State, 273 Ga. 721, 545 S.E.2d 895 (2001).

After filing a notice of conflicts under

General Consideration (Cont'd)

Uniform Superior Court Rules, Rule 17.1, defense counsel's actions in failing to notify the affected trial courts once a higher priority matter concluded waived the defendant's speedy trial demand. Fisher v. State, 273 Ga. 721, 545 S.E.2d 895 (2001).

Failure of counsel to move for dismissal. — Defendant's appellate counsel was ineffective in not raising trial counsel's failure to move for dismissal pursuant to a statutory speedy trial demand. Sloan v. Sanders, 271 Ga. 299, 519 S.E.2d 219 (1999).

Exercise of discretion under this section lied with the trial judge rather than the appellate courts. Newman v. State, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

Effect of statutory amendment changing terms of court. — Amendment of a statutory provision, so as to change the dates of commencement of terms of court, was not an ex post facto law as applied to the defendant, who was not at any time entitled to discharge and acquittal of the offenses with which the defendant was charged. Aspinwall v. State, 201 Ga. App. 203, 410 S.E.2d 388 (1991).

Due to an error in the enactment, an amendment changing the terms of court from four to two had not gone into effect at the time the defendant moved for acquittal; thus, the defendant was entitled to acquittal for failure to try the defendant within the term when the defendant's speedy trial demand was made. Houston v. State, 217 Ga. App. 783, 459 S.E.2d 583 (1995).

State's failure to obtain evidence no excuse. — Even if the accused was guilty, the failure of the state to obtain evidence furnished no justification for disregarding this section. Bishop v. State, 11 Ga. App. 296, 75 S.E. 165 (1912).

Extended or special session of a regular term of court constitutes a regular term, not a special term, for purposes of O.C.G.A. § 17-7-170. Barkley v. State, 179 Ga. App. 795, 348 S.E.2d 122 (1986).

Defendant absent due to extradition. — Defendant who is unable to satisfy the second proviso of O.C.G.A. § 17-7-170 because of involuntary extradition to another state is not without a speedy trial remedy since the defendant can invoke the provisions of O.C.G.A. § 42-6-20 et seq. Bashlor v. State, 165 Ga. App. 329, 299 S.E.2d 418 (1983).

If defendant was incarcerated in another state on the date the demand for speedy trial was filed, and the defendant failed to show that juries were impaneled and qualified in the county from the time the defendant was extradited and returned until the end of the term, the defendant's motion for discharge and acquittal was premature. Cooper v. State, 224 Ga. App. 621, 481 S.E.2d 607 (1997).

Defendant must have been "available" for trial before the defendant's speedy trial demand ran; because the defendant had been incarcerated in Texas and Louisiana since the defendant's indictment, the defendant was not available to the trial court, the defendant's speedy trial demand did not run, and the trial court correctly denied the defendant's motion for discharge and acquittal. Baldwin v. State, 270 Ga. App. 201, 605 S.E.2d 889 (2004).

Trial court properly denied the defendant's plea in bar based on speedy-trial grounds because the defendant's incarceration in Michigan extended the time for the defendant's speedy trial demand as the defendant was not available for trial because the defendant was in the custody of a different sovereign and the Interstate Agreement on Detainers Act, O.C.G.A. § 42-6-20 et seq., did not apply; there was no inherent authority in a Georgia court to compel the defendant's presence or in-court attendance since the defendant was incarcerated by or in the control of a different sovereign, specifically Michigan; and nothing in the record reflected the defendant's desire to waive the defendant's right to be present at trial. Gosline v. State, 341 Ga. App. 708, 802 S.E.2d 275 (2017).

Extradition to another jurisdiction does not waive presence requirement. — Although the defendant moved for discharge and acquittal for delay in trial under O.C.G.A. § 17-7-170 and sought to circumvent defendant's absence from the jurisdiction by arguing the state

voluntarily released the defendant to the United States court, the presence requirement was not waived by the state's action. Luke v. State, 180 Ga. App. 378, 349 S.E.2d 391 (1986), overruled as to presence requirement, State v. Collins, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

Defendant's incarceration in federal custody at the time the defendant filed a demand for trial and time during which jurors were impaneled extended time in which the state had to try the defendant. McIver v. State, 205 Ga. App. 648, 423 S.E.2d 27, cert. denied, 205 Ga. App. 900, 423 S.E.2d 27 (1992).

Strict compliance required. — Dismissal of a criminal case pursuant to O.C.G.A. § 17-7-170 is an extreme sanction which can be invoked only if there has been strict compliance with the statute. Head v. State, 189 Ga. App. 111, 375 S.E.2d 46 (1988); Hanson v. State, 196 Ga. App. 589, 396 S.E.2d 510 (1990); Merrill v. State, 201 Ga. App. 247, 411 S.E.2d 283, cert. denied, 201 Ga. App. 904, 411 S.E.2d 283 (1991).

Construction with Ga. Unif. Sup. Ct. R. 32.1. — Because the trial court's calendar did not allow for the defendant's trial to be continued within the current term of court and hence a demand for a speedy trial could not be met and in light of the fact that the court gave the parties an opportunity to dispose of the case by way of a plea agreement, the court's noncompliance with Ga. Unif. Super. Ct. R. 32.1, denial of a motion to continue, and dismissal of the case for want of prosecution were not an abuse of discretion. State v. Hitchcock, 285 Ga. App. 140, 645 S.E.2d 631 (2007).

Trial court did not wholly fail to comply with the seven-day notice requirement of Ga. Unif. Super. Ct. R. 32.1 because the trial court gave at least five days notice, and it was apparent by the defendant's demand for trial that the defendant had shortened the time for trial, which constituted a factor for the trial court to consider when setting the trial date; the trial court was attempting to comply with the demand for trial, and the only way to do so was by deviating from the notice requirement. Higuera-Hernandez v. State, 289 Ga. 553, 714 S.E.2d 236 (2011).

Defendant's burden to establish that there were qualified jurors impaneled. — Term of court, during which the defendant filed a demand for a speedy trial during the final week, would count for purposes of O.C.G.A. § 17-7-170(b) only if jurors were impaneled and qualified at the time of the defendant's demand, or thereafter in the term, and it was defendant's burden to establish that there were qualified jurors impaneled during the relevant court terms so as to trigger that section. Union v. State, 273 Ga. 666, 543 S.E.2d 683 (2001).

Because the defendant failed to show that jurors were impaneled and qualified to try the defendant's case during the relevant time period after the defendant filed the speedy trial demand, the trial court did not err in denying the defendant's motion for discharge and acquittal. Cown v. State, 259 Ga. App. 8, 576 S.E.2d 20 (2002).

Cited in Dacey v. State, 15 Ga. 286 (1854); Stripland v. State, 115 Ga. 578, 41 S.E. 987 (1902); Campbell v. State, 6 Ga. App. 539, 65 S.E. 307 (1909); Sneed v. State, 72 Ga. App. 102, 33 S.E.2d 29 (1945); Horne v. State, 94 Ga. App. 522, 95 S.E.2d 288 (1956); Connelly v. Balkcom, 213 Ga. 491, 99 S.E.2d 817 (1957); Butler v. State, 126 Ga. App. 22, 189 S.E.2d 870 (1972); Adams v. State, 129 Ga. App. 839, 201 S.E.2d 649 (1973); McRoy v. State, 131 Ga. App. 307, 205 S.E.2d 445 (1974); Wood v. State, 234 Ga. 758, 218 S.E.2d 47 (1975); State v. Clendinin, 136 Ga. App. 303, 221 S.E.2d 71 (1975); Cross v. State, 136 Ga. App. 400, 221 S.E.2d 615 (1975); State v. Weeks, 136 Ga. App. 637, 222 S.E.2d 117 (1975); State v. King, 137 Ga. App. 26, 222 S.E.2d 859 (1975); State v. Fields, 137 Ga. App. 726, 224 S.E.2d 829 (1976); Hightower v. State, 137 Ga. App. 790, 224 S.E.2d 842 (1976); State v. Rowe, 138 Ga. App. 904, 228 S.E.2d 3 (1976); Williams v. State, 140 Ga. App. 505, 231 S.E.2d 366 (1976); Gay v. State, 140 Ga. App. 516, 231 S.E.2d 509 (1976); Gibson v. Giles, 242 Ga. 720, 251 S.E.2d 231 (1978); Garrett v. Arrington, 245 Ga. 47, 262 S.E.2d 808 (1980); State v. Benton, 154 Ga. App. 141, 267 S.E.2d 775 (1980); Collins v. State, 154 Ga. App. 651, 269 S.E.2d 509 (1980); Pate v. State, 158 Ga. App.

General Consideration (Cont'd)

395, 280 S.E.2d 414 (1981); State v. Adamczyk, 162 Ga. App. 288, 290 S.E.2d 149 (1982); State v. Edwards, 162 Ga. App. 291, 290 S.E.2d 362 (1982); Reed v. State, 249 Ga. 344, 290 S.E.2d 469 (1982); Forbus v. State, 162 Ga. App. 307, 290 S.E.2d 559 (1982); State v. Floyd, 162 Ga. App. 291, 291 S.E.2d 264 (1982); Wallace v. State, 162 Ga. App. 367, 291 S.E.2d 437 (1982); Day v. State, 163 Ga. App. 839, 296 S.E.2d 145 (1982); Waller v. State, 251 Ga. 124, 303 S.E.2d 437 (1983); Mullins v. State, 167 Ga. App. 670, 307 S.E.2d 61 (1983); Dickerson v. State, 172 Ga. App. 267, 322 S.E.2d 502 (1984); Malpass v. State, 173 Ga. App. 690, 327 S.E.2d 753 (1985); Lawrence v. State, 174 Ga. App. 518, 330 S.E.2d 445 (1985); State v. Mintz, 179 Ga. App. 451, 346 S.E.2d 591 (1986); Dean v. State, 180 Ga. App. 770, 350 S.E.2d 489 (1986); State v. Spence, 179 Ga. App. 750, 347 S.E.2d 612 (1986); Stephens v. State, 185 Ga. App. 546, 365 S.E.2d 136 (1988); Brooks v. State, 187 Ga. App. 92, 369 S.E.2d 349 (1988); Claypool v. State, 188 Ga. App. 642, 373 S.E.2d 765 (1988); In re M.O.B., 190 Ga. App. 474, 378 S.E.2d 898 (1989); State v. Stewart, 191 Ga. App. 35, 381 S.E.2d 50 (1989); Stirling v. State, 192 Ga. App. 39, 383 S.E.2d 595 (1989); Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577 (1990); Proveaux v. State, 198 Ga. App. 119, 401 S.E.2d 12 (1990); Quick v. State, 198 Ga. App. 353, 401 S.E.2d 758 (1991); Redd v. State, 261 Ga. 300, 404 S.E.2d 264 (1991); Howard v. State, 200 Ga. App. 188, 407 S.E.2d 769 (1991); Hall v. State, 201 Ga. App. 133, 410 S.E.2d 448 (1991); Wells v. State, 201 Ga. App. 398, 411 S.E.2d 125 (1991); Butler v. State, 207 Ga. App. 824, 429 S.E.2d 280 (1993); State v. Smith, 209 Ga. App. 404, 433 S.E.2d 599 (1993); McIver v. State, 212 Ga. App. 670, 442 S.E.2d 855 (1994); Obiozor v. State, 213 Ga. App. 523, 445 S.E.2d 553 (1994); Pope v. State, 214 Ga. App. 458, 448 S.E.2d 54 (1994); Walker v. State, 216 Ga. App. 236, 454 S.E.2d 156 (1995); State v. Ganong, 221 Ga. App. 250, 470 S.E.2d 794 (1996); Jackson v. State, 222 Ga. App. 700, 475 S.E.2d 717 (1996); Ganong v. State, 223 Ga. App. 163, 477 S.E.2d 324 (1996); Ingram v. State, 224 Ga. App. 271, 480 S.E.2d 302 (1997); Cross v. State, 272 Ga. 282, 528 S.E.2d 241 (2000); Copeland v. State, 248 Ga. App. 346, 546 S.E.2d 351 (2001); Williams v. State, 248 Ga. App. 353, 545 S.E.2d 621 (2001); Patten v. State, 250 Ga. App. 498, 552 S.E.2d 110 (2001); Brooks v. State, 257 Ga. App. 515, 571 S.E.2d 504 (2002); Mayfield v. State, 264 Ga. App. 551, 593 S.E.2d 851 (2003); Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003); Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16 (2004); Brown v. State, 275 Ga. App. 281, 620 S.E.2d 394 (2005); Burdett v. State, 285 Ga. App. 571, 646 S.E.2d 748 (2007); Ruffin v. State, 284 Ga. 52, 663 S.E.2d 189 (2008); Grizzard v. State, 301 Ga. App. 613, 688 S.E.2d 402 (2009); Teasley v. State, 307 Ga. App. 153, 704 S.E.2d 248 (2010); Weems v. State, 310 Ga. App. 590, 714 S.E.2d 119 (2011); Walker v. State, 290 Ga. 696, 723 S.E.2d 894 (2012); Neal v. Hibbard, 296 Ga. 882, 770 S.E.2d 600 (2015); State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015); In the Interest of M.D.H., 300 Ga. 46, 793 S.E.2d 49 (2016).

Timing

Time for filing accusation. — Solicitor's (now district attorney) delay of approximately six weeks in filing the accusation was not unreasonable. State v. Frazier, 201 Ga. App. 6, 410 S.E.2d 134 (1991).

When defendant may demand trial. — Defendant cannot demand trial until there is a case in the court which has jurisdiction to try that defendant. Flint v. State, 12 Ga. App. 169, 76 S.E. 1032 (1913).

When the defendant did not file a demand for trial as a matter of right during either the court term at which the accusation was filed or the next regular court term, and did not seek special permission from the court to file at the subsequent term, the defendant's motion was not properly filed. Clark v. State, 236 Ga. App. 130, 510 S.E.2d 616 (1998), aff'd, 271 Ga. 519, 520 S.E.2d 694 (1999).

Trial court did not err in denying the defendant's motion for discharge and acquittal after the defendant filed a demand for a speedy trial of the defendant's three

traffic offenses in the recorder's court, an assistant solicitor filed charges based on the same three offenses in the state court, the charges in the recorder's court were dismissed, and the defendant filed a motion for discharge and acquittal in the state court; since the recorder's court did not impanel juries nor have regular terms, the speedy trial demand filed in that court was not a filing of a speedy trial demand filed in the state court and because the defendant did not file a demand for a speedy trial in the state court, the trial court was not obligated to dismiss the defendant's case on that basis. Oliver v. State, 262 Ga. App. 637, 586 S.E.2d 333 (2003).

Time of demand. — In order to trigger this section, the defendant must make the defendant's demand at a time that a traverse jury is impaneled and qualified to try the defendant. Although the order entering the demand recites that the demand truly states that such was the case, the order is not conclusive. State v. McDonald, 242 Ga. 487, 249 S.E.2d 212 (1978).

Defendant's motion for acquittal and discharge based on the defendant's demand for a speedy trial was properly denied as the defendant failed to prove that jurors were impaneled at the time the defendant filed the defendant's demand on December 15, 2016, because the evidence showed that, although jurors were impaneled at the beginning of the day on December 15, 2016, the jurors were excused at some point during the morning or afternoon as the cases for which the jurors had been summoned were resolved by plea; and the defendant did not show at what time the defendant filed the defendant's demand on December 15, 2016, and whether the jurors had not yet been discharged at the time that the defendant filed the defendant's demand that day. Zarouk v. State, 344 Ga. App. 261, 810 S.E.2d 156 (2018).

Time for filing a speedy trial demand did not depend on whether jurors were impaneled; when the defendant's speedy trial demand was not filed within the same term that the accusation was filed or the next succeeding term, it was untimely filed, regardless of the fact that there were no jurors impaneled for the remainder of the term during which the accusation was filed, and the trial court's denial for discharge and acquittal was proper. Nesmith v. State, 267 Ga. App. 530, 600 S.E.2d 644 (2004).

Motion based on first demand for speedy trial. — In prosecution charging the defendant with two counts of obstruction of an officer, the trial court properly denied the defendant's motion for discharge and acquittal pursuant to O.C.G.A. § 17-7-170 because the motion was based on the defendant's first demand for a speedy trial, which the defendant made before the indictment was returned. Collins v. State, 259 Ga. App. 587, 578 S.E.2d 201 (2003).

Since the defendant did not file a speedy trial demand until three terms following the term in which the defendant was indicted, the demand was untimely pursuant to O.C.G.A. § 17-7-170(a); the trial court would have had authority to dismiss the defendant's speedy trial demand even in the absence of a motion by the state since the demand was untimely. Branton v. State, 279 Ga. App. 300, 630 S.E.2d 787 (2006).

Timing of demand for speedy trial. — Demand for speedy trial pursuant to the provisions of O.C.G.A. § 17-7-170 may not be made until an indictment has been returned or an accusation preferred. Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Wilson v. State, 186 Ga. App. 190, 366 S.E.2d 826 (1988); Little v. State, 188 Ga. App. 410, 373 S.E.2d 260 (1988).

When the defendant was arrested on a warrant and filed a pro se demand for a speedy trial from the issuance of the warrant rather than from an indictment or accusation, it was held that only a person who has been indicted or otherwise formally charged with a crime can invoke the rights afforded by O.C.G.A. § 17-7-170, and although the defendant was not without a means to produce a speedy trial, the defendant simply utilized the wrong method by prematurely invoking the provisions of that section rather than the constitutional protections which were available to the defendant. Subsequent filing of the indictment did not breathe life

Timing (Cont'd)

into the premature demand. State v. Hicks, 183 Ga. App. 715, 359 S.E.2d 712, cert. denied, 183 Ga. App. 907, 359 S.E.2d 712 (1987).

Demand for speedy trial filed the day before an indictment was returned was a nullity, and service of this prematurely filed demand, even after the indictment, was still only notice of a void demand. Thus, the trial court did not err by denying the motion. Grier v. State, 198 Ga. App. 840, 403 S.E.2d 857 (1991).

If an indictment is required in order to prosecute the offense, an accusation alone is insufficient, and a demand for speedy trial filed before an indictment is premature. Groom v. State, 212 Ga. App. 133, 441 S.E.2d 259 (1994).

O.C.G.A. § 17-7-170 did not apply when the defendant unilaterally filed a "waiver of indictment" and "consent to be tried upon accusation" and concurrently filed a demand for trial prior to presentment of the defendant's case to the grand jury. That section is available only to those against whom a true bill of indictment or an accusation is filed, not those who otherwise consent to jurisdiction. Smith v. State, 218 Ga. App. 392, 461 S.E.2d 561 (1995).

Defendant's right to demand a speedy trial was implicated when a uniform traffic citation was filed with the state court clerk's office on March 4 and, therefore, the defendant's speedy trial demand, filed on March 19, was timely. Hayek v. State, 269 Ga. 728, 506 S.E.2d 372 (1998).

Absent a waiver of indictment, the defendant's speedy trial demand filed prior to the defendant's indictment for a felony offense was premature. Ellsworth v. State, 232 Ga. App. 164, 500 S.E.2d 642 (1998).

Because all jurors were dismissed and not subject to recall at the time the defendant filed a motion at 4:00 p.m. on the last business day of the "present" term, the motion did not trigger the two-term period until the next succeeding term. Redstrom v. State, 239 Ga. App. 769, 521 S.E.2d 904 (1999).

Defendant's demand was not filed during the current or succeeding terms and the defendant did not receive special permission from the court to file untimely; thus, the trial court did not err in denying the defendant's motion for discharge and acquittal. Price v. State, 245 Ga. App. 128, 535 S.E.2d 766 (2000).

Trial court properly denied the defendant's motion to dismiss the indictment because the defendant never filed an effective statutory demand for a speedy trial and, as to the defendant's constitutional right to a speedy trial, the 68-month delay was presumed prejudicial, but the defendant prolonged the proceedings due to the defendant's own issues with retaining counsel, including the defendant's original counsel obtaining various leaves of absences due to illness and the defendant's unsuccessful efforts to retain other private counsel. Henderson v. State, 290 Ga. App. 427, 662 S.E.2d 652 (2008).

Premature demand. — Finding that the defendant's demand for a speedy trial was premature was proper because no uniform traffic citation, indictment, or other accusation had been filed by the state, and the defendant could not "file" the case personally by submitting citations and a speedy trial demand to the court clerk. Shire v. State, 225 Ga. App. 306, 483 S.E.2d 694 (1997).

Demand for speedy trial filed before the indictment is returned is a nullity. Daniels v. State, 235 Ga. App. 296, 509 S.E.2d 368 (1998).

Speedy trial demand that was filed prior to the solicitor's (district attorney's) consent to the filing of uniform traffic citations was premature, and the demand was not resuscitated when the formal accusation was filed. Meservey v. State, 230 Ga. App. 382, 496 S.E.2d 518 (1998).

Defendant's pro se demand for a speedy trial filed upon the defendant's arrest and prior to presentment of the accusation charging the defendant with criminal trespass was not filed timely. Carter v. State, 231 Ga. App. 42, 497 S.E.2d 812 (1998), but see Malloy v. State, 293 Ga. 350 (2013).

Because accusations and uniform traffic citations had not been filed at the time the defendant filed a demand, it was premature and the trial court properly denied the defendant's motion for discharge and acquittal and, even though the case was

assigned a case number and an arraignment date, it was not "filed" within the meaning of O.C.G.A. § 17-7-170. Lagyak v. State, 245 Ga. App. 546, 538 S.E.2d 467 (2000).

Although the defendant filed a speedy trial demand prematurely, nonetheless the demand placed all parties on notice that the defendant wanted a speedy trial, and in considering the defendant's motion for discharge and acquittal on constitutional grounds, the trial court weighed this factor in the defendant's favor. State v. Bazemore, 249 Ga. App. 584, 549 S.E.2d 426 (2001).

Defendant's premature demand for trial was a nullity because it was filed the day before the defendant was indicted and was therefore fatally premature. Roberts v. State, 278 Ga. 610, 604 S.E.2d 781 (2004).

Trial court properly denied a defendant's motion for discharge and acquittal on statutory speedy trial grounds pursuant to O.C.G.A. § 17-7-170(a) because the defendant's speedy trial demand was premature and a nullity since the "complaint" was filed after the defendant's arrest, was not an accusation pursuant to O.C.G.A. §§ 17-7-70 and 17-7-70.1, and the prosecution did not proceed on the "complaint." Campbell v. State, 294 Ga. App. 166, 669 S.E.2d 190 (2008).

Prematurely filed speedy trial demand cannot be resuscitated by a later returned accusation or indictment whether the accusation or indictment is filed in the same term or not. State v. McKenzie, 184 Ga. App. 191, 361 S.E.2d 54 (1987).

Premature speedy trial demand. — Given the defendant's premature speedy trial demand, made after the defendant's arrest, but before the grand jury indictment was filed, the trial court properly denied the defendant's motion for discharge and acquittal. Roberts v. State, 263 Ga. App. 472, 588 S.E.2d 242 (2003).

Pre-trial speedy trial demand could not be made via habeas petition. — Because the issue of whether a defendant's prosecution was barred pursuant to O.C.G.A. § 17-7-170 was a statutory defense which could be raised in the pending criminal action and the claim was not relevant to the validity of any pre-trial detention, the habeas court properly dismissed the defendant's pre-trial habeas petition without an evidentiary hearing. Mungin v. St. Lawrence, 281 Ga. 671, 641 S.E.2d 541 (2007).

Period for filing a demand for speedy trial may expire before arraignment. — Once a defendant knows a criminal charge has been brought against the defendant, the defendant is under a duty to monitor the status of the case if the defendant wishes to file a timely demand pursuant to O.C.G.A. § 17-7-170, and thus trigger the state's obligation to act to arraign and try the defendant within the allotted time. Smith v. State, 207 Ga. App. 762, 429 S.E.2d 149 (1993).

State has reasonable time to prepare and try state's case. — O.C.G.A. § 17-7-170 affords the state a reasonable time frame in which to prepare and try the state's case against the accused. This would be no less true in a retrial after reversal on appeal. The state is able and obligated to try the case only during periods when the court has jurisdiction of the case. Ramirez v. State, 196 Ga. App. 11, 395 S.E.2d 315 (1990), aff'd, 211 Ga. App. 356, 439 S.E.2d 4 (1993), overruled on other grounds, Henry v. James, 264 Ga. 527, 449 S.E.2d 79 (1994).

Defendant's affirmative action tolls period. — Moving to quash the indictments or other affirmative action, including the granting of a remittitur, tolls the period for demand of speedy trial. Fletcher v. State, 213 Ga. App. 401, 445 S.E.2d 279 (1994).

When an indictment is quashed on defendant's motion and the defendant is subsequently reindicted, a defendant must file a new speedy trial demand and the time limits for trial run only from the term in which the new demand is filed. Willingham v. State, 232 Ga. App. 244, 501 S.E.2d 575 (1998).

Time of demand if charged by accusation. — Right to make a demand for trial applying equally when the defendant is charged by accusation, the defendant had the right, without the necessity of obtaining special permission of the court, to file a demand for trial during the term of the accusation or the next succeeding

Timing (Cont'd)

regular term. Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703 (1981).

Section provides for demand after indictment but speedy trial right attaches upon arrest. — Although former Code 1933, § 27-1901 and Ga. L. 1952, p. 299, §§ 1 and 2 (see O.C.G.A. §§ 17-7-170 and 17-7-171) prescribed a means of asserting one's right to a speedy trial after indictment, there was a right under U.S. Const., amend. 6 to a speedy trial, which attaches at arrest and can be asserted thereafter. Haisman v. State, 242 Ga. 896, 252 S.E.2d 397 (1979); Glidewell v. State, 169 Ga. App. 858, 314 S.E.2d 924 (1984).

Protection conferred by O.C.G.A. § 17-7-170 attaches with the formal indictment or accusation, but over and above the statutory provisions, Sixth Amendment rights to speedy trial attach upon arrest. Andrews v. State, 175 Ga. App. 22, 332 S.E.2d 299 (1985).

Right attached at remittitur. — Delay in scheduling the defendant's trial was measured not from the defendant's arrest nor from the defendant's second indictment, but from the remittitur to the trial court on an earlier case involving the same charges; the delay of two and a half months between the remittitur and the scheduling of trial was not presumptively prejudicial and the defendant's right to a speedy trial was not violated. Roberts v. State, 279 Ga. App. 434, 631 S.E.2d 480 (2006), overruled on other grounds, DeSouza v. State, 285 Ga. App. 201, 645 S.E.2d 684 (2007).

Computation of two-term requirement. — In computing the time allowed by the two-term requirement of O.C.G.A. § 17-7-170 (b), terms or remainders of terms during which no jury is impaneled are not counted. Smith v. State, 199 Ga. App. 771, 406 S.E.2d 118 (1991).

In computing the time allowed by the two-term requirement, terms or remainders of terms during which no jury is impaneled are not counted. Kaysen v. State, 191 Ga. App. 734, 382 S.E.2d 737 (1989); Deadwiley v. State, 192 Ga. App. 229, 384 S.E.2d 221 (1989); McIver v. State, 205 Ga. App. 648, 423 S.E.2d 27, cert. denied, 205 Ga. App. 900, 423 S.E.2d 27 (1992).

Trial court erred in granting the defendant's motion for discharge and acquittal in a case when the jury was unable to reach a unanimous verdict and the trial court was thus forced to declare a mistrial on the last business day of the term of court as the trial itself was commenced within the statutory two-term limit and the state immediately announced the state was ready to try the defendant on the unresolved charges; accordingly, the state had the right to try the defendant in that term if jurors were available, and, if not, the next succeeding regular term of court, again providing that there were juries impaneled and qualified to hear the case. State v. Varner, 277 Ga. 433, 589 S.E.2d 111 (2003).

As to "next succeeding term" in court to which indictment is transferred, see Castleberry v. State, 11 Ga. App. 757, 76 S.E. 74 (1912).

Demandant's rights cannot be defeated by adjourning one regular term into another regular term. Nix v. State, 5 Ga. App. 835, 63 S.E. 926 (1909).

State may not repeatedly schedule trial to conflict with defense counsel's schedule. — When the procedural evidence was very clear that the state scheduled trial only when the appellant's counsel was absent or otherwise heavily engaged in other trials set by the state, the denial of the appellant's statutory right to absolute discharge and acquittal under O.C.G.A. § 17-7-170 on grounds it was appellant who affirmatively sought to avoid any trial was clearly erroneous. Birts v. State, 192 Ga. App. 476, 385 S.E.2d 120 (1989).

Effect of publishing trial calendar. — That the trial calendar for jury trials had been published before a defendant filed the defendant's demand for a speedy trial did not mean that there were no juries impaneled and qualified to try the defendant. A calendar serves the convenience of and promotes the orderly business of a court in disposing of the court's duties; nonetheless, the convenience of a set calendar must give way to the clear mandate of statutory law. O.C.G.A. § 17-7-170 clearly puts the burden on the state to try a defendant within the time limits set by statute. Campbell v. State,

199 Ga. App. 25, 403 S.E.2d 882 (1991).

Continuance at defendant's request. — Since the state was ready to proceed with the defendant's trial within four months of the offense, but the defendant requested a continuance to prepare the defendant's case, any delay in trial was caused by the defendant's own actions, and the defendant was not denied a speedy trial. Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1025, 71 L. Ed. 2d 310 (1982).

Counsel's request for a continuance and consent to reset the trial to a time outside the period allowed by the demand for speedy trial waived the defendant's right to automatic discharge and acquittal under O.C.G.A. § 17-7-170. State v. Davis, 243 Ga. App. 867, 534 S.E.2d 159 (2000).

Continuance after speedy trial demand. — Trial court improperly denied a continuance based on the ground that the defendant filed a speedy trial demand; a brief continuance did not waive a speedy trial demand when the court still could have tried the case within the time required, and nothing showed that the defendant here could not have been tried for the remainder of the term. Ingram v. State, 286 Ga. App. 662, 650 S.E.2d 743 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Counting terms of court after filing of remittitur. — In a case when a speedy trial demand was filed and, after an unrelated appeal, the remittitur from the Court of Appeals was filed near the end of the court term when no jury was present and available, that term did not count as one of the two terms in which the state must try the defendant. Pope v. State, 265 Ga. 473, 458 S.E.2d 115 (1995).

Impanelling of two traverse juries is sufficient; one when the demand is made, the other at the next succeeding term. Adams v. State, 65 Ga. 516 (1880).

Term at which impanelment requirement should be fulfilled. — Fact that at the initial term at which the demand was made there was no jury impaneled is of no consequence, provided at least two terms pass at which a jury was impaneled. Bush v. State, 152 Ga. App. 598, 263 S.E.2d 499 (1979).

Special terms do not count toward time limit. — This section referred to regular terms of court, and a party was not entitled to be discharged because the state failed to try the party at a special term held after demand was made. Stripland v. State, 115 Ga. 578, 41 S.E. 987 (1902).

Thirty-four month delay in requesting speedy trial. — Although over 34 months elapsed from the date of a defendant's arrest to the date of the denial of a motion to dismiss the indictment based on an alleged Sixth Amendment speedy trial violation, the motion was properly denied. The defendant never filed a statutory demand for speedy trial under O.C.G.A. § 17-7-170 and only raised the constitutional right to a speedy trial in a motion filed 30 months after indictment; the state never sought a continuance; the delay was solely due to the congested docket; and the defendant had been free on bail and did not show that the defendant's ability to present a defense would be impaired. West v. State, 295 Ga. App. 15, 670 S.E.2d 833 (2008).

Defendant's demand for a speedy trial was timely filed. — Trial counsel was not ineffective because the second defendant's speedy trial demand was filed in a timely fashion. Maldonado v. State, 325 Ga. App. 41, 752 S.E.2d 112 (2013).

Procedure

Filing of demand. — O.C.G.A. § 17-7-170 does not require the defendant to be tried within 120 days of the filing of a demand for trial. Carver v. State, 203 Ga. App. 197, 416 S.E.2d 810, cert. denied, 203 Ga. App. 905, 416 S.E.2d 810 (1992).

O.C.G.A. § 17-7-170 imposes no requirement that demand be made in a certain form or delivered to a specified officer of the court. Pless v. State, 157 Ga. App. 681, 278 S.E.2d 475 (1981).

Demand for jury trial is not sufficient. — Court of Appeals in the case of State v. Adamczyk, 162 Ga. App. 288, 290 S.E.2d 149 (1982), expressly rejected as adequate a demand for "trial by jury" without more, and expressly overruled all cases allowing such loose language to stand for a proper demand for trial so as to

Procedure (Cont'd)

invoke the penalty provisions of O.C.G.A. § 17-7-170. Smith v. State, 166 Ga. App. 352, 304 S.E.2d 476 (1983).

Demand to enjoy a trial by a jury of 12 cannot reasonably be construed as a demand for trial within the next succeeding term of court. Getz v. State, 251 Ga. 462, 306 S.E.2d 918 (1983).

Document filed by the defendant, captioned "Plea of Not Guilty and Demand for a Jury Trial," did not amount to a request for a speedy trial, but merely set forth a request for a trial by jury. Boyd v. State, 200 Ga. App. 591, 409 S.E.2d 44, cert. denied, No. S91C1482, 1991 Ga. LEXIS 584 (Ga. Sept. 6, 1991).

If the defendant sought a copy of the indictment and list of witnesses and requested that the defendant be "tried by a jury and waives nothing," this was not a speedy trial demand pursuant to O.C.G.A. § 17-7-170. Daniels v. State, 235 Ga. App. 296, 509 S.E.2d 368 (1998).

Trial court did not err in denying the defendant's motion for acquittal and discharge since the demand simply documented the defendant's request to be tried by a jury. Chastain v. State, 237 Ga. App. 640, 516 S.E.2d 362 (1999).

When demanding a speedy trial, the minimum acceptable standard required that a demand for trial be coupled with some other language placing the state on reasonable notice that a speedy trial under the sanctions of O.C.G.A. § 17-7-170 was being invoked, i.e., a reference to trial at the next term, reference to a "speedy trial," use of the language of the statute, or reference to the statute section. Merrow v. State, 268 Ga. App. 47, 601 S.E.2d 428 (2004).

Pleading caption reasonably construed as demand. — Defendant's pleading captioned as defendant's "DEMAND," which included a demand for "trial by jury pursuant to the Official Code of Georgia Annotated, Section 17-7-170 ...." could reasonably be construed as a demand for a speedy trial. Green v. State, 191 Ga. App. 873, 383 S.E.2d 359 (1989).

Pleading captioned a "waiver of jury trial & demand for jury trial," and demanding a jury trial in the event the defendant's case were transferred from the recorder's court to the superior court, constituted a demand for speedy trial under O.C.G.A. § 17-7-170, when the pleading served the important purpose of notifying the state and the court of the defendant's intention to proceed to a trial, or be discharged, at a subsequent term. Huff v. State, 201 Ga. App. 408, 411 S.E.2d 60, cert. denied, 201 Ga. App. 904, 411 S.E.2d 60 (1991).

Caption "demand for jury trial" on defendant's motion was legally sufficient to place the state on notice of the defendant's demand for speedy trial since the body of the notice stated clearly "this is a request for speedy trial under this section." Aranza v. State, 213 Ga. App. 192, 444 S.E.2d 349 (1994).

Demand for trial was sufficient even though it was captioned with an inaccurate indictment number. State v. Wright, 221 Ga. App. 584, 472 S.E.2d 144 (1996).

When counsel for a defendant charged with rape filed a document entitled "Entry of Appearance of Counsel and Demand for Trial," which simply demanded a trial, this was insufficient to invoke the sanctions of O.C.G.A. § 17-7-170 for violation of the right to speedy trial. Merrow v. State, 268 Ga. App. 47, 601 S.E.2d 428 (2004).

Form not adequate to constitute demand. — Document entitled "Arraignment Plea and Waiver" upon which a box was checked by the appellee next to the statement "I request a jury trial" did not constitute a demand for speedy trial pursuant to O.C.G.A. § 17-7-170. State v. King, 164 Ga. App. 834, 298 S.E.2d 586 (1982).

Demand for speedy trial was insufficient when the demand failed to identify the charges upon which the defendant demanded a speedy trial by name, date, term of court, or case number. Aranza v. State, 213 Ga. App. 192, 444 S.E.2d 349 (1994).

Provision in the fifth paragraph of a document entitled "Motion Filed on Behalf of Defendant" stating "causes now, the defendant in the above styled case and makes demand upon the state for a speedy trial," was insufficient to invoke speedy trial requirements. Dyal v. State, 211 Ga. App. 816, 440 S.E.2d 716 (1994).

Defendant's motion that requested a jury trial and referenced O.C.G.A. § 17-7-170 could not reasonably be construed to demand a speedy trial. Bennett v. State, 244 Ga. App. 149, 534 S.E.2d 881 (2000).

Pleading caption held insufficient. — Caption "JURY DEMAND" failed to set out the exact nature of a pleading as a demand for trial. A demand for trial will not be considered sufficient to invoke the extreme sanction of O.C.G.A. § 17-7-170 unless it is presented for what it is — a demand to be tried within the next succeeding term of court. Kramer v. State, 185 Ga. App. 254, 363 S.E.2d 800, cert. denied, 185 Ga. App. 910, 363 S.E.2d 800 (1987).

Defendant's "Omnibus Motion" was insufficient to invoke O.C.G.A. § 17-7-170 when, although the motion contained language requesting a trial, the caption of the motion obfuscated the nature of the pleading. Wilder v. State, 192 Ga. App. 891, 386 S.E.2d 685 (1989).

Because the defendant did not strictly comply with the pleading requirements, having titled the pleading "Defendant's Waiver of Formal Arraignment, Entry of 'Not Guilty Plea' and Demand for Jury Trial" rather than "Demand for Speedy Trial" and failing to make it a separate pleading, the trial court properly determined that the defendant was not entitled to discharge and acquittal. Uribe v. State, 346 Ga. App. 264, 816 S.E.2d 113 (2018).

Demand insufficient to invoke section. — Letter addressed to and delivered to the district attorney by the defendant's attorney requesting a trial by jury is not a demand sufficient to invoke the discharge provisions of O.C.G.A. § 17-7-170. Forbus v. State, 250 Ga. 24, 295 S.E.2d 530 (1982).

Writing a request for speedy trial on the back of the indictment did not constitute actual notice to the prosecutor as required by O.C.G.A. § 17-7-170 and the trial court did not err in denying the defendant the extreme sanction of a directed verdict of acquittal and discharge. Carter v. State, 226 Ga. App. 198, 486 S.E.2d 79 (1997).

Demand in letter held sufficient. — Defendant's letter containing a specific request to be tried "at this or the next succeeding term of court" and a specific reference to O.C.G.A. § 17-7-170 was sufficient to invoke the extreme sanction of acquittal. State v. Prestia, 183 Ga. App. 24, 357 S.E.2d 829, cert. denied, 183 Ga. App. 907, 357 S.E.2d 829 (1987).

Obvious mistake in naming another person as the movant in the body of the demand could not have misled the state's attorney since the defendant was correctly identified as the defendant in the style of the pleading, and the citation numbers referencing the charges against the defendant were correctly set forth therein. Verscharen v. State, 188 Ga. App. 746, 374 S.E.2d 349 (1988).

Service of process. — Defendant was not entitled to a motion for discharge and acquittal on speedy trial grounds when the prosecution rebutted prima facie evidence of the certificate of service as strict compliance with O.C.G.A. § 17-7-170 was a prerequisite for relief. Leimbach v. State, 251 Ga. App. 589, 554 S.E.2d 771 (2001).

Failure to serve demand for trial. — Trial court's finding that the state's attorney was not served with the defendant's demand for trial is supported by an absence of certificates of service showing that the state's attorney had been served with the defendant's demand for trial and by the state's attorney's statement that neither the state attorney nor the district attorney's office had been served with the defendant's demand for trial. Under these circumstances, the trial court did not err in denying the defendant's plea of autrefois acquit. Johnson v. State, 203 Ga. App. 896, 418 S.E.2d 155 (1992).

Trial court properly denied a pre-indictment motion for discharge and acquittal pursuant to O.C.G.A. § 17-7-170 after the defendant filed the waiver of formal indictment and demand for trial without serving a copy upon the prosecutor or the trial judge. Webb v. State, 278 Ga. App. 9, 627 S.E.2d 925 (2006).

Failure to serve speedy trial demand on trial court. — Trial court properly denied the defendant's motion autrefois convict in a rape case under O.C.G.A. § 16-6-1; the defendant did not substantially comply with the O.C.G.A. § 17-7-170 requirements for filing a

Procedure (Cont'd)

speedy trial demand on sexual battery charges that were pending before the instant rape charge was filed because the defendant failed to file the demand on the trial judge and thus no speedy trial demand was made. Baker v. State, 270 Ga. App. 762, 608 S.E.2d 38 (2004).

Trial court erred in denying the defendant's motions for discharge and acquittal pursuant to the defendant's statutory right to a speedy trial because, despite the defendant's assertions to the contrary, the defendant did not show that the defendant properly served the trial court judge with the motion for speedy trial as, on the motion's face, there was nothing in the certificate of service that showed that the defendant properly served the trial court judge as required by O.C.G.A. § 17-7-170. Wimbush v. State, 345 Ga. App. 54, 812 S.E.2d 489 (2018).

Defendant failed to perfect service of defendant's demand for trial on either the official charged with prosecuting offenses in the recorder's court (where the demand was filed) or the official responsible for prosecuting offenses in the superior court (where the case had been transferred prior to the defendant's filing a demand for trial); there was no error in denying the defendant's plea of autrefois acquit based on the defendant's failure to serve the appropriate official with a copy of the defendant's demand. Vondolteren v. State, 184 Ga. App. 344, 361 S.E.2d 833, cert. denied, 184 Ga. App. 911, 361 S.E.2d 833 (1987).

Defendant need not repeat demand upon grant of a new trial. — If at a term when a demand for trial is operative, a trial is had resulting in a verdict of guilty, and a new trial is thereafter granted, the defendant is not required to again demand a trial since the state is already on notice of the demand, and if two regular terms go by in which juries are impaneled and qualified, and the defendant is not tried, the defendant shall be absolutely discharged and acquitted of the offense in which a demand for trial has been made. Dennis v. Grimes, 216 Ga. 671, 118 S.E.2d 923 (1961).

Trial as to other charges when new trial granted as to one. — When a demand for trial is filed and a new trial is granted as to one charge upon the remittitur of the Supreme Court being made the order of the lower court, this section being tolled during the period as to that charge, nevertheless, the demand for trial as to the other charge requires a trial at the next succeeding regular term thereafter, provided at both terms there were juries impaneled and qualified to try the accused, or the petitioner would be entitled to discharge and acquittal of the latter offense. Dennis v. Grimes, 216 Ga. 671, 118 S.E.2d 923 (1961).

Forfeiture of bond for nonappearance is no bar to demanding trial provided there is a jury qualified to try the cause when the demand is made. Hall v. State, 21 Ga. 148 (1857).

Effect of nolle prosequi on demand. — Entry of a nolle prosequi without the accused's consent would not affect the accused's rights. The demand would stand over to be complied with at the next term. Brown v. State, 85 Ga. 713, 11 S.E. 831 (1890).

If compliance with the notice requirement of Rule 31.2, Uniform Superior Court Rules, would cause the state to violate defendant's right to a speedy trial, a trial court does not abuse the court's discretion in proceeding to trial in accordance with the defendant's speedy trial demand. Kellibrew v. State, 239 Ga. App. 783, 521 S.E.2d 921 (1999).

Motion for severance properly denied. — Trial court did not abuse the court's discretion by denying the defendant's motion to sever the offenses charged in the indictment because all but one of the charged offenses occurred within a five-week period, the offenses took place at the same location, three of the offenses shared common witnesses, and since the jury acquitted the defendant of aggravated battery, aggravated assault, and battery, it was clear that the jury was able to distinguish the evidence and apply the law intelligently as to each offense. Rossell v. State, 341 Ga. App. 356, 799 S.E.2d 34 (2017).

Role of Clerk

Function of placing the demand on the minutes is to give notice to the state

that the time in which trial must be had is running. Newman v. State, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

Court's duty to allow demand to be placed on minutes. — It is the duty of the trial court, upon notice, to allow the demand to be placed on the minutes of the court. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

Right to speedy trial unaffected by fact that demand is not entered on minutes. — Fact that a demand for trial is not actually entered by the clerk upon the minutes of the court may not affect the defendant's statutory right to speedy trial. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

If demand is filed with clerk, failure to actually enter demand is immaterial. — If the demand is filed in the office of the clerk of the superior court, prior to the adjournment of that court, it is immaterial that such demand was not actually entered by the clerk upon the minutes of the court. Bryning v. State, 86 Ga. App. 35, 70 S.E.2d 779 (1952).

If clerk is at fault for omission from minutes, special plea in bar not thereby defeated. — If all other requisites of this section had been met and the omission of the demands from the minutes is the fault of the clerk of court and not of the defendants or defendants' counsel, such omission does not defeat the special plea in bar. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

Correction of minutes to eliminate omission. — If as a matter of fact the minutes fail to speak the truth in that the minutes do not show the demand, the court has the power to correct the minutes and eliminate the omission so that the court's own records conform to the truth. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

If demand not permitted, recording demand serves no purpose. — It serves no purpose to record a demand in the usual fashion when permission to make the demand has not been granted. Newman v. State, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

Defendant's right to inclusion of jury demand in minutes. — If jury demand be made, it is the right of the accused to have the demand spread upon the minutes and the duty of the clerk to do it. Pless v. State, 157 Ga. App. 681, 278 S.E.2d 475 (1981); Lusher v. State, 192 Ga. App. 606, 386 S.E.2d 364 (1989); Larouche v. State, 192 Ga. App. 610, 386 S.E.2d 367 (1989).

Qualified Jury

"Qualified" defined. — Word "qualified" as used in this section related to the general qualification of the panels, rather than to the particular qualification of an individual juror appearing thereon. If the panel is a qualified panel, or if the array is not subject to challenge, the defendant should be tried upon the defendant's demand, or discharged. If necessary, the court may cause the panels to be filled in the event any of the jurors disqualify or are otherwise put off for cause. Campbell v. State, 6 Ga. App. 539, 65 S.E. 307 (1909).

Qualification of jury. — O.C.G.A. § 17-7-170 only requires that during the court terms there be juries impaneled and qualified to try a defendant; the statute does not require such a jury the moment appellant files a demand for trial. Lusher v. State, 192 Ga. App. 606, 386 S.E.2d 364 (1989); Larouche v. State, 192 Ga. App. 610, 386 S.E.2d 367 (1989).

Jurors impaneled in county superior court were qualified to try the defendant in the state court of the county and, thus, the defendant was entitled to discharge and acquittal when the defendant was not tried during the term in which the defendant's demand for trial was made. Scott v. State, 206 Ga. App. 17, 424 S.E.2d 325 (1992).

When jurors were summoned for a special civil trial session of the July 1993 term of court, and the defendant filed a demand for trial during that term, at a time when the jurors were impaneled and qualified, the fact that the state's attorney did not wish to work the jurors impaneled did not warrant the trial court's conclusion that the time for the defendant's demand did not begin to run until the next (October) term of the court and that the demand would not trigger a bar to prosecution until the expiration of the January

Qualified Jury (Cont'd)

1994 term. McKnight v. State, 215 Ga. App. 899, 453 S.E.2d 38 (1994).

For purposes of a state court prosecution, a term in which superior court jurors were impaneled did not apply to a speedy trial determination because the jurors were not qualified to serve as state court jurors since the summons sent to the jurors referred only to the superior court. George v. State, 229 Ga. App. 632, 494 S.E.2d 526, aff'd, 269 Ga. 863, 505 S.E.2d 743 (1998).

If there is a demand for a speedy trial in a state court case in a term for which no state court jurors are impaneled, a jury impaneled by a superior court may serve in state court if the conditions of O.C.G.A. § 15-12-130 are met. George v. State, 269 Ga. 863, 505 S.E.2d 743 (1998).

If no jury is impaneled and qualified to try a person when the demand is filed, the time designated in O.C.G.A. § 17-7-170 does not begin to run until the term at which jurors are impaneled and qualified to try the person. Kersey v. State, 191 Ga. App. 847, 383 S.E.2d 348 (1989).

Consideration of number of available jurors. — Court of appeals erred in holding that the term in which the defendant filed a speedy trial demand did not count for purposes of determining entitlement to discharge and acquittal. The court of appeals erred in finding there were only five jurors available as the remaining 32 who appeared were either serving on other trials or had been committed for other trials; O.C.G.A. § 17-7-170 did not require the court to examine how many jurors were serving on other trials or committed to other trials. Williamson v. State, 295 Ga. 185, 758 S.E.2d 790 (2014).

Demand

Purpose of demand. — Purpose of entry of demand is to notify the state of the defendant's intention to proceed to a trial, or be discharged at a subsequent term. Stripland v. State, 115 Ga. 578, 41 S.E. 987 (1902).

Conflict with local law. — As O.C.G.A. § 15-7-43(b), enacted in 1983, incorporates the speedy trial provisions of O.C.G.A. § 17-7-170 by reference, those provisions supersede a 1981 local law provision entitling a defendant in a state court to discharge and acquittal if no trial is had at the term when the demand is made or within the next two succeeding regular terms thereafter. Majia v. State, 174 Ga. App. 432, 330 S.E.2d 171, aff'd, 254 Ga. 660, 333 S.E.2d 834 (1985); Parks v. State, 239 Ga. App. 333, 521 S.E.2d 370 (1999).

As between O.C.G.A. § 17-7-170 and the Act establishing the State Court of Gwinnett County, Ga. L. 1977, p. 3331, as amended by Ga. L. 1981, pp. 3033, 3034, O.C.G.A. § 17-7-170 controls and governs the practice in the State Court of Gwinnett County. Hensler v. State, 174 Ga. App. 609, 332 S.E.2d 45, aff'd, 254 Ga. 660, 333 S.E.2d 834 (1985); Dean v. State, 177 Ga. App. 678, 340 S.E.2d 647 (1986).

Demand applies only in courts which have terms and impanel juries. — Implicit in the wording of O.C.G.A. § 17-7-170 is that the demand is applicable only in courts which have terms and impanel juries. Ramsey v. State, 189 Ga. App. 91, 375 S.E.2d 63 (1988).

Demand for trial would be effective to invoke the statutory sanction of mandatory acquittal only if filed in a court of record having both regular terms and the authority to impanel juries. Cliatt v. State, 194 Ga. App. 110, 389 S.E.2d 568 (1989).

Demand must be made in the court when the case is pending. Hunley v. State, 105 Ga. 636, 31 S.E. 543 (1898).

Defendant failed to file a demand for speedy trial in the superior court as required by O.C.G.A. § 17-7-170 when, although the defendant filed a demand in the probate court where the charges were filed, the defendant failed to file a new demand in the superior court after the charges were transferred pursuant to the defendant's request for transfer. Conley v. State, 267 Ga. App. 185, 598 S.E.2d 897 (2004).

Order entering demand for trial is not conclusive when entered. — Ex parte order which enters a demand for trial and which recites that such demand truly made at a time that a traverse jury

was impaneled and qualified to try the case is not conclusive upon the trial court when entered. State v. McDonald, 242 Ga. 487, 249 S.E.2d 212 (1978).

Defendant cannot claim the benefits of this section if the defendant made no demand for trial. Dansby v. State, 140 Ga. App. 104, 230 S.E.2d 64 (1976).

Defendant's presence not required. — O.C.G.A. § 17-7-170 does not require the physical presence of a defendant in the trial court in order to pursue a demand for trial. The statute is satisfied if a defendant is available for trial, whether physically present in court or not. State v. Collins, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

Defendant's presence required. — Fact that the defendant was unable to appear due to involuntary extradition to another state did not alleviate the requirement that the defendant be present and announce ready for trial. Bashlor v. State, 165 Ga. App. 329, 299 S.E.2d 418 (1983).

Demand binding only in court in which it is filed. — Although the defendant's demand was filed in a municipal court, and a copy of the demand was sent to the state court prosecutor, the demand was ineffective as to the state court because the demand was "binding only in the court in which the demand is filed." Adams v. State, 189 Ga. App. 345, 375 S.E.2d 642 (1988).

Demand follows the indictment to whatever court the case may be transferred. Castleberry v. State, 11 Ga. App. 757, 76 S.E. 74 (1912).

It is immaterial that the court to which the indictment is transferred is without authority to try the accused. Brock v. Slaton, 18 Ga. App. 175, 89 S.E. 156 (1916).

Transfer of case. — Demand for trial is deemed to be transferred along with the case when the case is transferred from one court to another, and, therefore, the defendant was entitled to an acquittal when the demand was not included in the materials forwarded to the other court and the case was not tried within two terms after the filing of the demand. Turner v. State, 188 Ga. App. 267, 372 S.E.2d 826 (1988).

Defendant's demand for a speedy trial was binding in superior court after the defendant's case was transferred to the superior court, even though the superior court did not receive the motion until after July 1, 1987, the effective date of the amendment to O.C.G.A. § 17-7-170 providing that a demand for a speedy trial is binding only in the court in which it is filed, when the defendant filed the demand prior to the effective date of the amendment. O'Neal v. State, 188 Ga. App. 270, 372 S.E.2d 833 (1988).

Since a Uniform Traffic Citation accusation expired when the defendant's case was transferred to the superior court for indictment and trial, and the defendant's demand for speedy trial was made only as to the indictment, the demand did not transfer to the state court as a demand for trial on an accusation filed after the indictment had been dismissed. Ramsey v. State, 189 Ga. App. 91, 375 S.E.2d 63 (1988).

Defendant who did not make a demand in a court which could not give the defendant a trial in accordance with O.C.G.A. § 17-7-170 is not precluded from making a demand for trial after being bound over to the jurisdiction of another court after a new accusation is filed and the defendant makes a demand at that term or the next regular term. Marks v. State, 192 Ga. App. 106, 384 S.E.2d 186, cert. denied, 192 Ga. App. 902, 384 S.E.2d 186 (1989).

Defendant, charged with a traffic violation, filed a demand for trial in the recorder's court but not in the state court after the case was transferred, but that demand for trial was ineffective to invoke the sanction of discharge and acquittal under O.C.G.A. § 17-7-170, and the trial court properly denied the defendant's motion for discharge and acquittal. Cliatt v. State, 194 Ga. App. 110, 389 S.E.2d 568 (1989), cert. denied, 194 Ga. App. 911, 389 S.E.2d 568 (1990).

Trial court did not err in denying the defendant's plea in bar as the defendant's demand for a speedy trial applied only to the prosecution against the defendant on misdemeanor traffic charges in the probate court when the defendant made the demand; since the defendant expressly waived the right to a speedy trial when

Demand (Cont'd)

the defendant requested that the defendant's case be transferred to the superior court, the defendant's speedy trial rights were not violated. Bishop v. State, 261 Ga. App. 445, 582 S.E.2d 571 (2003).

Demand not inferred. — Demand for speedy trial as to an accusation under O.C.G.A. § 17-7-170 will not be inferred unless a demand is specifically made. Ramsey v. State, 189 Ga. App. 91, 375 S.E.2d 63 (1988).

Ambiguous demand insufficient. — Demand which merely requests a trial by jury is insufficient; to invoke the extreme sanction of O.C.G.A. § 17-7-170 the demand must provide a reasonable reference to the provisions of that section, or otherwise clearly indicate that it is a demand for a speedy trial. Kevinezz v. State, 207 Ga. App. 456, 428 S.E.2d 366 (1993).

When no indictment is necessary. — Statutory language referring to "a true bill of indictment or an accusation" applies to an accusation only in those cases in which no indictment is necessary, either because of the nature of the offense or a defendant's written waiver of indictment. Groom v. State, 212 Ga. App. 133, 441 S.E.2d 259 (1994).

Time demand is entered as affecting rights. — If the demand was entered and allowed, the accused was entitled to all the rights of this section, regardless of the term at which the demand was entered. Dublin v. State, 126 Ga. 580, 55 S.E. 487 (1906).

Filing demand after indictment not prerequisite for asserting violation of constitutional speedy trial right. — Trial court erred in denying the defendant's motion to dismiss an indictment on the ground that the state violated the defendant's right to a speedy trial under the Sixth Amendment because the trial court failed to consider the facts showing that the defendant was out on bond and without counsel during the 42-month period between the defendant's arrest and indictment; the defendant was not entitled to file a statutory demand for a speedy trial pursuant to O.C.G.A. § 17-7-170 during the 42 months following the arrest but prior to the indictment, and the filing of a demand after the indictment was not a prerequisite for asserting a violation of the constitutional right to a speedy trial. Goffaux v. State, 313 Ga. App. 428, 721 S.E.2d 635 (2011).

In order to trigger this section, the defendant must make a demand at a time that a traverse jury is impaneled and qualified to try the defendant. State v. McDonald, 242 Ga. 487, 249 S.E.2d 212 (1978).

Demand for trial must be made at a regular term of court at which there was a jury impaneled and qualified to try the defendant, and while no order of the court may be necessary if it was filed during the term at which the defendant was indicted, this section expressly requires permission of the court if the demand was made at a regular term subsequent to the term of indictment and the first term thereafter. Hatfield v. State, 139 Ga. App. 535, 228 S.E.2d 720 (1976).

In order to invoke the provisions of this section, the defendant must move for an immediate trial, the trial court must accept the demand, and note the demand on the minutes of the court. The movant must also be in attendance or available at the court in which the movant demands trial. There is no inherent authority in a court of this state to compel a defendant's in-court attendance when such defendant is incarcerated outside this state pursuant to a sentence imposed by a different sovereign. Hunt v. State, 147 Ga. App. 787, 250 S.E.2d 517 (1978).

Demand for jury trial on last day of term. — Because a criminal defendant made a demand for a jury trial on January 31, the last day of the November term of court, when there were no juries available for service, the trial court did not err in denying the defendant's plea in bar filed in the May term. Kirk v. State, 194 Ga. App. 801, 392 S.E.2d 249 (1990).

Demand for trial need not be presented to the trial judge and approved by the judge. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

Approval of the trial judge was not required under this section when the demand is made at the term at which the indictment is returned or the next succeeding regular term thereafter. Nor was

it necessary to present the demand to the judge rather than to the clerk of court in order to apprise the court of the demand's existence. Dickerson v. State, 108 Ga. App. 548, 134 S.E.2d 51 (1963).

Decision holding that demand for trial must be made to the judge and not to the clerk. — See Turner v. State, 136 Ga. App. 42, 220 S.E.2d 57 (1975).

Demand for trial need not be presented to the judge rather than to the clerk of court. Dickerson v. State, 108 Ga. App. 548, 134 S.E.2d 51 (1963).

Right to demand trial during term in which indictment found. — Every person against whom a bill of indictment is found shall be tried at the term of court at which the indictment is found, unless the absence of a material witness or the principles of justice require a postponement of the trial, in which event the court shall allow a postponement until the next term. In keeping with this policy, this section provided that an accused person may demand such trial. Harris v. State, 84 Ga. App. 1, 65 S.E.2d 267 (1951).

Defendant does not have to wait a term before making a demand for trial but may make the demand at the term at which the indictment was returned. Harris v. State, 84 Ga. App. 1, 65 S.E.2d 267 (1951).

Demand must be for trial at next term. — Demand for trial will not be sufficient to invoke the extreme sanction of O.C.G.A. § 17-7-170 unless the demand is presented for what it is — a demand to be tried within the next succeeding term of court. Smith v. State, 166 Ga. App. 352, 304 S.E.2d 476 (1983).

If a defendant fails to make a demand for trial at the term at which the indictment was returned, or at the next term and did not obtain the permission of the court to make an out-of-time demand, the defendant's claims under O.C.G.A. § 17-7-170 are without merit. Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (1985); Ramsey v. State, 183 Ga. App. 48, 357 S.E.2d 869, cert. denied, 183 Ga. App. 906, 357 S.E.2d 869 (1987).

Demand by defendant who is not within state nor subpoena power of the state's courts. — If the defendant applies for a speedy trial under former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170) but cannot procedurally seek a speedy trial under that section because the defendant is not physically present or within the subpoena power of the Georgia courts, the defendant's right to a speedy trial must be determined under the Interstate Agreement of Detainers, Art. 2, Ch. 6, T. 42, if that statute was utilized to secure the defendant's trial. Johnson v. State, 154 Ga. App. 512, 268 S.E.2d 782 (1980).

Demand for jury trial was a demand for trial sufficient to invoke this section. Wallis v. State, 154 Ga. App. 764, 270 S.E.2d 45 (1980).

Motion for opportunity to select fair jury is not a demand for trial. — Motion to require that the defendant have an opportunity to select a fairly constituted traverse jury was not a demand for trial operating to invoke this section. Bennett v. State, 153 Ga. App. 21, 264 S.E.2d 516 (1980).

Notice sent to the Board of Offender Rehabilitation requesting a final disposition of an escape charge does not have the same effect as a demand for trial. Halm v. State, 125 Ga. App. 618, 188 S.E.2d 434 (1972).

Demand may be made by one of two persons jointly indicted after one has secured a severance. Winkle v. State, 20 Ga. 666 (1856).

Standing over of demand to next term upon securing of new trial by convicted defendant. — When a convicted defendant who filed a demand for speedy trial successfully takes action to negate the determination of guilt and secures a new trial, the demand will stand over to be complied with at the next term. Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429 (1981).

Demand for trial may be waived by counsel. Hogan v. State, 193 Ga. App. 543, 388 S.E.2d 532 (1989).

Defendant did not waive a demand for trial by a letter from defense counsel to the solicitor advising the defendant that it "would not be necessary to hear the motions" in the defendant's case since a demand for trial is not a motion and therefore was not the subject of the letter. Larouche v. State, 192 Ga. App. 610, 386 S.E.2d 367 (1989).

Demand (Cont'd)

Demand not waived by pretrial motions. — Defendants' filing of pretrial motions did not constitute a consent or other affirmative act amounting to waiver of a demand for trial in the next succeeding term of court. Peek v. State, 189 Ga. App. 584, 377 S.E.2d 8 (1988), aff'd sub nom. Parks v. Norred & Assocs., 206 Ga. App. 494, 426 S.E.2d 12 (1992).

Order not entered pursuant to demand. — In order to invoke the provisions of O.C.G.A. § 17-7-170, a defendant must make a demand for trial. The court's order, requiring that the sheriff or the sheiff's deputy "pick up … defendant and bring him before [the] Court for the disposition of his case as soon as possible," neither indicated that it was entered pursuant to a demand for trial made by the defendant, nor was the order sufficient to invoke the extreme sanction of that Code section. Coggins v. State, 188 Ga. App. 455, 373 S.E.2d 269 (1988).

If there is no jury impaneled and qualified at the time the demand is made, the demand is not good for that term. State v. McDonald, 146 Ga. App. 83, 245 S.E.2d 446, rev'd on other grounds, 242 Ga. 487, 249 S.E.2d 212 (1978).

Since the defendant filed a demand for a speedy trial during a term in which no jurors were impaneled, the term did not count in computing the two-term requirement under O.C.G.A. § 17-7-170(a). Spencer v. State, 259 Ga. App. 664, 577 S.E.2d 817 (2003).

Because jurors were dismissed and not subject to recall, the jurors were not empanelled for service when the defendant made the defendant's demand for speedy trial; thus, the term in which the demand was filed did not count for computation of the two-term requirement. Johnson v. State, 264 Ga. App. 195, 590 S.E.2d 145 (2003).

Pro se demand invalid if defendant has counsel. — Because, at the time the defendants filed the defendants' pro se demand for discharge pursuant to O.C.G.A. § 17-7-170, the defendants were represented by counsel, the trial court was clearly authorized to find that this pro se demand was of no legal effect. Goodwin v. State, 202 Ga. App. 655, 415 S.E.2d 472 (1992); Maddox v. State, 218 Ga. App. 320, 461 S.E.2d 286 (1995).

Since the defendant was represented by counsel when the defendant filed a pro se demand for speedy trial, that demand was of no legal effect whatsoever. Daniels v. State, 235 Ga. App. 296, 509 S.E.2d 368 (1998).

Defendant's demand for speedy trial was filed pro se while the defendant was represented by counsel, and because such demand was filed before the indictment was returned against the defendant, the defendant's demand had no legal effect. Brown v. State, 264 Ga. App. 9, 589 S.E.2d 830 (2003), cert. denied, 543 U.S. 831, 125 S. Ct. 172, 160 L. Ed. 2d 48 (2004).

Accused may sit mute at the second term. — Only duty imposed on the defendant being that the defendant be not voluntarily absent from the court, and that the defendant shall have done no other act which in law would amount to a waiver of the defendant's demand. Flagg v. State, 11 Ga. App. 37, 74 S.E. 562 (1912).

Demand including request for trial by jury. — Because the defendant filed a single demand which was specifically captioned and written as a "Demand For Speedy Trial By Jury Under OCGA § 17-7-170", the defendant's subsequent "Withdrawal of Jury Demand", without more, served to withdraw the defendant's single, previously filed demand in the demand's entirety. Price v. State, 245 Ga. App. 128, 535 S.E.2d 766 (2000).

Waiver

Silence at second term and failure to bring demand to court's attention not waiver. — Accused may waive the right under this section, but mere silence at the second term and failure to bring the demand to the court's attention will not amount to a waiver. Flagg v. State, 11 Ga. App. 37, 74 S.E. 562 (1912).

Allowing jury to be discharged is not waiver. Dacey v. State, 15 Ga. 286 (1854).

Absence when the case is called constitutes waiver. Moreland v. State, 51 Ga. 192 (1874); Odom v. State, 25 Ga. App. 746, 105 S.E. 54 (1920).

Voluntary absence from court constituted a waiver by the accused of rights under this section. Flagg v. State, 11 Ga. App. 37, 74 S.E. 562 (1912).

Voluntary absence from the court amounts to a waiver of the demand for trial and the defendant is not entitled to discharge and acquittal. Daniels v. State, 199 Ga. App. 400, 405 S.E.2d 88, cert. denied, 199 Ga. App. 905, 405 S.E.2d 88 (1991); State v. Collins, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

Absence from calendar call not waiver. — Absence of the defendant and, by extension, the defendant's counsel from a calendar call is not, per se, sufficient grounds to find waiver of the trial demand. McKnight v. State, 215 Ga. App. 899, 453 S.E.2d 38 (1994).

No waiver of the defendant's demand for a speedy trial occurred as a result of defense counsel's absence from the courtroom when the case was called for trial because under the facts in the case defense counsel justifiably believed counsel was "on call." State v. McKnight, 265 Ga. 701, 462 S.E.2d 142 (1995).

Waiver. — If defense counsel failed to appear at a calendar call, failed to file a conflict letter, and failed to contact the court when a conflicting trial ended (in accordance with Ga. Unif. Super. Ct. R. 17.1(C)), counsel's actions amounted to a waiver of the defendant's O.C.G.A. § 17-7-170 speedy trial demand. Oni v. State, 268 Ga. App. 840, 602 S.E.2d 859 (2004).

Speedy trial demand in a non-capital case did not impose a requirement to announce a readiness for trial; rather, a request for a continuance outside the term of the demand waived the speedy trial demand. Dingler v. State, 281 Ga. App. 721, 637 S.E.2d 120 (2006).

When the court previously found that a defendant waived the defendant's statutory speedy trial claim, the defendant could not relitigate the issue in a subsequent appeal despite a delay following remittitur. Oni v. State, 285 Ga. App. 342, 646 S.E.2d 312 (2007).

Waiver by guilty plea. — Despite attempts by the defendant to reserve the right prior to a plea, the defendant waived the right to assert on appeal that the state failed to comply with the speedy trial requirement of O.C.G.A. § 17-7-170(b) by a guilty plea. Hewell v. State, 277 Ga. App. 265, 626 S.E.2d 237 (2006).

Failure to make demand as waiver of speedy trial. — While the burden was on the defendant to protect the defendant's statutory rights to a speedy trial by making a timely demand for trial under this section, the defendant's failure to do so did not, of itself, work a waiver of rights under U.S. Const., amend. 6. Sanders v. State, 132 Ga. App. 580, 208 S.E.2d 597 (1974).

While there is a burden on a defendant to protect the defendant's right to a speedy trial, failure to make a demand does not amount to a waiver of rights under U.S. Const., amend. 6. Simpson v. State, 150 Ga. App. 814, 258 S.E.2d 634 (1979).

Defendant's right to a speedy trial was not violated because the defendant did not file a statutory demand for speedy trial under O.C.G.A. § 17-7-170 and the delay was partially attributable to the defendant. Manning v. State, 250 Ga. App. 187, 550 S.E.2d 762 (2001).

Trial court erred in dismissing the defendant's demand for a speedy trial on the state's motion to dismiss; although the defendant was required to obtain special permission of the court to file such a demand for trial because the defendant had not entered such a demand during the court term in which the indictment was filed or at the next succeeding regular term of court, the record showed that the trial court essentially granted permission by instructing the defendant at a bond revocation hearing to file such a demand. Prather v. State, 261 Ga. App. 506, 583 S.E.2d 191 (2003).

Defendant's motion for continuance did not constitute waiver. — Defendant's action in moving for a continuance until scientific test results were forthcoming, when the state failed to produce scientific test results the state had informed the trial court would be ready on the day of trial, did not constitute a waiver of the defendant's rights under O.C.G.A. § 17-7-170. Weidlund v. State, 191 Ga. App. 668, 382 S.E.2d 709 (1989).

Defendant's attorney did not waive demand by agreeing to continuance. — Although a defendant's attorney agreed

Waiver (Cont'd)

to a continuance in early December 2004, there was no evidence that the attorney agreed to continue the case past that term of court which, pursuant to O.C.G.A. § 15-5-3, did not end until February 2005, and in which the case could have been tried and was required to be tried following the defendant's speedy trial demand under O.C.G.A. § 17-7-170 in the prior court term. Thornton v. State, 301 Ga. App. 784, 689 S.E.2d 361 (2009).

Waiver by motion to quash. — Defendant's O.C.G.A. § 17-7-170 speedy trial claim was properly denied because the defendant's motions to quash the indictments were affirmative actions which forced the state to reindict, the defendant failed to support, with evidence the assertion that there were jurors ready to hear trials toward the end of the term of court, and, finally, after the third indictment, the defendant requested to be tried within the current or following term, which included the August term during which the defendant filed the motion that led to the appeal; defendant's latest request for a speedy trial afforded no ground for relief at that time. Tyner v. State, 298 Ga. App. 42, 679 S.E.2d 82 (2009).

Waiver of rights by numerous continuances. — Defendant's numerous requested continuances and leaves of absence, and the defendant's consenting to a notice resetting the case over to the next court term, waived the defendant's speedy trial demand and right to automatic discharge. Jones v. State, 250 Ga. App. 829, 553 S.E.2d 24 (2001), aff'd, 276 Ga. 171, 575 S.E.2d (2003).

By challenging the jury pool, defendant waives the right to a jury trial during that term and to use that term in the computation of terms under O.C.G.A. § 17-7-170 (b). Wilson v. State, 181 Ga. App. 337, 352 S.E.2d 189 (1986).

Waiver of demand for speedy trial would result from continuance granted on motion of accused, or from any other act on the accused's part showing affirmatively that the accused consented to passing the case until a subsequent term. Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429 (1981).

Requesting a continuance is not the only way to waive a demand for trial since any affirmative action of the defendant which results in a continuance or a failure to try the case within the time fixed by statute after the filing of the demand has the effect of tolling the time. Sykes v. State, 236 Ga. App. 518, 511 S.E.2d 566 (1999).

Defendant waived the right to a speedy trial under O.C.G.A. § 17-7-170 as the defendant repeatedly acknowledged that the defendant's motion for a continuance would constitute a waiver of the defendant's right to an automatic discharge and acquittal. Furthermore, there was no evidence that the state intended to manipulate the trial calendar by re-indicting the defendant; although the new indictment required proof of a new element, the defendant was given two weeks' notice of the state's intent to present the new indictment to the grand jury, and it was the defendant who requested a continuance on the last date in which it was possible to try the case in accordance with the defendant's speedy trial demand. Trimm v. State, 297 Ga. App. 861, 678 S.E.2d 567 (2009).

Waiver by filing subsequent formal demand for trial. — Although timely demand for jury trial is sufficient to trigger O.C.G.A. § 17-7-170, the defendant waives the right to rely upon that demand by filing a subsequent formal demand for trial during the succeeding term or the following term and thus the defendant, in effect, consented to extending the defendant's demand for trial. Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703 (1981).

Defense counsel's actions waived demand. — Conduct of the defendant and defense counsel of demanding and proceeding to trial, not consenting to a substitute judge, and objecting to a recess of the case in addition to requesting a mistrial, realizing that such action would pass the case into the next term, amounted to conduct to avoid trial and affirmatively waived the demand. Cates v. State, 226 Ga. App. 519, 486 S.E.2d 654 (1997).

Because defense counsel did not comply with Ga. Unif. Super. Ct. R. 16.2 governing a leave of absence, counsel's failure to

appear at trial acted as a waiver of the defendant's speedy trial rights. Linkous v. State, 254 Ga. App. 43, 561 S.E.2d 128 (2002), aff'd, sub nom. Jones v. State, 276 Ga. 171, 575 S.E.2d 456 (2003).

In an action in which the defendant filed a demand for a speedy trial pursuant to O.C.G.A. § 17-7-170(a), but the defendant's counsel later consented to the continuance of the case beyond the time when trial was to be held, the defendant was deemed to have waived the right to automatic discharge. Cobb v. State, 275 Ga. App. 554, 621 S.E.2d 548 (2005).

Trial court did not err in denying the defendant's pro se demand for a speedy trial on the ground that the defendant was represented by counsel when the defendant filed the motion because the defendant was represented by a public defender when the defendant filed the pro se demand; at the bond hearing, the defendant's attorney stated that the attorney spoke with the defendant and that they were not adopting the pro se speedy trial demand filed previously, which operated as a waiver of the defendant's right to an automatic discharge under O.C.G.A. § 17-7-170, and once the case was tried, the defendant's demand for a speedy trial expired. Works v. State, 301 Ga. App. 108, 686 S.E.2d 863 (2009), cert. denied, No. S10C0458, 2010 Ga. LEXIS 251 (Ga. 2010).

State carried the state's burden of demonstrating that the defendant waived the demand for a speedy trial because trial counsel announced that the demand for speedy trial was withdrawn, and counsel made the announcement only after consulting the defendant; counsel also announced that the defendant was making a joint motion with the state for a continuance. Twiggs v. State, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

Waiver by pro se defendant who failed to demand speedy trial. — When a pro se defendant moved to dismiss the indictment for lack of a speedy trial, but the record contained no evidence that the defendant filed a demand for speedy trial under O.C.G.A. § 17-7-170, the issue could not be considered by the appellate court. Owens v. State, 258 Ga. App. 647, 575 S.E.2d 14 (2002).

In a criminal case when defense counsel requested leave exceeding a total of 30 days but was never granted such leave by the trial court under Ga. Unif. St. Ct. R. 16.2, no valid leave of absence was in place and defense counsel effectively waived the defendant's speedy trial demand under O.C.G.A. § 17-7-170 by being absent, without excuse, on the only days left in the term when the defendant could have been tried. Jones v. State, 276 Ga. 171, 575 S.E.2d 456 (2003).

Demand waived by agreement to postpone outside term. — Waiver of a demand for a trial in accordance with O.C.G.A. § 17-7-170 does not result from an agreement by the defendant to postpone the trial to a time within the term of the demand; for waiver to occur, the agreement must be to postpone to a time outside the term of demand. State v. McNeil, 176 Ga. App. 323, 335 S.E.2d 728 (1985).

Proof of waiver. — State has the burden of showing that the defendant or defense counsel took such affirmative action resulting in a waiver of the requirements of O.C.G.A. § 17-7-170. State v. Grant, 217 Ga. App. 358, 457 S.E.2d 263 (1995).

Defendant made a timely demand for trial and was convicted following the erroneous denial of the defendant's motion for a continuance, and such conviction was reversed and the case remitted for new trial, the motion for a continuance and appeal did not constitute an affirmative action by the defendant resulting in delay and a waiver of the defendant's original demand and the defendant was entitled to a retrial within the two-term limits of O.C.G.A. § 17-7-170. State v. Grant, 217 Ga. App. 358, 457 S.E.2d 263 (1995).

State failed to establish waiver. — Trial court erred in denying the defendant's motion for discharge and acquittal on statutory speedy trial grounds because the state failed to establish a waiver based upon the fact that the defendant's counsel had filed several notice of conflict letters pursuant to Ga. Unif. Super. Ct. R. 17.1; the conflict letters were filed after the two terms of court had expired and were not relevant to the waiver issue. Gifford v. State, 301 Ga. App. 50, 686 S.E.2d 831 (2009).

Impact of Motions for Mistrials

Effect of mistrial or grant of new trial. — If there is a mistrial in the case, or if the accused is convicted and a new trial granted, the accused will not lose the accused's rights under the demand, but the accused will be entitled to a trial or discharge at the next succeeding term. Gordon v. State, 106 Ga. 121, 32 S.E. 32 (1898); Dublin v. State, 126 Ga. 580, 55 S.E. 487 (1906).

Mistrial does not satisfy speedy trial requirements. — Mistrial based on the jury's inability to reach a verdict does not satisfy the speedy trial requirements, at least if the defendant could have been retried before the expiration of the term. Orvis v. State, 237 Ga. 6, 226 S.E.2d 570 (1976).

Motion for mistrial not waiver of demand. — Defendant's motion for mistrial did not constitute an affirmative waiver of the defendant's statutory demand for a speedy trial. State v. Allen, 165 Ga. App. 86, 299 S.E.2d 158 (1983).

Mistrial was not a trial within the meaning of this section, and a defendant was accordingly entitled to be again tried during the term or released at the term's end. Rider v. State, 103 Ga. App. 184, 118 S.E.2d 749 (1961).

Trial court abused the court's discretion in declaring a mistrial and abridging the defendant's constitutional right to be tried by the originally impaneled jury without first considering less drastic alternatives when the assigned courtroom was unavailable at the appointed time. The procedure the court used was flawed, not the result. A trial court is not categorically required to grant a continuance under similar circumstances; merely the court should consider a continuance as an alternative to declaring a mistrial. Since the trial court told defense counsel that if the defendant did not plead guilty, the court would declare a mistrial, the court took little or no heed to the defendant's constitutional rights thereby constituting an abuse of discretion. McGee v. State, 287 Ga. App. 839, 652 S.E.2d 822 (2007).

Accused need not take any steps to bring the case to trial again after mistrial; it is only requisite that the accused remain in attendance before the court. Thornton v. State, 7 Ga. App. 752, 67 S.E. 1055 (1910).

Trial in next term following mistrial. — Under O.C.G.A. § 17-7-170(b), since the defendant's trial ended in a mistrial, the defendant could have been tried at any time during the next term of court, which was the April term; the denial of the defendant's motion to dismiss and the filing of the defendant's notice of appeal were both in the April term and the denial of the defendant's motion was proper because the state complied with O.C.G.A. § 17-7-170. Rivers v. State, 279 Ga. App. 906, 633 S.E.2d 74 (2006).

Discharge and Acquittal

Discharge of defendant generally. — Upon entry of the demand for trial on the minutes, if the defendant is not tried at the term when the demand is made, or at the next succeeding regular term thereafter, provided, that at both terms there were juries impaneled and qualified to try the defendant, then the defendant is absolutely entitled to be discharged and acquitted of the offense charged in the indictment. Dickerson v. State, 108 Ga. App. 548, 134 S.E.2d 51 (1963).

Defendant who has made a proper demand for a trial is entitled to an automatic discharge without further motion if the defendant is not tried on the second term of court, provided a jury is present at each term who is qualified to try the defendant. Parker v. State, 135 Ga. App. 620, 218 S.E.2d 324 (1975).

This section was explicit in that if the defendant was not tried within two terms after the defendant filed a demand for speedy trial, the defendant must be absolutely acquitted and discharged of the offense. State v. Cox, 140 Ga. App. 30, 230 S.E.2d 87 (1976).

Statutory right is imperative and means that if the state fails to try a defendant eligible for trial as set forth in this section, the prisoner absolutely shall be discharged and acquitted of the offense with which the defendant stands charged. Jeffries v. State, 140 Ga. App. 477, 231 S.E.2d 369 (1976).

This section and the cases interpreting it, stand for the proposition that when

demand was made and two terms of court expire, at both of which juries are impaneled and qualified to try the defendant, then discharge and acquittal must follow. Bush v. State, 152 Ga. App. 598, 263 S.E.2d 499 (1979).

O.C.G.A. § 17-7-170 provides that the defendant is to be discharged and acquitted if the defendant is not tried during the term the demand is made or the next succeeding term provided that "at both court terms there were juries impaneled and qualified to try him." Whether or not a defendant sought a bench trial when the defendant was arraigned is immaterial. Pursuant to the statute, acquittal depends on the availability of a jury (and, logically, the court sitting without a jury) to try the defendant. Strickland v. State, 192 Ga. App. 613, 386 S.E.2d 165 (1989).

O.C.G.A. § 17-7-170 provides that when a person makes a demand for trial the person is entitled to be discharged and acquitted of the offense charged if the person is not tried during the term in which the person's demand for trial is made or at the next succeeding regular term, and there were juries impaneled and qualified to try the person at each of those terms. Scott v. State, 206 Ga. App. 17, 424 S.E.2d 325 (1992).

In an action in which the trial court in the defendant's criminal matter entered an order of nolle prosequi regarding criminal charges against the defendant, the defendant's motion for discharge and acquittal, based on a claim that the trial court failed to comply with the demand for a speedy trial under O.C.G.A. § 17-7-170, should have still been ruled on; accordingly, it was error to find that the defendant's petition for a writ of mandamus, pursuant to O.C.G.A. § 9-6-20, seeking to have the trial court judge rule on the motion for discharge and acquittal, was rendered moot. Davis v. Wilson, 280 Ga. 29, 622 S.E.2d 325 (2005).

Defendant's motion for discharge and acquittal was properly granted even though a trial judge had been recused on the defendant's own initiative resulting in a delay of the proceedings. State v. Allen, 192 Ga. App. 730, 386 S.E.2d 394 (1989).

Trial court properly granted the defendant's motion for discharge and acquittal of charges against the defendant, upon reconsideration, based on the state's failure to have speedily tried the defendant pursuant to O.C.G.A. § 17-7-170(b); although originally denied, the trial court granted the motion upon submission by the defendant of a jury manager's affidavit that indicated that there were qualified jurors who were impaneled and ready to try the case. State v. Edminson, 265 Ga. App. 91, 593 S.E.2d 18 (2003).

Defendant's motion for discharge and acquittal was improperly denied. — Defendant was denied the constitutional right to a speedy trial and to due process based on the state's intentional act of trading discovery responses for a speedy trial right, and the resulting prejudice from the disappearance of a material witness. The trial court therefore abused the court's discretion in denying the defendant's motion for discharge and acquittal. Ditman v. State, 301 Ga. App. 187, 687 S.E.2d 155 (2009), cert. denied, No. S10C0539, 2010 Ga. LEXIS 243 (Ga. 2010).

Because a defendant did not waive the defendant's statutory right to a speedy trial on the accusations charging the defendant with fleeing and attempting to elude and reckless driving, and because the state failed to try the defendant during the term in which the demand was filed or the next succeeding regular term of court, pursuant to O.C.G.A. § 17-7-170(b), the defendant was entitled to an acquittal on those charges. Goddard v. State, 310 Ga. App. 2, 712 S.E.2d 528 (2011).

Failure of motion for discharge and acquittal. — When two counts of an indictment charged a defendant with crimes arising from the same conduct, and the crimes were known to the prosecutor at the time of commencing the prosecution and were within the jurisdiction of the same court, the defendant's motion for discharge and acquittal of count two was properly denied despite the admitted failure of the state to try the defendant in the time proscribed. State v. Luster, 204 Ga. App. 156, 419 S.E.2d 32, cert. denied, 204 Ga. App. 922, 419 S.E.2d 32 (1992).

To be entitled to discharge, demand must be on minutes. — To entitle the

Discharge and Acquittal (Cont'd)

defendant to an order of discharge, the defendant must show by the minutes of the court that the defendant has made the demand required by this section. Couch v. State, 28 Ga. 64 (1859).

Discharge is effective whether the order is ever entered on the minutes or not; however, as a matter of form and regularity the discharge should be entered. Thornton v. State, 7 Ga. App. 752, 67 S.E. 1055 (1910).

Acquittal results automatically, by operation of law, after the adjournment of the second term. Thornton v. State, 7 Ga. App. 752, 67 S.E. 1055 (1910); Bishop v. State, 11 Ga. App. 296, 75 S.E. 165 (1912); Smith v. State, 192 Ga. App. 604, 386 S.E.2d 370, cert. denied, 192 Ga. App. 903, 386 S.E.2d 370 (1989).

In an appeal of the trial court's denial of appellant's absolute discharge and acquittal for failure of speedy trial, since the appellant filed a demand for speedy trial on May 20, 1988, and appellant's case was not placed on the first two trial term calendars or on any other calendar, and in September appellant filed a motion for absolute discharge and acquittal under O.C.G.A. § 17-7-170, the trial court erred in denying the appellant's motion since the statute provides that upon proper demand, the defendant shall be acquitted and discharged, if the defendant is not tried when the demand is made or at the next succeeding regular court term thereafter. Birts v. State, 192 Ga. App. 476, 385 S.E.2d 120, cert. denied, 192 Ga. App. 901, 385 S.E.2d 120 (1989).

Demand not a prerequisite to invoke sanction of acquittal. — Because the filing of a statutory speedy trial demand was not a prerequisite to seeking discharge and acquittal based on a denial of the defendant's constitutional rights to a speedy trial, such could not serve as a valid argument to overturn the trial court's order in granting the defendant a discharge and acquittal on speedy trial grounds. State v. Moore, 289 Ga. App. 99, 656 S.E.2d 156 (2007), cert. denied, No. S08C0808, 2008 Ga. LEXIS 483 (Ga. 2008).

Demand insufficient to invoke sanction of acquittal. — Although the defendant's demand contained neither a specific reference to O.C.G.A. § 17-7-170 nor a specific request to be tried within the next succeeding term of court, its denomination as a "demand for trial as guaranteed by the law of the State of Georgia . . . filed during the April term of 1984 while jurors are impaneled to try the defendant" provided reasonable reference to that section and was sufficient to invoke the extreme sanction of acquittal. Edwards v. State, 177 Ga. App. 557, 340 S.E.2d 229 (1986).

Defendant, whose case was transferred from the recorder's court to the superior court, was not entitled to acquittal since it was questionable whether the defendant's speedy trial demand had any efficacy at all, in that the demand was filed only in a court which did not have terms or juries, and the demand was not refiled in the court which did have such. Huff v. State, 201 Ga. App. 408, 411 S.E.2d 60, cert. denied, 201 Ga. App. 904, 411 S.E.2d 60 (1991).

Trial court erred by granting the defendant's plea in bar and by granting the defendant's request for acquittal and discharge of aggravated battery and aggravated assault counts based on procedural double jeopardy protections as the defendant was never placed in jeopardy as to those charges, which were brought in a new indictment against the defendant, and the defendant's speedy trial request did not apply to the new indictment since the case had been transferred to the superior court. State v. Jones, 290 Ga. App. 879, 661 S.E.2d 573 (2008).

Request for speedy trial, absent identification of charges. — Defendant's handwritten request for "speedie [sic] trial of any or all charges Pickens County and/or Jaspe [sic] City would have against me," which request did not identify the charges pending by name, date, term of court, or case number, could not be reasonably construed as sufficient to convey notice of the defendant's intention to invoke the extreme sanction (discharge and acquittal) of O.C.G.A. § 17-7-170. Ferris v. State, 172 Ga. App. 729, 324 S.E.2d 762 (1984).

Inasmuch as the defendant's demand for speedy trial did not identify the charges pending against the defendant, it

could not reasonably be construed as sufficient to put the authorities on notice of defendant's intention to invoke the extreme sanction of O.C.G.A. § 17-7-170. Cummins v. State, 202 Ga. App. 155, 413 S.E.2d 773 (1991), cert. denied, 202 Ga. App. 773, 413 S.E.2d 773 (1992).

Statute tolled by successful motion to suppress evidence. — Since the defendant successfully moved to suppress evidence, the defendant invoked the entire procedure applicable to that issue including the state's right to a direct appeal, and the statute was tolled for the time required for that procedure to occur. State v. Dymond, 248 Ga. App. 582, 546 S.E.2d 69 (2001).

Discharge is available to defendant even if absent from county having jurisdiction to try defendant. — Absence of the defendant from the county having jurisdiction to try the defendant does not render the remedy of this section unavailable since the defendant had available the writ of habeas corpus ad deliberandum et recipiendum to compel the production of the defendant's person in the county having jurisdiction for the purpose of trying the defendant on the pending charge. Josey v. State, 102 Ga. App. 707, 117 S.E.2d 641 (1960).

Formal entry of discharge can be made at any time, nunc pro tunc. Collins v. Smith, 7 Ga. App. 653, 67 S.E. 847 (1910).

Exception to discharge when accused responsible for delay. — Exception to the operation of this section existed when the accused was personally responsible for a delay in bringing the case to trial after the demand had been made. Flagg v. State, 11 Ga. App. 37, 74 S.E. 562 (1912).

Trial court did not abuse the court's discretion in denying the defendant's motion for discharge and acquittal after the defendant was brought to trial 14 years beyond the time the defendant was supposed to be tried for DUI —less safe driver, as the delay in bringing the defendant to trial was brought about solely by the defendant failing to appear at the defendant's scheduled trial, of which the defendant was given notice at the time of the defendant's initial arrest. Smith v. State, 260 Ga. App. 403, 579 S.E.2d 829 (2003).

Discharge improper absent evidence that accusation filed prior to demand for trial. — Since the state brought a direct appeal from the trial court's grant of the defendant's motion for discharge and acquittal pursuant to O.C.G.A. § 17-7-170, and the current version of that Code section required that an accusation be filed with the clerk before an accused may file a demand for trial, without evidence that a uniform traffic citation or a formal accusation was filed in the state court prior to the defendant's demand for trial, the trial court erred in granting the defendant's motion for discharge. State v. Lipsky, 191 Ga. App. 842, 383 S.E.2d 204 (1989).

Discharge properly granted. — Defendant's constitutional right to a speedy trial was violated due to an unexplained four year delay between arrest and the call of case for trial, especially in light of the death of a key defense witness. State v. Allgood, 252 Ga. App. 638, 556 S.E.2d 857 (2001).

Trial court properly granted the defendant's motion for discharge and acquittal which included jury manager's affidavit stating that jurors were summoned during each week in the two previous terms, were available for state and superior courts, and were not released until Thursday evening of each week. State v. Shields, 265 Ga. App. 473, 594 S.E.2d 692 (2004).

Orders of discharge and acquittal of the defendants on the ground that the defendants' statutory rights to a speedy trial had been violated were affirmed because the defendants remaining silent and failing to object was an insufficient affirmative act to waive the defendants statutory demand for a speedy trial under O.C.G.A. § 17-7-170. Georgia precedent clearly establishes that remaining silent and failing to object is an insufficient affirmative act to waive a defendant's statutory demand for a speedy trial. State v. Marshall, 337 Ga. App. 336, 787 S.E.2d 290 (2016).

Discharge properly refused since demand not actually filed. — Trial judge did not err in refusing to discharge and acquit the defendant of the offenses charged since the demand upon which the

Discharge and Acquittal (Cont'd)

defendant relied bore no filing stamp, and the trial court made a specific determination, on the basis of the evidence presented at the dismissal hearing, that the demand had never actually been filed. Head v. State, 189 Ga. App. 111, 375 S.E.2d 46, cert. denied, 189 Ga. App. 912, 375 S.E.2d 46 (1988).

Denial of the defendant's motion for discharge and acquittal predicated on the defendant's failure to obtain special permission for an out-of-time speedy trial demand was proper because the trial court's statements regarding the defendant's options after the defendant waived pending demands did not amount to a grant of permission. Jackson v. State, 231 Ga. App. 187, 498 S.E.2d 780 (1998).

Because the defendant waived the defendant's original demand for a speedy trial and never filed another demand, the defendant had no valid demand on which to rely for a second statutory claim; thus, the defendant was not entitled to have a second motion for discharge and acquittal granted. Oni v. State, 285 Ga. App. 342, 646 S.E.2d 312 (2007).

Nolle prosequi as discharge. — When at the term next succeeding that in which trial is demanded the solicitor general (now district attorney) asks that the case be nol prossed, and the court so orders, the defendant, not consenting to that order but insisting on the defendant's demand for trial, is entitled to a discharge. Hurt v. State, 62 Ga. App. 878, 10 S.E.2d 136 (1940).

Entry of a nolle prosse did not prevent the defendant from claiming the benefits of O.C.G.A. § 17-7-170, and since the defendant had been automatically discharged and acquitted by operation of law, the defendant was entitled to a formal acknowledgment of discharge and acquittal. Coker v. State, 181 Ga. App. 559, 353 S.E.2d 56 (1987).

Entry of an order of nolle prosequi in a case does not prevent a defendant as a matter of law from claiming the benefits of O.C.G.A. § 17-7-170. The trial court should entertain the merits of a motion for autrefois acquit based upon O.C.G.A. § 17-7-170(b) and decide the motion as required by O.C.G.A. § 15-6-21(b). A refusal to rule on the merits of the defendant's motion for autrefois acquit on the basis of any intervening nolle prosequi is deemed a final and appealable determination by the court. Ciprotti v. State, 187 Ga. App. 61, 369 S.E.2d 337 (1988); State v. Daniels, 206 Ga. App. 443, 425 S.E.2d 366 (1992).

Defendant who has filed a demand for a speedy trial in one term of court is not automatically acquitted if the indictment is thereafter nolle prosequi in the next succeeding term. It is the state's failure to try a defendant pursuant to the defendant's original demand for a speedy trial, not the subsequent entry of a nolle prosequi, that results in an automatic acquittal. Knight v. State, 197 Ga. App. 250, 398 S.E.2d 202 (1990); State v. Daniels, 206 Ga. App. 443, 425 S.E.2d 366 (1992).

Although the defendant was entitled to discharge and acquittal of charges set forth in a first indictment (subsequently nolle prossed) and repeated in reindictment, the speedy trial demand directed at the first indictment was ineffective as to a new count added by the reindictment. State v. Daniels, 206 Ga. App. 443, 425 S.E.2d 366 (1992).

Nolle prosequi does not bar benefits. — Inasmuch as more than two terms of court passed since the defendant filed a demand for trial and juries were impaneled for the purpose of trying criminal cases during each of those terms, the defendant is entitled to a discharge and acquittal because the entry of the nolle prosequi did not prevent the defendant from claiming the benefits of O.C.G.A. § 17-7-170. Bond v. State, 212 Ga. App. 608, 442 S.E.2d 482 (1994).

Motion for discharge and acquittal constitutes a plea in bar. — When a person filed a motion for discharge and acquittal because of the failure to grant the person's demand for trial under this section, such a motion constituted a plea in bar. State v. Benton, 246 Ga. 132, 269 S.E.2d 470 (1980).

If a person files a motion for discharge and acquittal because of the failure to grant the person's demand for trial, such a motion constitutes a plea in

bar which is filed and ruled on before the person is put in jeopardy. State v. Benton, 246 Ga. 132, 269 S.E.2d 470 (1980).

If the offense is the same as that for which trial demanded, though differently designated, the accused may plead a discharge obtained under this section. Holt v. State, 38 Ga. 187 (1868).

Defendant may waive defendant's right to automatic discharge by some action on the defendant's part or on the part of defense counsel, such as defense counsel's own request for a continuance of the case. Parker v. State, 135 Ga. App. 620, 218 S.E.2d 324 (1975).

If the defendant filed and was granted a motion to suppress, and the state exercised the state's right to a direct appeal of the granting of the motion, the defendant, by virtue of having filed the motion, was deemed to have consented to the delay resulting from resolution of the appeal and to have waived the right to automatic discharge that would have otherwise been available as a result of the delay. State v. Waters, 170 Ga. App. 505, 317 S.E.2d 614 (1984).

Defendant was not entitled to discharge and acquittal when the defendant waived a right to be tried before expiration of the court term by requesting a postponement less than two weeks before expiration of the term and then filing a plea of former jeopardy and a request for a hearing on the plea. Jennings v. State, 230 Ga. App. 661, 497 S.E.2d 13 (1998).

Trial court correctly denied the defendant's motion for discharge and acquittal after counsel failed to appear due to noticed conflicts and the defendant acquiesced in the continuance of the case outside the period allowed by the demand for speedy trial. Fisher v. State, 244 Ga. App. 113, 534 S.E.2d 845 (2000).

Demand not waived by continuance. — Request for a three to four day continuance prior to the last week in which a trial could be held in accordance with the demand for a speedy trial did not waive the defendant's right to a speedy trial. Williams v. State, 216 Ga. App. 109, 454 S.E.2d 142 (1995).

Defendant's continued participation in a pre-trial hearing and acquiescence to a continuance proposed by the trial judge after the end of the second term of court did not constitute a waiver of the defendant's speedy trial rights and the defendant's demand was still in effect. Ringo v. State, 219 Ga. App. 753, 466 S.E.2d 660 (1996).

Burden of showing a waiver is on the state. Parker v. State, 135 Ga. App. 620, 218 S.E.2d 324 (1975).

Absence after the requisite time for discharge had passed would not waive rights under this section. Flagg v. State, 11 Ga. App. 37, 74 S.E. 562 (1912).

Proof required for reversal of denial of discharge. — That there are qualified juries at both terms must affirmatively appear to the Supreme Court in order for the Supreme Court to reverse a judgment of the superior court denying the discharge. Roebuck v. State, 57 Ga. 154 (1876).

Motion properly denied if prejudice not shown. — Denial of the defendant's O.C.G.A. § 17-7-170 motion for discharge and acquittal was affirmed when, inter alia: the defendant failed to show the defendant was prejudiced by delay in trial; there was no evidence of oppressive pretrial incarceration as all but a couple of months of the time the defendant was incarcerated before trial was attributable to service of other sentences; nor was there evidence of impairment of the defendant's defense due to the delay as none of the witnesses who testified at the first trial were allegedly unavailable. Weldon v. State, 262 Ga. App. 782, 586 S.E.2d 452 (2003).

Defendant's motion for discharge and acquittal was in a form sufficient to be recognized as a motion for speedy trial since the demand directly referred to O.C.G.A. § 17-7-170 and thus could be reasonably construed as a demand for trial under the statutory provisions. State v. Allen, 192 Ga. App. 730, 386 S.E.2d 394 (1989).

Trial court properly denied the defendant's motion and amended motion to withdraw a guilty plea as the entry of the plea waived any right to assert a speedy trial issue on appeal. Moreover, given the fact that the defendant was represented by counsel at the time both pro se speedy trial motions were filed, and absent evi-

Discharge and Acquittal (Cont'd)

dence that counsel filed or adopted the motions, no viable demand for a speedy trial existed in the record to support a discharge and acquittal based on O.C.G.A. § 17-7-170. Wallace v. State, 288 Ga. App. 480, 654 S.E.2d 442 (2007).

Trial court erred in denying the defendant's motion for discharge and acquittal on statutory speedy trial grounds because the state's contention that the defendant had failed to comply with O.C.G.A. § 17-7-170 since the defendant had not been physically present in court when the case was called for trial was misplaced; the reason the defendant was not physically present in court was that the defendant remained in state custody and had not been returned from prison to the courtroom. Gifford v. State, 301 Ga. App. 50, 686 S.E.2d 831 (2009).

Application

Nine-month delay following seven-year delay. — Since the issue of a seven-year trial delay had been addressed previously, denial of a motion to dismiss was proper as the court properly found the defendant was not prejudiced by a nine-month trial delay, especially since the defendant waited until the eve of trial to assert the defendant's right to a speedy trial. Brannen v. State, 262 Ga. App. 719, 586 S.E.2d 383 (2003).

Eleven-month delay. — Defendant's motion for discharge and acquittal should have been granted since an 11-month delay in the filing of the accusation was unreasonable, and the failure to file the accusation in a timely manner after the accusation was transferred to the state court was attributable to a clerical error by a court official, not to any failure of the defendant to follow the requirements set forth in O.C.G.A. § 17-7-170. Klinetob v. State, 194 Ga. App. 52, 389 S.E.2d 551 (1989).

Fourteen-month absence of necessary and material witness. — While the trial court was authorized to conclude that the "lead officer" in the prosecution against the defendant was a material and necessary witness who was unavailable for 14 months while the defendant's case was pending, and thus a continuance during that period was proper under O.C.G.A. § 17-8-31, despite the fact that no explanation was given for the remainder of the delay, given that the defendant failed to prove any of the other Barker v. Wingo factors in determining whether a speedy trial violation occurred, the defendant's motion to dismiss the indictment on speedy trial grounds was properly denied. Bell v. State, 287 Ga. App. 300, 651 S.E.2d 218 (2007), cert. denied, No. S08C0031, 2007 Ga. LEXIS 811 (Ga. 2007).

Fifteen-month delay. — Because the defendant failed to show evidence that any prejudice resulted by a 15-month delay in the filing of formal charges, specifically, evidence of either actual anxiety or concern or any specific evidence as to how the delay impaired the ability to present a defense, the trial court abused the court's discretion in finding otherwise. State v. Moore, 289 Ga. App. 99, 656 S.E.2d 156 (2007), cert. denied, No. S08C0808, 2008 Ga. LEXIS 483 (Ga. 2008).

A 27-month delay between the defendant's arrest and the date the defendant filed a motion to dismiss did not violate the defendant's right to a speedy trial when the state's primary reason for delay was to wait for several significant appellate court decisions, the defendant did not assert the defendant's statutory or constitutional right during the period of the delay, the defendant did not demonstrate any isolated or distinct oppressiveness, anxiety, or concern the defendant suffered due to incarceration, and the sole example of impairment of evidence, the memory lapses of police officers, worked to the defendant's advantage. Howard v. State, 215 Ga. App. 343, 450 S.E.2d 824 (1994).

A 67 month delay between arrest and placement of case on trial calendar was presumptively prejudicial and authorized the trial court to dismiss the case for violation of the defendant's speedy trial rights when the prosecutor told defense counsel that the case would be dead docketed; the state could not explain the reason for the delay; defense counsel, relying on the state's representation destroyed the defendant's file; critical evidence related to the scene no longer existed; and a defense witness had died.

State v. Redding, 274 Ga. 831, 561 S.E.2d 79 (2002).

Five-year delay. — Constitutional right of the defendant charged with vehicular homicide and hit and run to a speedy trial was violated when the defendant was not indicted for three years, without explanation, and two additional years of delay between the defendant's indictment and a possible trial were attributable to the state, despite the defendant's five-year delay in demanding a speedy trial because the defendant's delay was mitigated by the delay in indicting the defendant and by the delay in appointing counsel for the defendant until the statutory time for demanding a speedy trial under O.C.G.A. § 17-7-170(a). Hester v. State, 268 Ga. App. 94, 601 S.E.2d 456 (2004).

Superior court abused the court's discretion in dismissing an indictment on speedy trial grounds, despite a five-year delay in bringing the defendant to trial, which was held to be excessively long and not to be excused; however, because the delay was caused by the state's negligence or other court-related circumstances which were not to be weighed heavily against the state and because the defendant failed to assert a speedy trial violation or show prejudice from the delay, dismissal of the indictment was reversed. State v. Giddens, 280 Ga. App. 586, 634 S.E.2d 526 (2006).

Trial court did not abuse the court's discretion in finding that a defendant failed to show a constitutional violation of the defendant's right to a speedy trial and by denying the defendant's motion for discharge and acquittal with regard to the defendant's convictions for sexual assault as the defendant never filed a speedy trial demand; there was no evidence nor finding by the trial court that the state intentionally delayed the trial to impair the defendant's defense; the defendant's failure to assert either a statutory or constitutional right to a speedy trial was entitled to strong evidentiary weight against the defendant; and the fact that the defendant never filed a speedy trial demand suggested that the defendant was not suffering anxiety or stress from the delay. The reviewing court noted that the five year delay in bringing the defendant to trial was solely based on requests from defense counsel due to illness, death in the family, or death of an expert witness. Disharoon v. State, 288 Ga. App. 1, 652 S.E.2d 902 (2007).

Seven year delay, caused in part by the state's negligence in prosecuting the case and loss of a 911 tape critical to the defendant's claim of self defense, authorized the trial court to find that defendant was denied the defendant's constitutional right to a speedy trial. State v. Johnson, 274 Ga. 511, 555 S.E.2d 710 (2001).

Trial court's failure to apply proper case law balancing test. — Trial court erred by denying the defendant's motion to dismiss the indictment for pre-indictment delay and granting the defendant's motion to dismiss for delay in prosecution because the court failed to properly weigh the case law factors and improperly analyzed the defendant's claim for pre-indictment delay as a due process violation. State v. Curry, 317 Ga. App. 611, 732 S.E.2d 459 (2012).

Effect of guilty plea. — Because, during the term that a trial was required after the defendant's original speedy trial demand, a guilty plea hearing was held in lieu of a bench trial, the defendant's guilty plea constituted a withdrawal of the speedy trial demand. Thompson v. State, 240 Ga. App. 539, 524 S.E.2d 239 (1999).

Denial of motion to dismiss for lack of time to prepare defense. — Trial court did not err in denying the defendant's motion to dismiss the charges against the defendant based on the defendant's lack of sufficient time to prepare a defense since it did not appear that the defendant ever moved for a continuance, but rather it appeared that, acting through retained counsel, the defendant filed a demand for trial pursuant to O.C.G.A. § 17-7-170, at a time when the defendant was incarcerated in Alabama on unrelated charges, and that the defendant's subsequent trial in Georgia occurred during the last term in which the defendant could have been tried pursuant to that section. Miller v. State, 183 Ga. App. 563, 359 S.E.2d 359 (1987).

Distinction between capital and noncapital offenses for purposes of demanding trial. — Furman v. Georgia,

Application (Cont'd)

408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), which struck down punishment by death of persons convicted of certain capital offenses, did not have the effect of abolishing the category of "capital offenses" for purposes of determining the term of court by which a defendant must be given a trial, after having made the demand, before the defendant must be absolutely discharged and acquitted of the offense charged in the indictment. Letbedder v. State, 129 Ga. App. 196, 199 S.E.2d 270 (1973), cert. denied, 414 U.S. 1134, 94 S. Ct. 877, 38 L. Ed. 2d 759 (1974).

While the death penalty could not be constitutionally imposed for a rape conviction when the victim did not die, rape was still a capital offense, for purposes of the speedy trial statutes, O.C.G.A. §§ 17-7-170 and 17-7-171, because a determination that the death penalty could not be imposed did not affect the legislature's decision that rape was a crime for which the state should be allowed additional time to prepare the state's case, so, under O.C.G.A. § 17-7-171(b), the state had until the end of the third term of court following the term in which a speedy trial demand was made to try such a case. Merrow v. State, 268 Ga. App. 47, 601 S.E.2d 428 (2004).

If a multi-count indictment includes both capital and noncapital offenses, the time for trial upon a proper demand by a defendant is the time allowed under O.C.G.A. § 17-7-171 for the more serious offenses. Cleary v. State, 258 Ga. 203, 366 S.E.2d 677 (1988), overruled on other grounds, Mize v. State, 262 Ga. 489, 422 S.E.2d 180 (1992).

Armed robbery as a capital offense. — Conviction for armed robbery standing alone will not authorize the incorporation of the death penalty and for appellate jurisdictional purposes armed robbery was no longer a capital felony. Notwithstanding the above, armed robbery was still considered a capital offense under the aggravating circumstances provision of former Code 1933, § 27-2534 (see O.C.G.A. § 17-10-30). Simmons v. State, 149 Ga. App. 830, 256 S.E.2d 79 (1979).

Armed robbery was a capital offense even when the state does not seek the death penalty. It therefore falls under the three-term speedy trial requirements of Ga. L. 1952, p. 299, §§ 1 and 2 (see O.C.G.A. § 17-7-171), rather than the two-term requirement for noncapital offenses under former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170). Orvis v. State, 237 Ga. 6, 226 S.E.2d 570 (1976).

Notwithstanding that the death penalty can no longer be imposed, this punishment statute places the offense of armed robbery within the definition of a capital offense and the state was not required to try the defendant on the armed robbery charges by the end of the next term after the defendant's demand for trial. Accordingly, the trial court did not err in denying the defendant's motion for discharge and acquittal pursuant to O.C.G.A. § 17-7-170. White v. State, 202 Ga. App. 291, 414 S.E.2d 297 (1991).

This section did not apply to a murder indictment, which was a capital offense and may therefore affect the life of the defendant. Turner v. State, 136 Ga. App. 42, 220 S.E.2d 57 (1975).

Renovations to courthouse making it impossible to hold court. — Denial of the discharge by reason of the failure of the state to afford the defendant a trial pursuant to the defendant's demand is proper when renovations to the courthouse make it impossible to hold court. Stone v. State, 132 Ga. App. 697, 209 S.E.2d 116 (1974).

Defendant's acquiescence in defense counsel's delays. — Defendant waived the right to discharge and acquittal by acquiescing in defense counsel's numerous absences, which resulted in a continuance of the defendant's trial outside the period of speedy trial demand. State v. Dodge, 251 Ga. App. 361, 553 S.E.2d 83 (2001).

Defendant's agreement to extended discovery. — Since the defendant agreed to a proposed scheduling order that extended discovery and pushed the trial to beyond the speedy trial deadline, the defendant waived the right to an automatic discharge for the violation of O.C.G.A. § 17-7-170. Spencer v. State, 259 Ga. App.

664, 577 S.E.2d 817 (2003).

No special permission to file late. — Defendant was not entitled to a dismissal for the failure to try the defendant's criminal matter in a timely manner as the defendant's demand for a speedy trial was not filed during the term that the indictment was filed, nor was the demand filed during the next succeeding term as set forth in O.C.G.A. § 17-7-170(a); the trial court judge merely accepted the demand for filing, but the judge never indicated that the defendant had special permission to file the defendant's demand late. Rogers v. State, 271 Ga. App. 698, 610 S.E.2d 679 (2005).

Admissibility of evidence at resentencing hearing. — State was not barred from introducing, at the resentencing phase of the defendant's trial, evidence pertaining to crimes for which the defendant was acquitted under O.C.G.A. § 17-7-170(b). Such evidence would not be barred, either on grounds of collateral estoppel or double jeopardy, because the defendant was not being tried for those prior crimes. Morgan v. State, 257 Ga. 596, 361 S.E.2d 793 (1987), cert. denied, 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

Defendant reindicted. — Defendant, who did not file a new speedy trial demand after being reindicted but instead adopted an original demand, was entitled to discharge of the original charges, but the demand was ineffective as to an additional vehicular homicide charge that was added upon reindictment. Banks v. State, 251 Ga. App. 421, 554 S.E.2d 500 (2001).

Failure to request speedy trial for additional charges. — When the defendant was charged in city court with driving under the influence, being a less safe driver, serious injury by vehicle, hit and run, and failure to exercise due care, the defendant demanded a speedy trial, and the case was then transferred to superior court, and then the defendant was indicted for homicide by vehicle in the first degree, hit and run, less safe driver, and failure to exercise due care. Defendant's speedy trial demand was effective as to the charges which had been filed in city court because the city court had jury jurisdiction and two terms, and the defendant did not request the transfer to superior court, but the demand was not effective as to the new vehicular homicide charge; therefore, when the speedy trial time limits were violated, the defendant was entitled to discharge, under O.C.G.A. § 17-7-170(a) and (b), as to the charges carried over from city court to superior court, but was not entitled to discharge as to the vehicular homicide charge as the defendant did not file a new speedy trial demand after indictment. Sa v. State, 274 Ga. App. 773, 618 S.E.2d 616 (2005).

Defendant using demand to manipulate system. — Defendant was originally indicted on two charges of child molestation, but failed to make a speedy trial demand as to this indictment and was later re-indicted as to those two original charges, and additional charges as well, and timely filed a demand as to the second indictment. However, since the defendant failed to file a demand as to the original indictment, the defendant waived the defendant's rights with respect to the repeated charges, but not as to the new charges. Further, through defendant's attorney's petition for leave, the defendant consented to the passing of the defendant's case to the next term, and when the defendant's attorney then "revoked" the attorney's petition for leave late in the term, which impeded the trial court's scheduling ability, the appellate court found that the defendant was manipulating the judicial system and that the trial court should have denied the defendant's motion for discharge and acquittal on the remaining charges. State v. Summage, 266 Ga. App. 630, 597 S.E.2d 641 (2004).

Failure to file traffic citation. — Denial of a defendant's motion for discharge and acquittal on speedy trial grounds was upheld on appeal since to be effective a demand for a speedy trial must be filed in the court after the accusation or uniform traffic citation has been filed; since the traffic citation against the defendant was never filed with the trial court, the statutory demand for speedy trial under O.C.G.A. § 17-7-170 was never triggered. Walker v. State, 285 Ga. App. 529, 646 S.E.2d 734 (2007).

Traffic offenses. — Defendant's demand for a speedy trial upon receipt of a

Application (Cont'd)

uniform traffic citation and complaint form was not premature since such a citation itself contains the accusation, the preferring of which is a prerequisite to a demand for speedy trial. Majia v. State, 174 Ga. App. 432, 330 S.E.2d 171, aff'd, 254 Ga. 660, 333 S.E.2d 834 (1985).

Uniform traffic citation does not qualify as an accusation under O.C.G.A. § 17-7-170 and, therefore, a speedy trial demand filed after receipt of the citation was premature. State v. McKenzie, 184 Ga. App. 191, 361 S.E.2d 54 (1987).

Defendant did not make a timely claim for speedy trial when the traffic citations had been stamped January 15 and the defendant's demand for speedy trial was filed on May 21, which did not satisfy the requirement that the request be filed within the next two terms of court. Even if the citations were not filed in the court on January 15 so that the time for demand began with the filing of the formal accusations on July 1, then the defendant's request would be premature. State v. Black, 213 Ga. App. 331, 444 S.E.2d 368, cert. denied, No. S94C1374, 1994 Ga. LEXIS 929 (1994).

Mere issuance of a uniform traffic citation, without subsequently filing the citation with the clerk of the courts, is not sufficient to authorize the entry of a filed demand for speedy trial pursuant to O.C.G.A. § 17-7-170(a). Ghai v. State, 219 Ga. App. 479, 465 S.E.2d 498 (1995).

Speedy trial demand is premature and a nullity if the demand is filed before the uniform traffic citation or accusation is filed with the court. State v. Stang, 228 Ga. App. 204, 491 S.E.2d 382 (1997).

Defendant's speedy trial demand was premature when the demand was filed prior to the filing of misdemeanor traffic citations in state court. Ellsworth v. State, 232 Ga. App. 164, 500 S.E.2d 642 (1998).

Defendant did not file a speedy trial demand until two terms after the traffic citations were filed; thus, the demand was untimely under O.C.G.A. § 17-7-170(a) and the trial court properly denied the defendant's motion for discharge and acquittal. Parks v. State, 239 Ga. App. 333, 521 S.E.2d 370 (1999).

Filing of uniform traffic citation. — Right to demand a speedy trial of a traffic offense in state court attaches when the uniform traffic citation is filed with the court, not only when a formal accusation is filed. State v. Gerbert, 267 Ga. 169, 475 S.E.2d 621 (1996), reversing State v. Gerbert, 219 Ga. App. 720, 467 S.E.2d 177 (1995); Tyler v. State, 224 Ga. App. 550, 481 S.E.2d 228 (1997).

First possible opportunity for the defendant to demand a speedy trial is the state's filing of a uniform traffic citation or a formal accusation, if no citation has been filed. Shire v. State, 225 Ga. App. 306, 483 S.E.2d 694 (1997).

Speedy trial demand filed before the state filed uniform traffic citations or an accusation with the court was premature and a nullity. Millan v. State, 231 Ga. App. 121, 497 S.E.2d 664 (1998).

When uniform traffic citation is a "found" accusation. — It is not until the traffic violations bureau loses jurisdiction to the state court under O.C.G.A. § 40-13-62 that a uniform traffic citation becomes an accusation and is "found" for purposes of O.C.G.A. § 17-7-170. Keller v. State, 183 Ga. App. 717, 359 S.E.2d 714 (1987).

When the state filed uniform traffic citations with the court, the citations functioned as an accusation, commenced the prosecution, and established the term of court at which the right to a speedy trial attached. Clark v. State, 236 Ga. App. 130, 510 S.E.2d 616 (1998), aff'd, 271 Ga. 519, 520 S.E.2d 694 (1999).

Defendant's demand for a speedy trial was not timely filed since the demand was filed in the next term following the filing of the formal accusation, rather than in the next term following the filing of the uniform traffic citation. Clark v. State, 271 Ga. 519, 520 S.E.2d 694 (1999), affirming Clark v. State, 236 Ga. App. 130, 510 S.E.2d 616 (1998).

Demands for speedy trial filed in a probate court, which was not a court of record, were ineffective; thus, if cases were transferred to the state court and the defendants did not file demands for speedy trial, the state court did not err in denying the defendants' motions for discharge and acquittal on such basis.

Fausnaugh v. State, 244 Ga. App. 263, 534 S.E.2d 554 (2000).

Dismissal of defendant's demand for speedy trial was improper when no affirmative act of the accused delayed the trial during the period mandated by the defendant's demand. Ciprotti v. State, 190 Ga. App. 639, 379 S.E.2d 802 (1989).

Motion for acquittal correctly denied. — See Caracena v. State, 186 Ga. App. 763, 368 S.E.2d 532 (1988).

When 13 people were each charged by consecutively numbered accusations with theft from their common employer, and each filed a motion requesting that all motions filed by any of them be adopted as motions made by all, but no written order was entered on the motions to adopt, the trial court correctly denied a motion for acquittal predicated on the state's failure to bring nine of the defendants to trial in the term within which the defendants' demands for trial had been made or the next succeeding term, as only one defendant (not one of the nine) actually filed a demand for trial. Jordan v. State, 194 Ga. App. 415, 390 S.E.2d 614, cert. denied, 194 Ga. App. 911, 390 S.E.2d 614 (1990), aff'd sub nom., Parks v. Norred & Assocs., 206 Ga. App. 494, 426 S.E.2d 12 (1992).

Defendant's motion for discharge and acquittal was correctly denied since the defendant's first demand for speedy trial was invalid because the defendant filed the demand before the indictment was returned and the defendant's second demand was filed after the time allotted under O.C.G.A. § 17-7-171(a). Freeman v. State, 232 Ga. App. 715, 503 S.E.2d 601 (1998).

Trial court acted properly in denying the defendant's motion for discharge and acquittal when, after filing a demand, the defendant withdrew the demand in an attempt to delay trial, filed an appeal, and then insisted that the demand was somehow automatically revived upon remittitur. Doehling v. State, 238 Ga. App. 293, 518 S.E.2d 137 (1999).

Since the record showed that juries were impaneled and qualified to try the defendant during the December term after the defendant's demand was filed, the defendant's demand for speedy trial was effective in the December term; since the record further showed that juries were impaneled and qualified to try the defendant during the February term, the defendant was entitled to discharge and acquittal. Campbell v. State, 199 Ga. App. 25, 403 S.E.2d 882 (1991).

Since the defendant's motion to suppress was not granted and appealed by the state, but derived more than two terms after the demand for trial was filed, and there was no evidence that the defendant took any action by which the defendant or defendant's counsel caused or consented to a delay of the trial to a subsequent term, the defendant was entitled to discharge and acquittal. Ballew v. State, 211 Ga. App. 672, 440 S.E.2d 76 (1994).

Trial court erred in denying the defendant's motion for discharge and acquittal as the defendant demanded a speedy trial during the trial court's September term, and did not waive that demand when the trial court failed to timely notify the defendant of the defendant's trial date during the November term, which caused the defendant to miss the defendant's trial since the defendant's trial was not held within the time provided for by Georgia statutory law. Clark v. State, 259 Ga. App. 573, 578 S.E.2d 184 (2003).

Trial court erred in denying defendant's motion to dismiss which alleged a speedy trial violation as the delay in bringing the defendant to trial was prejudicial, especially when, after an assertion of the right, an additional seven months passed before the court ruled on the claim, and in the interim, an alleged material defense witness died. Hardeman v. State, 280 Ga. App. 168, 633 S.E.2d 595 (2006).

Trial court did not err in failing to grant the defendant a discharge and acquittal on statutory speedy trial grounds because the defendant failed to file a valid demand pursuant to O.C.G.A. § 17-7-170, but filed a pro se demand while represented by counsel. Smith v. State, 332 Ga. App. 849, 775 S.E.2d 211 (2015).

Demand sufficient to invoke section. — Although the defendants' demand for trial did not specifically reference O.C.G.A. § 17-7-170, because the defendants' demand for trial both requested a speedy trial and recited the style of the

Application (Cont'd)

case and the indictment number to which the demand applied, the demand was sufficient to invoke the provisions of that section providing for discharge and acquittal. Baker v. State, 212 Ga. App. 731, 442 S.E.2d 815 (1994).

Request for final disposition of detainers is not demand for trial. — Request for final disposition of detainers on a prisoner's record (see O.C.G.A. § 42-6-1 et seq.) is not the equivalent of a demand for trial and the failure to try the inmate at the term at which such request is made or at the next succeeding term does not authorize the inmate's discharge and acquittal of the offense charged in the pending indictment, accusation, or information. Spurlin v. State, 228 Ga. 2, 183 S.E.2d 765 (1971).

Appeals

Denial of a motion under O.C.G.A. § 17-7-170 is directly appealable. Smith v. State, 169 Ga. App. 251, 312 S.E.2d 375 (1983), overruled on other grounds, State v. Collins, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

Denial of a motion to dismiss based upon O.C.G.A. § 17-7-170 is directly appealable under O.C.G.A. § 5-6-34(a). Hubbard v. State, 254 Ga. 694, 333 S.E.2d 827 (1985).

Although not technically a final judgment, the denial of a motion to dismiss (more properly, a motion for acquittal) based upon O.C.G.A. § 17-7-170 is directly appealable under O.C.G.A. § 5-6-34(a). Cook v. State, 183 Ga. App. 720, 359 S.E.2d 716 (1987).

Defendant's direct appeal from the denial of a speedy trial motion to dismiss was proper given the state of Georgia law; however, the motion was properly denied because the defendant, who had been incarcerated in the interim period, was equally responsible for the pretrial delay, never asserted the right to trial, never requested disposition of the subject offenses, suffered no prejudice, and did not suffer oppressive pretrial incarceration. Lamar v. State, 262 Ga. App. 735, 586 S.E.2d 416 (2003).

State's right of appeal from grant of motion for discharge and acquittal. — State had the right under Ga. L. 1973, p. 297, § 1 (see O.C.G.A. § 5-7-1) to appeal a trial court's grant of a criminal defendant's motion for discharge and acquittal since such motion was based on the denial of the defendant's demand for trial pursuant to former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170). State v. Benton, 246 Ga. 132, 269 S.E.2d 470 (1980).

State's appeal tolled speedy trial period. — When the defendant's motion to suppress was granted and the state appealed, the appeal tolled, but did not waive, the speedy trial period; the defendant's subsequent requests for bond to allow participation in rehabilitation programs did not demonstrate a desire to delay the trial and therefore did not waive the defendant's speedy trial demand. Banks v. State, 251 Ga. App. 421, 554 S.E.2d 500 (2001).

Time for trial after interlocutory appeal. — On defendant's interlocutory appeal, after filing of the remittitur in the lower court, the state has the remainder of that term and one additional regular term of court in which to try the defendant pursuant to the defendant's demand for trial, provided there are juries impaneled and qualified to try the defendant. Henry v. State, 214 Ga. 527, 449 S.E.2d 79 (1994).

Interlocutory appeal not required. — Criminal defendant is not required to follow the interlocutory procedures of O.C.G.A. § 5-6-34(b) when appealing, prior to the conclusion of a trial on the merits, from the denial of a plea in bar based on O.C.G.A. § 17-7-170. Hubbard v. State, 254 Ga. 694, 333 S.E.2d 827 (1985).

Recommencement of demand clock after interlocutory appeal. — On defendant's interlocutory appeal, filing of the remittitur in the lower court is the point in time at which the demand clock resumes ticking on a pre-appeal demand for trial, not when the trial court makes the appellate court judgment the judgment of the lower court, overruling Ramirez v. State, 211 Ga. App. 356, 439 S.E.2d 4 (1993). Henry v. State, 214 Ga. 527, 449 S.E.2d 79 (1994).

OPINIONS OF THE ATTORNEY GENERAL

In order to receive the right or privilege granted under this section, the defendant must show a demand made in accordance with the statute. 1965-66 Op. Att'y Gen. No. 65-70.

Demand by person already serving another sentence. — Individual making a proper demand for trial under this section must be produced for trial within the statutorily allotted time, even though the individual may be serving another sentence under the jurisdiction of the Board of Offender Rehabilitation at the time of demand. 1965-66 Op. Att'y Gen. No. 65-70.

Fact that a demand for jury trial is filed on the last day of the term has no legal significance as long as there are jurors impaneled and qualified to try the case. 1984 Op. Att'y Gen. No. U84-39.

Section inapplicable to probate courts. — Provisions of O.C.G.A. § 17-7-170 do not apply to probate courts, since no juries are available in that court, and therefore there would be no "juries inpaneled and qualified to try" the defendant. 1986 Op. Att'y Gen. No. U86-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 267 et seq., 278 et seq.

C.J.S. — 16B C.J.S., Constitutional Law, § 1328. 16C C.J.S., Constitutional Law, § 1696. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 554. 23 C.J.S., Criminal Procedure and Rights of the Accused, §§ 793 et seq., 820 et seq.

ALR. — Discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense, 3 A.L.R. 519.

Remedy for delay in bringing accused to trial or to retrial after reversal, 58 A.L.R. 1015.

Waiver or loss of defendant's right to speedy trial in criminal case, 129 A.L.R. 572; 57 A.L.R.2d 302.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Continuance of criminal case because of illness of accused, 66 A.L.R.2d 232.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

Illness or incapacity of judge, prosecuting officer, or prosecution witness as justifying delay in bringing accused speedily to trial — state cases, 78 A.L.R.3d 297.

Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 A.L.R.4th 899.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial — spoken words, 102 A.L.R.6th 279.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial — laughter, crying, and other nonverbal sounds by spectators, 103 A.L.R.6th 35.

What constitutes accused's consent to court's discharge of jury or to grant of motion for mistrial which will constitute waiver of former jeopardy plea — silence or failure to object or protest, 103 A.L.R.6th 137.

Construction and application of Speedy Trial Act, 18 USCS §§ 3161 to 3174 — United States Supreme Court cases, 46 A.L.R. Fed. 2d 129.

17-7-171. Time for demand for speedy trial in capital cases; discharge and acquittal when no trial held before end of two court terms of demand; counting of terms in cases in which death penalty is sought; special pleas of incompetency.

(a) Any person accused of a capital offense may enter a demand for speedy trial at the term of court at which the indictment is found or at the next succeeding regular term thereafter; or, by special permission of the court, the defendant may at any subsequent term thereafter demand a speedy trial. The demand for speedy trial shall be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned or, if the case is not assigned, upon the chief judge of the court in which the case is pending. A demand for trial filed pursuant to this Code section shall be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. Such demand shall clearly be titled "Demand for Speedy Trial"; reference this Code section within the pleading; and identify the indictment number or accusation number for which such demand is being made. The demand for speedy trial shall be binding only in the court in which such demand is filed, except where the case is transferred from one court to another without a request from the defendant.

(b) If more than two regular terms of court are convened and adjourned after the term at which the demand for speedy trial is filed and the defendant is not given a trial, then the defendant shall be absolutely discharged and acquitted of the offense charged in the indictment, provided that at both terms there were juries impaneled and qualified to try the defendant and provided, further, that the defendant was present in court announcing ready for trial and requesting a trial on the indictment.

(c) In cases involving a capital offense for which the death penalty is sought, if a demand for speedy trial is entered, the counting of terms under subsection (b) of this Code section shall not begin until the convening of the first term following the completion of pretrial review proceedings in the Supreme Court under Code Section 17-10-35.1.

(d) If a defendant files a special plea of incompetency to stand trial pursuant to Code Section 17-7-130 or if the court, pursuant to Code Section 17-7-129, conducts a trial on the competency of the defendant, the period of time during which such matter is pending shall not be included in the computation of determining whether a demand for speedy trial has been satisfied.

History. — Ga. L. 1952, p. 299, §§ 1, 2; Ga. L. 1983, p. 452, § 3; Ga. L. 1988, p. 1437, § 3; Ga. L. 1990, p. 8, § 17; Ga. L. 2006, p. 893, § 2/HB 1421; Ga. L. 2011, p. 372, § 4/HB 421.

Cross references. — Requests by in-

mates for final disposition of indictments or accusations pending against the inmates, § 42-6-3.

Law reviews. — For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005); 58 Mercer L. Rev. 83 (2006). For annual survey on the death penalty, see 64 Mercer L. Rev. 109 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Appeals

General Consideration

Rights attach upon indictment but constitutional right to speedy trial attaches upon arrest. — Although Ga. L. 1952, p. 299, §§ 1 and 2 and former Code 1933, § 27-1901 (see O.C.G.A. §§ 17-7-170 and 17-7-171) prescribe a means of asserting one's right to a speedy trial after indictment, there was a right under U.S. Const., amend. 6 to a speedy trial which attaches at arrest and can be asserted thereafter. Haisman v. State, 242 Ga. 896, 252 S.E.2d 397 (1979).

Unlike the statutory protections conferred by O.C.G.A. §§ 17-7-170 and 17-7-171 that attach with formal indictment or accusation, the Sixth Amendment provides constitutional protection over and above the statutory provisions and under that amendment, the right to a speedy trial attaches upon arrest and can be asserted thereafter; a trial court properly denied the defendant's statutory speedy trial demand when no indictment was filed, but improperly overlooked or failed to consider the defendant's constitutional speedy trial demand, and thus, the trial court's judgment was vacated and the case was remanded with direction to the trial court to address the defendant's constitutional claims. Smith v. State, 266 Ga. App. 529, 597 S.E.2d 414 (2004).

O.C.G.A. § 17-7-171 does not deprive defendants of equal protection of the law, despite the possibility of relatively longer trial waitings than in those circuits with more terms of court per year. Henry v. State, 263 Ga. 417, 434 S.E.2d 469 (1993).

Distinction between capital and noncapital offenses for purpose of demanding trial. — Furman v. Georgia, 508 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), which struck down punishment by death of persons convicted of certain capital offenses did not have the effect of abolishing the category of "capital offense" for purposes of determining the term of court by which a defendant must be given a trial, after having made the demand, before the defendant must be absolutely discharged and acquitted of the offense charged in the indictment. Letbedder v. State, 129 Ga. App. 196, 199 S.E.2d 270 (1973), cert. denied, 414 U.S. 1134, 94 S. Ct. 877, 38 L. Ed. 2d 759 (1974).

While the death penalty could not be constitutionally imposed for a rape conviction when the victim did not die, rape was still a capital offense for purposes of the speedy trial statutes, O.C.G.A. §§ 17-7-170 and 17-7-171, because a determination that the death penalty could not be imposed did not affect the legislature's decision that rape was a crime for which the state should be allowed additional time to prepare the state's case, so, under O.C.G.A. § 17-7-171(b), the state had until the end of the third term of court following the term in which a speedy trial demand was made to try such a case. Merrow v. State, 268 Ga. App. 47, 601 S.E.2d 428 (2004).

Armed robbery is a capital offense within the purview of Ga. L. 1952, p. 299, §§ 1 and 2 (see O.C.G.A. § 17-7-171). Simmons v. State, 149 Ga. App. 830, 256 S.E.2d 79 (1979).

Even when state does not seek death penalty. — Armed robbery is a capital offense even if the state does not seek the death penalty, and therefore falls under the three-term speedy trial requirements of Ga. L. 1952, p. 299, §§ 1 and 2

General Consideration (Cont'd)

(see O.C.G.A. § 17-7-171) rather than the two-term requirement for noncapital offenses under former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170). Orvis v. State, 237 Ga. 6, 226 S.E.2d 570 (1976).

O.C.G.A. § 17-7-171(a) does not require that jurors be impaneled at the time the demand is entered in order for the demand to be timely; it simply requires that the demand be entered either at the term of court at which the indictment was found or at the next succeeding regular term thereafter. Mize v. State, 262 Ga. 489, 422 S.E.2d 180 (1992).

O.C.G.A. § 17-7-171(b) provides a three-prong procedure which must be complied with in order for a demand for speedy trial to be effective. First, the demand must actually be filed with the court. Second, there must be juries impaneled and qualified to try the defendant at both of the first two regular terms of court following the term at which the demand is filed. Third, at some time during both of the first two regular terms of court following the term at which the demand is filed, the defendant must be present in court announcing ready for trial and requesting a trial on the indictment. Smith v. State, 261 Ga. 298, 404 S.E.2d 115 (1991).

Because pretrial review proceedings were not yet complete in the Supreme Court, the counting of terms under O.C.G.A. § 17-7-171(b) had not begun, and the trial court's denial of the defendant's motion for discharge and acquittal was proper. Franks v. State, 266 Ga. 707, 469 S.E.2d 651 (1996).

Terms of court control when demand required. — Defendant failed to file a new demand for trial following dismissal of the defendant's first demand and did not file a motion for dismissal of the indictment before proceeding to trial after five terms of court passed caused a waiver of the defendant's right to a speedy trial by the defendant's own acts or failure to act. Mize v. State, 262 Ga. 489, 422 S.E.2d 180 (1992).

On defendant's interlocutory appeal, after filing of the remittitur in the lower court, the state has the remainder of that term and one additional regular term of court in which to try the defendant pursuant to the defendant's demand for trial, provided there are juries impaneled and qualified to try the defendant. Henry v. State, 214 Ga. 527, 449 S.E.2d 79 (1994).

Defendant was indicted for felony murder and other charges during the June 2014 term of the trial court; the defendant did not file a valid demand in that term or the subsequent September 2014 term; and the December 2014 term began on December 1, pursuant to O.C.G.A. § 15-6-3(20), making the defendant's December 5 speedy trial demand untimely under O.C.G.A. § 17-7-171(a). Johnson v. State, 300 Ga. 252, 794 S.E.2d 60 (2016).

Waiver of the demand. — Speedy trial demand in a non-capital case did not impose a requirement to announce a readiness for trial; rather, a request for a continuance outside the term of the demand waived the speedy trial demand. Dingler v. State, 281 Ga. App. 721, 637 S.E.2d 120 (2006).

Although statutory right asserted untimely, court was required to consider constitutional factors. — Trial court properly denied a felony murder defendant's motion as to the defendant's statutory speedy trial right as untimely under O.C.G.A. § 17-7-171(a); however, the trial court failed to make the required findings and conclusions to enable review of the defendant's motion with respect to the defendant's constitutional speedy trial right under Ga. Const. 1983, Art. I, Sec. I, Para. XI, requiring remand. Johnson v. State, 300 Ga. 252, 794 S.E.2d 60 (2016).

Mere silence or inaction does not satisfy O.C.G.A. § 17-7-171. Crawford v. State, 252 Ga. App. 722, 556 S.E.2d 888 (2001).

When special permission of court needed to file motion for speedy trial. — Defendant whose conviction was set aside, but who was not reindicted needed special permission of the court to file a motion for speedy trial in order to invoke the benefits of O.C.G.A. § 17-7-171. Thus, the trial court did not err in refusing to grant the defendant's motion for acquittal. Abiff v. State, 260 Ga. 434, 396 S.E.2d 483 (1990), cert. denied, 497 U.S. 1072, 111 S. Ct. 797, 112 L. Ed. 2d 858 (1991).

Court cannot make out-of-time demand. — While a trial court can grant a defendant special permission to file an out-of-time demand for speedy trial, a trial court cannot actually make that demand for defendants. Smith v. State, 261 Ga. 298, 404 S.E.2d 115 (1991).

O.C.G.A. § 17-7-171 must be complied with in order to be discharged and acquitted thereunder. Dennis v. Grimes, 216 Ga. 671, 118 S.E.2d 923 (1961); Burns v. State, 265 Ga. 763, 462 S.E.2d 622 (1995), overruled on other grounds, Walker v. State, 290 Ga. 696, 723 S.E.2d 894 (2012).

Conditions that the defendant be present in court at each term, announcing ready, and that the defendant request a trial at that term must be complied with for the defendant to be discharged and acquitted. Hakala v. State, 225 Ga. 629, 170 S.E.2d 406 (1969).

Demand not a prerequisite to invoke sanction of acquittal. — Because the filing of a statutory speedy trial demand was not a prerequisite to seeking discharge and acquittal based on a denial of the defendant's constitutional rights to a speedy trial, such could not serve as a valid argument to overturn the trial court's order in granting the defendant a discharge and acquittal on speedy trial grounds. State v. Moore, 289 Ga. App. 99, 656 S.E.2d 156 (2007), cert. denied, No. S08C0808, 2008 Ga. LEXIS 483 (Ga. 2008).

If speedy trial not denied, release not authorized. — If the defendant is not denied a speedy trial, an appellate court is not authorized to order the defendant's release under this section. Butler v. State, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

Terms of court. — Ga. L. 1996, p. 627, which establishes two terms of court for the City Court of Atlanta, is not unconstitutional because it violates equal protection. Cross v. State, 272 Ga. 282, 528 S.E.2d 241 (2000).

Cited in Horne v. State, 212 Ga. 421, 93 S.E.2d 356 (1956); Horne v. State, 94 Ga. App. 522, 95 S.E.2d 288 (1956); Hakala v. State, 225 Ga. 629, 170 S.E.2d 406 (1969); Mays v. State, 229 Ga. 609, 193 S.E.2d 825 (1972); Letbedder v. State, 129 Ga. App. 196, 199 S.E.2d 270 (1973); Treadwell v. State, 233 Ga. 468, 211 S.E.2d 760 (1975); Turner v. State, 136 Ga. App. 42, 220 S.E.2d 57 (1975); Holmes v. State, 136 Ga. App. 572, 222 S.E.2d 121 (1975); Sheats v. State, 237 Ga. 757, 229 S.E.2d 600 (1976); Arnold v. State, 239 Ga. 752, 238 S.E.2d 876 (1977); Gibson v. Giles, 242 Ga. 720, 251 S.E.2d 231 (1978); High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983); Buxton v. State, 253 Ga. 137, 317 S.E.2d 538 (1984); Satterfield v. State, 256 Ga. 593, 351 S.E.2d 625 (1987); Matthews v. State, 181 Ga. App. 819, 354 S.E.2d 175 (1987); Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991); Redd v. State, 261 Ga. 300, 404 S.E.2d 264 (1991); Walker v. State, 216 Ga. App. 236, 454 S.E.2d 156 (1995); State v. McKnight, 265 Ga. 701, 462 S.E.2d 142 (1995); Freeman v. State, 232 Ga. App. 715, 503 S.E.2d 601 (1998); Azizi v. State, 274 Ga. 207, 274 A. 207, 553 S.E.2d 273 (2001); Herndon v. State, 277 Ga. App. 374, 626 S.E.2d 579 (2006); In the Interest of M.D.H., 300 Ga. 46, 793 S.E.2d 49 (2016).

Application

Motion should have been denied when prejudice from delay not shown. — Because the defendant failed to show evidence that any prejudice resulted by a 15-month delay in the filing of formal charges, specifically, evidence of either actual anxiety or concern or any specific evidence as to how the delay impaired the ability to present a defense, the trial court abused the court's discretion in finding otherwise. State v. Moore, 289 Ga. App. 99, 656 S.E.2d 156 (2007), cert. denied, No. S08C0808, 2008 Ga. LEXIS 483 (Ga. 2008).

Applying four-part Barker speedy trial test: (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right to a speedy trial; and (4) prejudice to the defendant, the appeals court decided that the defendant's U.S. Const. amend. 6, Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), and O.C.G.A. § 17-7-171, speedy trial rights were not violated—inter alia deciding that the three-year delay from arrest to trial was presumptively prejudicial, that the loss of DUI blood test result evidence was an

Application (Cont'd)

equal loss to the defendant and the state, and that the defendant's delay in asserting the right was an indication that the defendant was not anxious or stressed. Allen v. State, 268 Ga. App. 161, 601 S.E.2d 485 (2004).

Under the Barker test, passage of 26 to 27 months between the defendant's arrest and the trial, even though the defendant was in state custody on another sentence, did not violate speedy trial rights as there was no showing that the state dragged the state's feet in any effort to impede the defendant's defense. Brown v. State, 277 Ga. App. 169, 626 S.E.2d 128 (2006).

Nine month delay acceptable. — Nine-month delay between a defendant's indictment for murder and the defendant's filing of a motion to dismiss the indictment on constitutional grounds was not a speedy trial violation under the Sixth Amendment as the defendant filed no demand for a speedy trial under O.C.G.A. § 17-7-171; did not raise the speedy trial issue for nine months; was imprisoned on other charges during those nine months; and showed no prejudice from the delay. Jones v. State, 284 Ga. 320, 667 S.E.2d 49 (2008).

Twelve month delay acceptable. — Trial court did not err when the court denied the defendant's motion to dismiss based on a purported violation of the defendant's constitutional right to a speedy trial because the circumstances of the case warranted a finding that the twelve-month, ten-day delay between the defendant's indictment and the filing of the defendant's motion to dismiss was not presumptively prejudicial. The defendant was serving a sentence on an unrelated charge in Mississippi when the indictment was returned, a requisition warrant had to be obtained from the Mississippi Governor, which process was initiated within a month of the defendant's indictment and took three months before the warrant was issued, and the defendant was brought to Georgia two months after the warrant issued and was arraigned approximately two months later. Rogers v. State, 286 Ga. 387, 688 S.E.2d 344 (2010).

54 month delay. — Trial court did not abuse the court's discretion in denying a defendant's motion to dismiss on the basis that the state violated the defendant's right to a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) because although the 54-month delay between the defendant's arrest and the filing of the defendant's motion was presumptively prejudicial, and the state offered no explanation for the delay, the defendant did not file a request for speedy trial pursuant to O.C.G.A. § 17-7-171, the defendant did not assert the defendant's constitutional right to a speedy trial for the 54 months between the defendant's arrest and the filing of the defendant's motion to dismiss, and the trial court specifically found that the defendant failed to establish prejudice; the defendant's late assertion of the defendant's constitutional right to a speedy trial weighed heavily against the defendant as did the defendant's failure to show prejudice in light of such delay. Falagian v. State, 300 Ga. App. 187, 684 S.E.2d 340 (2009), overruled on other grounds, McNair v. State, 293 Ga. 282 (2013).

Five year delay acceptable. — Superior court abused the court's discretion in dismissing an indictment on speedy trial grounds, despite a five-year delay in bringing the defendant to trial, which was held to be excessively long and not to be excused; however, because the delay was caused by the state's negligence or other court-related circumstances which were not to be weighed heavily against the state and because the defendant failed to assert a speedy trial violation or show prejudice from the delay, dismissal of the indictment was reversed. State v. Giddens, 280 Ga. App. 586, 634 S.E.2d 526 (2006).

Despite the state's five-year delay in bringing the defendant's child molestation case to trial, the defendant's motion to dismiss based on the defendant's speedy trial right was denied because the defendant waited more than five years to assert the defendant's statutory right under O.C.G.A. § 17-7-171, and the defendant failed to show any prejudice resulting from the delay. Arbegast v. State, 301 Ga. App. 462, 688 S.E.2d 1 (2009), cert. de-

nied, No. S10C0630, 2010 Ga. LEXIS 348 (Ga. 2010).

Negligence of state in trying defendant not always harmful. — Although the state was negligent in failing to bring the defendant to trial in a timely fashion, that consideration was outweighed by the facts that the defendant suffered little actual prejudice from the delay and no unduly oppressive pretrial incarceration, and waited a significant amount of time before asserting a speedy trial right; hence, the defendant's constitutional rights to a speedy trial were not violated. Christian v. State, 281 Ga. 474, 640 S.E.2d 21 (2007).

Speedy trial rights violated. — Trial court erred in denying the defendant's motion to dismiss which alleged a speedy trial violation as the delay in bringing the defendant to trial was prejudicial, especially when, after an assertion of the right, an additional seven months passed before the court ruled on the claim, and, in the interim, an alleged material defense witness died. Hardeman v. State, 280 Ga. App. 168, 633 S.E.2d 595 (2006).

Speedy trial rights not violated. — Although the delay of eight years and two months between the defendant's arrest and the defendant's motion to dismiss the indictment was uncommonly long and presumptively prejudicial, the trial court did not abuse the court's discretion in denying the defendant's motion to dismiss the indictment because: (1) the case was dead-docketed for five years when the state could not locate the victim; (2) nothing in the record showed that the state deliberately attempted to delay the trial to hamper the defense; and (3) fourteen months of the delay could be attributed to the defendant's failure to appear for several court dates; the defendant did not show actual prejudice to the defendant's defense because the police officers who arrested the defendant were available, and every person who was an eyewitness to or participant in the incident for which the defendant was arrested was available to testify. Gray v. State, 303 Ga. App. 97, 692 S.E.2d 716 (2010).

Defendant was not entitled to be discharged and acquitted until the close of the third term of court after the term in which the defendant filed the defendant's demand for a speedy trial because that was when more than two regular terms of court would have convened and adjourned after the term at which the demand for speedy trial was filed. Because the State of Georgia filed the state's notice of intent to seek the death penalty during the third term, which was before the defendant was entitled to be discharged and acquitted, that notice reset the statutory speedy trial clock, pursuant to O.C.G.A. § 17-7-171(c), and the defendant's motion was premature. Walker v. State, 290 Ga. 696, 723 S.E.2d 894 (2012).

Defendant was not deprived of the defendant's statutory right to a speedy trial because the defendant was indicted during the March 2010 term of court and was tried within two terms, during the March 2011 term of court. Morrison v. State, 303 Ga. 120, 810 S.E.2d 508 (2018).

Acts of defendant amount to waiver of right. — Statutory right to a speedy trial is not jurisdictional in nature and may be waived by an accused's affirmative acts and/or failures to act; conduct of an accused, both before and after the filing of the speedy trial demand, may result in an accused waiving the accused's right to a speedy trial. Mize v. State, 262 Ga. 489, 422 S.E.2d 180 (1992).

It was not error for the trial court to deny the defendant's motion for discharge and acquittal based on the defendant's demand for a speedy trial since the defendant waived the right to a speedy trial by not: (1) serving the demand on the county district attorney; and (2) letting the court know that the defendant was ready for trial. Williams v. State, 258 Ga. App. 367, 574 S.E.2d 416 (2002).

By acquiescing in the trial court's action of striking the defendant's first speedy-trial demand under O.C.G.A. § 17-7-171, in response to the defendant's counsel's illness at the time set for trial, the defendant abandoned any arguments with regard to the speedy trial, and the defendant's later failure to file an out-of-time demand after gaining permission to do so constituted a waiver. Tolbert v. State, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

Effect of consent order. — Consent order was properly interpreted to allow

Application (Cont'd)

the state two terms beyond the term in which the order was entered to comply with the defendant's speedy trial demand. Turner v. State, 269 Ga. 392, 497 S.E.2d 560 (1998).

Must announce ready for trial. — Failure to comply with the express language of O.C.G.A. § 17-7-171 requiring that the defendant be in court announcing that the defendant is ready for trial following the filing of a speedy trial demand operated as a waiver of that demand; the statutory requirements were mandatory and required strict adherence, and a defendant could waive the right to a speedy trial by the defendant's own actions or inaction. Crawford v. State, 252 Ga. App. 722, 556 S.E.2d 888 (2001).

Failure to serve trial judge. — Defendant's failure to serve the trial judge with the defendant's demand for a speedy trial, in accordance with O.C.G.A. § 17-7-171, rendered the demand invalid; therefore, the trial court properly denied the defendant's motion for discharge and acquittal by concluding that the defendant either withdrew or waived the speedy trial demand. Burdett v. State, 285 Ga. App. 571, 646 S.E.2d 748 (2007).

Continuance granted at defendant's request operated as waiver of speedy trial demand, even though the continuance expired while time remained in that term. Rice v. State, 264 Ga. 846, 452 S.E.2d 492 (1995).

Escape of defendant and absence from court amounts to waiver of demand. — If the defendant is not tried within two successive terms of court following the term in which the defendant filed a demand for trial, the defendant's escape and voluntary absence from the court amounts to a waiver of the demand for trial and does not entitle the defendant to discharge and acquittal under Ga. L. 1952, p. 299, §§ 1, 2. Holmes v. State, 136 Ga. App. 572, 222 S.E.2d 121 (1975).

Failure to make demand not excused by fact that defendant is in custody. — Defendant was not entitled to discharge and acquittal as to an indictment since the record did not show that the defendant was present in court, announcing ready and requesting a trial thereon, for two terms after the term at which the demand was filed, as required by this section, despite an argument that since defendant was in custody during the period, defendant could not be present in court and announce ready, as defendant was represented by counsel who could have done this for the defendant. Dennis v. Grimes, 216 Ga. 671, 118 S.E.2d 923 (1961).

Weighing the state's negligent delay of trial against the defendants' failure to demonstrate that the defendants' defenses would be impaired by the delay as well as the defendants' failure to timely assert the defendants' Sixth Amendment right, the trial court did not err in denying the defendants' motions to dismiss indictments. Jackson v. State, 272 Ga. 782, 534 S.E.2d 796 (2000).

Continuance at defendant's request. — When the state was ready to proceed with defendant's trial within four months of the offense, but the defendant requested a continuance to prepare the defendant's case, any delay in trial was caused by the defendant's own actions, and the defendant was not denied a speedy trial. Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1025, 71 L. Ed. 2d 310 (1982).

Right not asserted until trial. — Two-year delay between commission of the crime and the beginning of the trial is not unconstitutional when some of the delay was due to separate trials of codefendants, the defendant did not assert the defendant's speedy-trial right until just before trial, and the only prejudice due to the delay was to the state. Harrison v. State, 257 Ga. 528, 361 S.E.2d 149 (1987), cert. denied, 485 U.S. 982, 108 S. Ct. 1281, 99 L. Ed. 2d 492 (1988).

Constructive compliance inadequate. — Defendant's correspondences to the trial judge and assistant district attorney did not satisfy the third prong of O.C.G.A. § 17-7-171(b) since the statute does not provide for constructive compliance and since the correspondence fell far short of demonstrating a readiness for trial during the court terms at issue. Levester v. State, 270 Ga. 485, 512 S.E.2d 258 (1999).

In a multi-count indictment which includes both capital and noncapital offenses, the time for trial upon a proper demand by a defendant is the time allowed under O.C.G.A. § 17-7-171 for the more serious offenses. Cleary v. State, 258 Ga. 203, 366 S.E.2d 677 (1988), overruled on other grounds, Mize v. State, 262 Ga. 489, 422 S.E.2d 180 (1992).

Right to acquittal affected by nolle prosequi order. — Defendant was entitled to a hearing, based on the defendant's written demand for a speedy trial, to determine whether or not the defendant was entitled to discharge and acquittal on 13 counts on which an order of nolle prosequi was entered to the extent the statute of limitations had not run on any of the offenses. Day v. State, 216 Ga. App. 29, 453 S.E.2d 73 (1994).

State's reindictment valid as procedural correction. — Because the record did not support the defendant's contention that the state reindicted the defendant in an attempt to extend the time in which the state could bring the defendant to trial, the trial court did not err in denying the defendant's motion for judgment of acquittal. Dalton v. State, 263 Ga. 138, 429 S.E.2d 89 (1993), overruled on other grounds, Rice v. State, 264 Ga. 846, 452 S.E.2d 492 (1995).

Trial found held before expiration of time period. — When the defendant filed a demand for trial during the July 1986 term of the superior court and the defendant was tried during the January 1987 term of court — i.e., during the second regular term of court following the term in which the defendant's demand was filed, notwithstanding that special juries had been empanelled in the interim, pursuant to O.C.G.A. § 15-6-20, the defendant was given a trial before more than two regular terms of court were convened and adjourned after the term at which the demand was filed. Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992).

Defense counsel's unexcused failure to announce request and ready for trial. — Defense counsel's mere explanation that "the district attorney chose not to call the case because they had not procured defendant's presence for trial" provided no basis for excusing strict compliance with the mandatory three-prong requirements of O.C.G.A. § 17-7-171(b). State v. Moore, 207 Ga. App. 677, 428 S.E.2d 815 (1993).

Trial of defendant in fourth term after indictment not a denial of speedy trial rights when the trial in the first term resulted in a hung jury, the defendant was granted a continuance in second term but agreed to an additional term of court, and the defendant failed to announce readiness for trial in the third term. Davis v. State, 221 Ga. App. 168, 471 S.E.2d 14 (1996).

Effect of mistrial. — Trial court erred in granting the defendant's motion for discharge and acquittal in a case when the jury was unable to reach a unanimous verdict and the trial court was thus forced to declare a mistrial on the last business day of the term of court as the trial itself was commenced within the statutory two-term limit and the state immediately announced the state was ready to try the defendant on the unresolved charges; accordingly, the state had the right to try the defendant in that term if jurors were available, and, if not, the next succeeding regular term of court, again providing there were juries impaneled and qualified to hear the case. State v. Varner, 277 Ga. 433, 589 S.E.2d 111 (2003).

Appeals

Time for trial after interlocutory appeal. — There is no authority holding that the time for exercising the right to make a demand for trial on one indictment is extended while the trial of another indictment against the same defendant is pending. Blevins v. State, 113 Ga. App. 413, 148 S.E.2d 192 (1966).

Recommencement of demand clock after interlocutory appeal. — On the defendant's interlocutory appeal, filing of the remittitur in the lower court is the point in time at which the demand clock resumes ticking on a pre-appeal demand for trial, not when the trial court makes the appellate court judgment the judgment of the lower court, overruling Ramirez v. State, 211 Ga. App. 356, 439 S.E.2d 4 (1993). Henry v. State, 214 Ga.

Appeals (Cont'd)

527, 449 S.E.2d 79 (1994).

Right to appeal. — Defendant may directly appeal from the pre-trial denial of either a constitutional or statutory speedy trial claim. Mayfield v. State, 264 Ga. App. 551, 593 S.E.2d 851 (2003).

Although the trial court orally indicated that the court was signing an order allowing the defendant's counsel to withdraw, no such order was in the record, and counsel's withdrawal notice had no effect on the defendant's representation; therefore, a pro se notice of appeal filed by the defendant following the denial of the defendant's speedy trial motion was ineffective because the defendant was represented at the time of the notice. Tolbert v. Toole, 296 Ga. 357, 767 S.E.2d 24 (2014).

Although denial of the defendant's constitutional speedy trial demand was not immediately appealable, the denial of the defendant's statutory speedy trial right was immediately appealable, and the constitutional speedy trial ruling was appealable along with it under O.C.G.A. § 5-6-34(d). Johnson v. State, 300 Ga. 252, 794 S.E.2d 60 (2016).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 1 et seq. 21 Am. Jur. 2d, Criminal Law, §§ 265 et seq., 275 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 25 et seq., 41 et seq. 16B C.J.S., Constitutional Law, § 1328 et seq. 23 C.J.S., Criminal Procedure and Rights of the Accused, § 793 et seq.

ALR. — Waiver or loss of accused's right to speedy trial, 129 A.L.R. 572; 57 A.L.R.2d 302.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

17-7-172. Requirement of announcement by state of readiness for trial prior to announcement by defendant; speedy trial.

The state shall be required in every case to announce ready or not ready for trial, except in those cases where the defendant is entitled by law to demand a speedy trial, before the defendant shall be called on to make such announcement.

History. — Ga. L. 1862-63, p. 138, § 1; Code 1868, § 4613; Code 1873, § 4710; Code 1882, § 4710; Penal Code 1895, § 959; Penal Code 1910, § 984; Code 1933, § 27-1902; Ga. L. 2006, p. 893, § 3/HB 1421.

JUDICIAL DECISIONS

Continuance at defendant's request. — Since the state was ready to proceed with the defendant's trial within four months of the offense, but the defendant requested a continuance to prepare the defendant's case, any delay in trial was caused by the defendant's own actions, and the defendant was not denied a speedy trial. Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1025, 71 L. Ed. 2d 310 (1982).

Cited in Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978); Garner v. State,

159 Ga. App. 244, 282 S.E.2d 909 (1981); Ruffin v. State, 284 Ga. 52, 663 S.E.2d 189 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 267 et seq., 278 et seq., 284.
C.J.S. — 23 C.J.S., Criminal Procedure and Rights of the Accused, §§ 793 et seq., 823 et seq.

ARTICLE 8

PROCEDURE FOR SECURING ATTENDANCE OF WITNESSES AT GRAND JURY OR TRIAL PROCEEDINGS

Cross references. — Compulsory process to obtain witnesses, Ga. Const. 1983, Art. I, Sec. I, Para. XIV. Subpoenas for attendance of witnesses, § 24-13-20 et seq. Securing attendance of prisoners, § 24-13-60 et seq. Uniform Act to Secure the Attendance of Witnesses from Without the State, § 24-13-90 et seq.

RESEARCH REFERENCES

ALR. — Court's witnesses (other than expert) in state criminal prosecution, 16 A.L.R.4th 352.

17-7-190. Subpoena of material witnesses for state for appearance before grand jury; furnishing of prosecuting officers with list of persons subpoenaed.

When any person accused of a criminal offense before a court of inquiry is bound over or committed for trial in superior court, the judicial officer holding the court of inquiry shall, at the time of the commitment hearing, give a subpoena to all material witnesses examined for the state to appear and testify before the grand jury at the term to which the defendant is committed or bound to appear; and, after the hearing and commitment or binding over, the prosecutor may apply to the clerk of the superior court and obtain a subpoena for any person deemed by him to be a material witness for the state before the grand jury. The subpoenas issued under this Code section shall be effectual in compelling the attendance of the witnesses to appear and give evidence before the grand jury. The judicial officer holding the court of inquiry and the clerk of the superior court shall, on the first day of the term of court to which the defendant is committed or bound to appear, furnish the prosecuting officers with a complete list of all persons so subpoenaed.

History. — Ga. L. 1873, p. 33, §§ 1, 2; Code 1873, § 3846; Code 1882, § 3846; Penal Code 1895, § 917; Penal Code 1910, § 942; Code 1933, § 27-413.

RESEARCH REFERENCES

ALR. — Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 A.L.R.4th 872.

17-7-191. Subpoena process for witnesses of defendant; when subpoenas may be extended to witnesses outside of county.

The defendant may, upon application to the committing judicial officer or to the clerk of the court to which he is committed or bound to appear for trial, obtain subpoenas for such witnesses as he deems material for his defense. The judicial officer or the clerk of the court shall issue such subpoenas requiring the witnesses to appear at the term of the court to which the defendant is committed or bound to appear and until his case is ended. The subpoenas so issued shall have the power and authority to compel the attendance of the witnesses at the court but shall not extend to witnesses for the defendant who reside outside the county until a true bill of indictment is found or an accusation is filed against the defendant.

History. — Ga. L. 1873, p. 33, § 3; Code 1873, § 3847; Code 1882, § 3847; Penal Code 1895, § 918; Penal Code 1910, § 943; Code 1933, § 27-414.

Cross references. — Uniform Act to Secure the Attendance of Witnesses from Without the State, § 24-13-90 et seq.

JUDICIAL DECISIONS

This section applied in seduction cases. Dowda v. State, 71 Ga. 481 (1883).

Defendant given reasonable time to locate witness. — Defendant should be granted a reasonable time within which to locate and procure the attendance of the absent witness, or a continuance of the case for the term. Battle v. State, 133 Ga. 182, 65 S.E. 382 (1909).

Continuance to procure testimony. — Defendant is entitled to a continuance to procure testimony of witnesses. Chatfield v. State, 10 Ga. App. 40, 72 S.E. 513 (1911).

Accused had the right to have the presence of the inmate compelled by court order, pursuant to former O.C.G.A. § 24-10-61 (see O.C.G.A. § 24-13-61), and when the witness, without fault on the part of the accused, failed to be present when the case was called, the accused was entitled to a continuance in order to obtain the presence of the witness. Grant v. State, 212 Ga. App. 565, 442 S.E.2d 899 (1994).

Despite the defendant's failure to move for a continuance, when the effect of the trial court's ruling as to a sought-after witness was to grant the defendant a continuance to allow the defendant the opportunity to subpoena the witness, the defendant's argument that the trial court failed to grant a continuance on this ground was not supported by the record. Schramm v. State, 286 Ga. App. 156, 648 S.E.2d 392 (2007).

When continuance because of absence of defense witness unavailable. — If, after being committed by a magistrate, the defendant fails to exercise the defendant's right to subpoena a defense witness who is then available for service, and attempts to serve the witness after the defendant's indictment one month later, at which time the witness has left the county, the defendant has not em-

ployed means for securing the witness which were within the defendant's power to employ and therefore is not entitled to a continuance because of the absence of such witness. Coker v. State, 87 Ga. App. 411, 74 S.E.2d 12 (1953).

State's failure to call witness on the state's list did not deny the defendant's Sixth Amendment rights because under O.C.G.A. § 17-7-191, the defendant could have subpoenaed the witness if deemed necessary to the defendant for impeachment purposes. Johnson v. State, 232 Ga. App. 717, 503 S.E.2d 603 (1998).

Authority to determine materiality of testimony of subpoenaed witnesses. — When the trial court, having conducted several hearings, is aware of the defendant's inept handling of the defendant's case, the court may act within the court's inherent authority to control proceedings before the court by requiring some competent person to determine materiality of testimony sought to be introduced by subpoenaed witnesses. Myron v. State, 248 Ga. 120, 281 S.E.2d 600 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1025, 71 L. Ed. 2d 310 (1982).

Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011).

Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" is one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b) (see O.C.G.A. § 24-13-92), by the judge in the county where the out-of-state witness is located, and the Georgia trial court evaluates the request under the Act, former O.C.G.A. § 24-10-94 (see O.C.G.A. § 24-13-94), and must determine only whether the out-of-state witness was a "material witness" in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

Preservation of alleged error for review. — Because the trial court could not compel a witness sought by the defendant to testify when the defendant failed to subpoena the witness, and there was no evidence in the record that the trial court ever ordered the witness to appear, no error resulted from the trial court's failure to enforce an order the court never issued; although the defendant filed a motion to compel the witness's attendance, absent an order on the motion, any alleged error related thereto was not preserved. Schramm v. State, 286 Ga. App. 156, 648 S.E.2d 392 (2007).

Full faith and credit given to out-of-state order. — Trial court did not err by requiring the defendant to proceed to trial without the source code and other requested information because the court had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required the defendant to proceed to trial.

Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

Cited in Carter v. State, 11 Ga. App. 141, 74 S.E. 846 (1912); West v. State, 68 Ga. App. 56, 22 S.E.2d 115 (1942); Murphy v. State, 132 Ga. App. 654, 209 S.E.2d 101 (1974); Dodd v. State, 236 Ga. 572, 224 S.E.2d 408 (1976); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978); Teat v. State, 181 Ga. App. 735, 353 S.E.2d 535 (1987).

RESEARCH REFERENCES

C.J.S. — 88 C.J.S., Trial, § 78 et seq. 97 C.J.S., Witnesses, §§ 3 et seq., 19 et seq.

17-7-192. Continuance for nonattendance of witnesses not subpoenaed by defendant.

A defendant who fails to use the subpoena power provided for in Code Section 17-7-191, when it is within his power to do so, shall not be entitled to a continuance because a witness material to his defense is not in attendance at the term of the court when his case is called for trial, if he is prosecuted for the same criminal act.

History. — Ga. L. 1873, p. 33, § 3; Code 1873, § 3848; Code 1882, § 3848; Penal Code 1895, § 919; Penal Code 1910, § 944; Code 1933, § 27-415.

Cross references. — Uniform Act to Secure the Attendance of Witnesses from Without the State, § 24-13-90 et seq.

JUDICIAL DECISIONS

O.C.G.A. § 17-7-192 does not require subpoena issued by clerk of court in addition to an order of the superior court commanding the presence of an inmate witness. Grant v. State, 212 Ga. App. 565, 442 S.E.2d 899 (1994).

Abuse of discretion in denial of motion. — Denial of a motion for continuance on the ground of an absent witness lies within the discretion of the trial court and unless manifestly abused, the denial thereof will not be disturbed. Wellons v. State, 144 Ga. App. 218, 240 S.E.2d 768 (1977).

Motion for continuance should state how attendance to be procured. — On the hearing of a motion for a continuance, based upon the absence of a material witness of the defense, when the court is authorized to find that the witness was beyond the jurisdiction of the court, that the witness's absence was not temporary, and that the court was powerless to force the witness to attend, although the movant states that the movant expected to have the witness present at the next term of the court, if possible, in these circumstances the motion should go further and state the means whereby the movant expects to procure the witness's attendance, as that the witness had promised to attend, or that the movant has some other ground for the movant's expectation. Wright v. State, 71 Ga. App. 346, 30 S.E.2d 839 (1944).

When continuance because of absence of defense witness unavailable. — When, after being committed by a magistrate, the defendant fails to exercise the defendant's right to subpoena a defense witness who is then available for service, and attempts to serve the witness after the defendant's indictment one month later, at which time the witness has left the county, the defendant has not employed means for securing the witness which were within the defendant's power to employ and therefore the defendant is not entitled to a continuance because of the absence of such witness. Coker v.

State, 87 Ga. App. 411, 74 S.E.2d 12 (1953).

Requirements for continuance when witnesses in county. — As to witnesses residing in the county, the accused must, in order to make a showing complete, either show that the accused has had the witnesses subpoenaed under the provisions of the preceding sections, or else that there has been a commitment trial. Chatfield v. State, 10 Ga. App. 40, 72 S.E. 513 (1911).

Proof of materiality of testimony may be required. Hood v. State, 93 Ga. 168, 18 S.E. 553 (1893).

Applicability to procedure to secure attendance of out-of-state witnesses. — Provisions of O.C.G.A. § 17-7-192, which deal with the accused's right to obtain subpoenas for such absent witnesses as the accused may deem material for the accused's defense, did not apply to the procedure set forth in the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. T. 24, C. 10, Art. 5 (see O.C.G.A. § 24-13-90 et seq.). Farrell v. State, 160 Ga. App. 321, 287 S.E.2d 318 (1981).

Cited in Carter v. State, 11 Ga. App. 141, 74 S.E. 846 (1912); West v. State, 68 Ga. App. 56, 22 S.E.2d 115 (1942); Parrish v. State, 125 Ga. App. 97, 186 S.E.2d 541 (1971); Reid v. State, 129 Ga. App. 657, 200 S.E.2d 454 (1973); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978); Gilmore v. State, 154 Ga. App. 429, 268 S.E.2d 693 (1980); Cave v. State, 171 Ga. App. 22, 318 S.E.2d 689 (1984); Sosebee v. State, 190 Ga. App. 746, 380 S.E.2d 464 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Continuance, §§ 10 et seq., 54 et seq. 21 Am. Jur. 2d, Criminal Law, §§ 293 et seq., 381.

C.J.S. — 17 C.J.S., Continuances, §§ 35, 36. 22 C.J.S., Criminal Procedure and Rights of the Accused, § 895 et seq.

ALR. — Right of accused to continuance because of absence of witness who is fugitive from justice, 42 A.L.R.2d 1229.

ARTICLE 9

DISCOVERY

Editor's notes. — For current provisions as to discovery in general, see O.C.G.A. § 17-16-1 et seq.

17-7-210, 17-7-211.

Reserved. Repealed by Ga. L. 1994, p. 1895, § 1, effective January 1, 1995.

Editor's notes. — These Code sections were based on Code 1933, §§ 27-1302 and 27-1303, enacted by Ga. L. 1980, p. 1388, § 2.

CHAPTER 8

TRIAL

Article 1

General Provisions

Sec.
17-8-1. Cases to be called in order in which they stand on docket; exceptions; preferred scheduling when alleged victim is disabled adult or elder person.
17-8-2. Indictments and special presentments to be presented to jury; exception for settlements between prosecutor and defendant which are approved by court.
17-8-3. Entry of nolle prosequi.
17-8-4. Procedure for trial of jointly indicted defendants; right of defendants to testify for or against one another; order of separate trials; acquittal or conviction where offense requires joint action or concurrence; number of strikes allowed defendants.
17-8-5. Recordation of testimony in felony cases; entering testimony on minutes of court where guilty verdict found; preparation of transcript where death sentence imposed; preparation of transcript where mistrial results in felony case.
17-8-6. Authority of municipal court to seal criminal records.

Article 2

Continuances

Sec.
17-8-20. Showing of due diligence required of applicants for continuances generally.
17-8-21. When showing for continuance required of state.
17-8-22. Consideration of motion for continuance by court generally; allowance of counter-showing to motion.
17-8-23. Absence of party as grounds for granting continuance.
17-8-24. Absence or illness of counsel as grounds for granting continuance.
17-8-25. Absence of witness as grounds for granting continuance.
17-8-26. Party or party's attorney in attendance at General Assembly as grounds for granting continuance.
17-8-27. Attorney General in attendance at General Assembly as grounds for granting continuance.
17-8-28. Witness in attendance at General Assembly as grounds for granting continuance.
17-8-29. Party or party's counsel in attendance at meeting of Board of Regents of the University System of Georgia as grounds for granting continuance.
17-8-30. Party or party's counsel in attendance at meeting of Board of Human Services or Board of Behavioral Health and Developmental Disabilities as grounds for granting continuance.
17-8-31. Party, leading attorney, or material witness in attendance on active duty as member of National Guard or component of armed forces of the United States as grounds for granting continuance; setting bail in certain cases.
17-8-32. Effect of admission by opposing party of facts to be proved upon allowance of continuance.
17-8-33. Granting of continuances where indictment found or accusation made; continuance where material witness unavailable; continuances required by principles of justice; granting of continuance where postponement possible to later date in term.
17-8-34. Granting of continuances in

Sec.
cases returned by appellate court for trial.
17-8-35. Effect of continuance by defendant upon trial of codefendants.
17-8-36. Entry of date of continuance upon docket of court; announcement of continuance in open court.
17-8-37. Duration of continuance.
17-8-38. Case not reached at trial term continued.

Article 3

Conduct of Proceedings

17-8-50. Courts in which trials of inmates escaping from correctional institutions to take place; admissibility of records pertaining to former trials of such inmates; testimony of other inmates.
17-8-51. Admissibility of testimony of inmates in trials for crime of mutiny.
17-8-52. Oath to be administered to witnesses.
17-8-53. Exclusion of public from courtroom when evidence vulgar or obscene.
17-8-54. Persons in courtroom when person under age of 16 testifies concerning sexual offense.
Sec.
17-8-55. Testimony of child less than 17 years old outside physical presence of accused.
17-8-56. Writing out and reading of charge to jury; filing of charge; furnishing of copies of charge.
17-8-57. Expression or intimation of opinion by judge as to matters proved or guilt of accused.
17-8-58. Objections to jury charges prior to the jury retiring to deliberate; failure to raise objections.

Article 4

Conduct and Argument of Counsel

17-8-70. Number of counsel permitted to argue case.
17-8-71. Order of argument after evidence presented.
17-8-72. Misdemeanors and cases arising from inferior judicatories; time limits on closing argument.
17-8-73. Noncapital and capital felony cases; time limits on closing argument.
17-8-74. Allowance of additional time for closing argument.
17-8-75. Improper statements by counsel.
17-8-76. Argument to or in front of jury as to possibility of clemency.

Cross references. — Guarantee of trial by jury, Ga. Const. 1983, Art. I, Sec. I, Para. XI. Criminal penalties for unlawfully influencing jurors, influencing witnesses, tampering with evidence, and other acts, § 16-10-90 et seq. Trial calendar, Uniform State Court Rules, Rule 8.3.

Law reviews. — For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000).

U.S. Code. — Trials, Federal Rules of Criminal Procedure, Rules 23-31.

RESEARCH REFERENCES

ALR. — Criminal trial of deaf, mute, or blind person, 80 A.L.R.2d 1084.

When does jeopardy attach in a nonjury trial, 49 A.L.R.3d 1039.

Jury's discussion of parole law as ground for reversal or new trial, 21 A.L.R.4th 420.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case, 21 A.L.R.4th 444.

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person

was under the influence of drugs, 21 A.L.R.4th 905.

Validity and efficacy of minor's waiver of right to counsel — modern cases, 25 A.L.R.4th 1072.

Impeachment of defendant in criminal case by showing defendant's prearrest silence — state cases, 35 A.L.R.4th 731.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 A.L.R.4th 304.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

Closed-circuit television witness examination, 61 A.L.R.4th 1155.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 A.L.R.4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend — modern cases, 79 A.L.R.4th 779.

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 A.L.R.4th 423.

Actions by state official involving defendant as constituting "outrageous" conduct violating due process guaranties, 18 A.L.R.5th 1.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Criminal trial calendar, Uniform Superior Court Rules, Rule 32.

17-8-1. Cases to be called in order in which they stand on docket; exceptions; preferred scheduling when alleged victim is disabled adult or elder person.

(a) The cases on the criminal docket shall be called in the order in which they stand on the docket unless the accused is in jail or, otherwise, in the sound discretion of the court.

(b)(1) As used in this Code section, the terms "disabled adult" and "elder person" shall have the same meaning as set forth in Code Section 16-5-100.

(2) When the alleged victim is a disabled adult or elder person, the prosecuting attorney shall notify the accused if it intends to seek preferred scheduling. The notice shall be in writing and shall:

(A) Allege the specific factor or factors that will inhibit a disabled adult from attending or participating in court proceedings if he or she is a disabled adult; or

(B) State the age of the alleged victim if he or she is an elder person.

(3) When notice has been given pursuant to paragraph (2) of this subsection, the court shall set a date for a hearing on the issue within 14 days after the filing of such notice. The court shall consider the matter and if the court determines that preferred scheduling is necessary, the trial shall not be:

(A) Subject to subsection (a) of this Code section; and

(B) Earlier than 30 days from the date of the hearing.

History. — Ga. L. 1862-63, p. 139, § 1; Code 1863, § 4592; Code 1868, § 4613; Code 1873, § 4710; Code 1882, § 4710; Penal Code 1895, § 942; Penal Code 1910, § 967; Code 1933, § 27-1301; Ga. L. 2015, p. 598, § 1-5/HB 72.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 63 (2015).

JUDICIAL DECISIONS

This section was directory, not mandatory. Rosenbrook v. State, 78 Ga. 111 (1886); Merrill v. State, 130 Ga. App. 745, 204 S.E.2d 632 (1974); Williams v. State, 188 Ga. App. 496, 373 S.E.2d 281 (1988).

Defendant was entitled to have case called in the proper order. In re Brookins, 153 Ga. App. 82, 264 S.E.2d 560 (1980).

Although the cases on the criminal docket shall be called in the order in which the cases stand on the docket, a trial court retains discretion to call the cases out of order; there was no error in calling the defendant's case for trial, despite the fact that another pending matter had been pending longer on the trial court's docket, because the defendant in the other case was expected to enter a plea following the sentencing in another matter. Kuykendoll v. State, 278 Ga. App. 369, 629 S.E.2d 32 (2006).

Injury resulting from change in order must be shown. — Before a party can be heard to object to the order in which the court proceeds, the party must show injury to oneself resulting from the act of the court. Rosenbrook v. State, 78 Ga. 111 (1886); Lister v. State, 143 Ga. App. 483, 238 S.E.2d 591 (1977).

Trial court did not err by calling a case out of the order listed on the trial calendar when both the prosecuting attorney and defense counsel announced that they were ready for trial and the defendant was not prejudiced by the case being called out of order. Wilkins v. State, 246 Ga. App. 667, 541 S.E.2d 458 (2000).

Grant or denial of continuance in court's discretion. — Grant or denial of a continuance to a criminal defendant is in the sound discretion of the court, especially when the defendant is in jail. Gann v. State, 166 Ga. App. 172, 303 S.E.2d 510 (1983).

Allowing the district attorney to call cases out of the order listed on the criminal trial calendar was an abuse of discretion. Cuzzort v. State, 271 Ga. 464, 519 S.E.2d 687 (1999).

Defendant was not entitled to reversal of the defendant's conviction on the basis of an illegal case assignment system pursuant to which the district attorney called the case for trial, and assigned the case to a judge since the case assignment system was not unconstitutional and it was highly improbable that the assignment contributed to the jury's verdict. State v. Wooten, 273 Ga. 529, 543 S.E.2d 721 (2001).

Defendant's case called before others with lower docket numbers. — When neither injury nor abuse of sound discretion are shown, the trial judge does not err in ruling against a defendant's motion for continuance on the ground that the defendant's case was called for trial prior to another case having a lower num-

ber on the docket. Merrill v. State, 130 Ga. App. 745, 204 S.E.2d 632 (1974).

"Speedy trial demand" cases. — Rule does not prohibit a local policy moving a "speedy trial demand" case to the top of a calendar; in fact, such a policy is only common sense and designed to accommodate the demand of the accused. Culliver v. State, 247 Ga. App. 877, 545 S.E.2d 392 (2001).

Prejudice from sounding several indictments against same defendant all at once. — Frequently, when several indictments are pending against the same defendant, the indictments are all sounded on the call of the docket in the hearing of the jurors who are assembled in the courtroom to try those and other cases on the calendar. This may be somewhat prejudicial to such defendants, but it is, nevertheless, the only proper and expedient method of sounding out the docket. It is no more prejudicial when another indictment is publicized to the jurors through error, than in the manner pointed out first, and to hold such conduct to be prejudicial would reflect on the authority of the trial court to call the docket as required by this section. Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742 (1948).

There was no abuse of discretion by the trial court in denying the motion for a mistrial or disqualifying the jurors after the prosecutor apparently read the criminal calendar in the presence of the panel of potential jurors prior to commencement of trial, which calendar allegedly contained three felony charges against the defendant, who moved for a mistrial on the ground that it placed the defendant's character in issue and made it impossible to obtain jurors who had not heard the prejudicial information about the defendant and, in the alternative, asked that all jurors present when the calendar was read be disqualified. Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57 (1983), rev'd on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984).

Arraigning for different offenses at same time. — This section did not vest in the solicitor general (now district attorney) the right to arraign a defendant, read to the defendant the indictment against the defendant, require the defendant to plead thereto, and upon receiving the defendant's plea of not guilty, proceed further to read two more indictments against the defendant involving different offenses, and receive pleas of guilty or not guilty thereto. Sides v. State, 213 Ga. 482, 99 S.E.2d 884 (1957).

Dismissal of continued case when state unprepared. — When a criminal case was called for trial, the court granted the state's motion for continuance and the state was placed on terms, the case was then reset for trial, and the state was not ready to try the case on that date, the court properly dismissed the charges against the defendant. State v. Grimes, 194 Ga. App. 736, 392 S.E.2d 727 (1990).

Sufficiency of harm. — Failure to try the defendant's case in the order in which the case appeared on the trial calendar resulting in the loss of contact with a witness who possessed exculpatory testimony provided an insufficient showing of harm since the content of the witness' expected testimony was never revealed. State v. Jessup, 187 Ga. App. 429, 370 S.E.2d 489 (1988).

Forfeiture of bail bond. — Bail bond was properly forfeited for nonappearance even though the defendant's case was called out of order on the trial calendar. Taylor v. State, 194 Ga. App. 245, 390 S.E.2d 601 (1990).

Cited in Barrentine v. State, 136 Ga. App. 802, 222 S.E.2d 103 (1975); Arnsdorff v. State, 152 Ga. App. 515, 263 S.E.2d 176 (1979); Garner v. State, 159 Ga. App. 244, 282 S.E.2d 909 (1981); Ramsey v. State, 169 Ga. App. 920, 315 S.E.2d 472 (1984); State v. Finkelstein, 170 Ga. App. 608, 317 S.E.2d 648 (1984).

17-8-2. Indictments and special presentments to be presented to jury; exception for settlements between prosecutor and defendant which are approved by court.

All indictments or special presentments shall be submitted to and passed upon by a jury under the direction of the presiding judge unless there is a settlement of the case between the prosecutor and the defendant, which settlement shall be valid only by the approval and order of the court on examination into the merits of the case.

History. — Laws 1850, Cobb's 1851 Digest, p. 864; Code 1863, § 4588; Code 1868, §§ 4609, 4610; Ga. L. 1870, p. 422, § 2; Code 1873, § 4706; Code 1882, § 4706; Penal Code 1895, § 956; Penal Code 1910, § 981; Code 1933, § 27-1701.

JUDICIAL DECISIONS

Once indictment occurs, O.C.G.A. § 17-8-2 applies, and the defendant and victim may not settle the offense between themselves without approval of the court. Pratt v. State, 167 Ga. App. 819, 307 S.E.2d 714 (1983).

Submission to jury not required when essential element of charge not provable. — There was no error when the trial judge dismissed one count of an indictment on the defendant's motion even though there was no settlement of the case between the defendant and the prosecutor since the trial judge had the authority to keep the case from a jury after the judge determined that the state could not as a matter of law establish an essential element of the offense charged. State v. Finkelstein, 170 Ga. App. 608, 317 S.E.2d 648 (1984).

What settlements require court approval. — This section required court approval of settlements only in cases which have proceeded by indictment or special presentment. Goolsby v. Bush, 53 Ga. 353 (1874); Childs v. State, 118 Ga. App. 706, 165 S.E.2d 577 (1968).

Settlement independent of court for minor offenses. — There may be a settlement independent of the court in such offenses as are not punishable by fine and imprisonment or a more severe penalty, but offenses of a higher grade than these cannot be settled without the consent of both the prosecutor and the court. McDaniel v. State, 27 Ga. 197 (1859).

Mere consideration for settlement will not suppress prosecution. — Neither former penal Code 1895, § 956 (see O.C.G.A. § 17-8-2) nor former Civil Code 1895, §§ 3894 and 3895 (see O.C.G.A. § 51-11-20) allow a settlement merely for a consideration to suppress a prosecution, whether the offense be a felony or a misdemeanor. Jones v. Dannenberg Co., 112 Ga. 426, 37 S.E. 729, 52 L.R.A. 271 (1900).

Court may exercise court's discretion. McDaniel v. State, 27 Ga. 197 (1859).

Action for malicious prosecution may not be based on settled case. — When the defendant in a criminal prosecution settles with the prosecutor the claim which is the subject matter in issue, the prosecution, although thereby terminated, is not terminated favorably to the defendant for purposes of an action for malicious prosecution. It being essential to a right of action for a malicious prosecution by a defendant in a criminal prosecution that the prosecution must have terminated favorably to the defendant. Suit brought by the defendant in a criminal proceeding against the prosecutor to recover damages for an alleged malicious prosecution, wherein the only allegation as respects the termination of the criminal proceedings is that the plaintiff, after the defendant has instituted criminal proceedings against the defendant, made an adjustment and settled the matter at a discount with the prosecutor, and that the prosecution was never further pursued, but that warrant went dismissed by the operation of law, fails to show a termina-

tion of the criminal prosecution favorable to the plaintiff as the defendant in the criminal prosecution, and therefore fails to set out a cause of action. Smith v. Otwell, 51 Ga. App. 741, 181 S.E. 493 (1935).

Cited in Statham v. State, 41 Ga. 507 (1871); Brown v. State, 44 Ga. 300 (1871); Jones v. Peterson, 117 Ga. 58, 43 S.E. 417 (1903); Sanders v. McKee, 145 Ga. 507, 89 S.E. 484 (1916); Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Cases brought by accusation. — Criminal case brought by accusation may be settled by the district attorney by a procedure like that outlined in O.C.G.A. § 17-8-2, although the statute, by the statute's terms, does not apply to cases brought by accusation. 1987 Op. Att'y Gen. No. U87-8.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 690 et seq.

ALR. — Duty to dismiss criminal proceedings on motion of attorney general or prosecuting attorney, pursuant to promise of immunity, 66 A.L.R. 1378.

Construction and effect of statute authorizing dismissal of criminal action upon settlement of civil liability growing out of act charged, 42 A.L.R.3d 315.

Admissibility of defense communications made in connection with plea bargaining, 59 A.L.R.3d 441.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

17-8-3. Entry of nolle prosequi.

After an examination of the case in open court and before it has been submitted to a jury, the prosecuting attorney may enter a nolle prosequi with the consent of the court. After the case has been submitted to a jury, a nolle prosequi shall not be entered except by the consent of the defendant. The prosecuting attorney shall notify the defendant and the defendant's attorney of record within 30 days of the entry of a nolle prosequi either personally or in writing; such written notice shall be sent by regular mail to the defendant at the defendant's last known address and to the defendant's attorney of record.

History. — Laws 1833, Cobb's 1851 Digest, p. 836; Code 1863, § 4535; Code 1868, § 4555; Ga. L. 1870, p. 422, § 1; Code 1873, § 4649; Ga. L. 1877, p. 108, § 1; Code 1882, § 4649; Penal Code 1895, § 957; Penal Code 1910, § 982; Code 1933, § 27-1801; Ga. L. 1989, p. 585, § 1.

Law reviews. — For survey article on death penalty law, see 59 Mercer L. Rev. 123 (2007).

JUDICIAL DECISIONS

Object of this section was to prevent entries of nolle prosequi by the solicitor general (now district attorney) without the sanction and approval of the judge, who presumably will not allow such entries to be made except for good reason. Examination in open court is required in order that the judge may have proper and

lawful information upon which to base the judge's action. Lewis v. State, 101 Ga. 532, 28 S.E. 970 (1897).

Provisions of this section were directory and for the protection of the public. Doyal v. State, 70 Ga. 134 (1883).

Timeliness of nolle prosequi motion. — Ga. Unif. Super. Ct. R. 31.1 did not apply to the state's motion for entry of nolle prosequi; the timeliness of an entry of nolle prosequi is governed by O.C.G.A. § 17-8-3. State v. Serio, 257 Ga. App. 369, 571 S.E.2d 168 (2002).

Trial court properly vacated the court's first nolle prosequi order entered pursuant to O.C.G.A. § 17-8-3 and substituted one entered in open court almost two years later; while a trial court could vacate an order of nolle prosequi at will only during the term of its court, and the trial court here indisputably vacated the court's order outside the term, this situation was governed by O.C.G.A. § 9-11-60, and treating the second ground of the defendant's motion as a motion to set aside under § 9-11-60(d)(2), the trial court was within the court's rights in essentially modifying the court's order under § 9-11-60(h). Montgomery v. State, 259 Ga. App. 153, 575 S.E.2d 917 (2003).

Recommendation of nol-prossed by district attorney. — It is duty of district attorney to determine whether it is in public interest to recommend to court that case be nol-prossed. State v. Davis, 159 Ga. App. 537, 284 S.E.2d 51 (1981).

Prosecutor's discretion to dismiss. — Prosecutor, as part of the authority of the prosecutor's office, has sole discretion to dismiss cases prior to indictment. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297 (1982).

Trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Court's discretion to follow nol-prossed recommendation. — When recommendation is made that indictment be nol-prossed, it is within the discretion of the trial court whether to follow the recommendation. State v. Davis, 159 Ga. App. 537, 284 S.E.2d 51 (1981).

Plea bargain was not "judicially coerced" when the court agreed to accept the nolle prosequi only if the defendant's coindictee exonerated the defendant or accepted primary responsibility for the crimes charged, and declined to consent to the nolle prosequi when the state could not produce this evidence. Wilcox v. State, 236 Ga. App. 235, 511 S.E.2d 597 (1999).

Disclosure of nolle prosequi agreement to jury. — When the jury is made aware of a nolle prosequi agreement between a codefendant and the prosecutor by the prosecutor's disclosure of the agreement, the requirements of due process were satisfied. Williams v. State, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

Purpose of requirement for examination of case in open court. — Requirement that the nolle prosequi be entered after an examination of the case in open court would appear to be for the purpose of protecting the interests of both the accused and the state by making all the proceedings conducted openly in the courtroom in the presence of anyone who legitimately may be present, rather than covertly so as to conceal or at least give the appearance of concealing the fact and the true purposes of such proceedings. Thompson v. State, 142 Ga. App. 888, 237 S.E.2d 419, rev'd on other grounds, 240 Ga. 296, 240 S.E.2d 87 (1977).

Failure to enter nolle prosequi of original indictment in open court may affect the validity of the attempted nolle prosequi, but it does not affect the validity of a new indictment. Casillas v. State, 267 Ga. 541, 480 S.E.2d 571 (1997).

De novo investigation was not required before the entry of nolle prosequi orders on an original indictment when the court conducted an examination in open court. Larochelle v. State, 219 Ga. App. 792, 466 S.E.2d 672 (1996).

Accused's consent not required prior to attachment of jeopardy. — Nolle prosequi may be entered without the consent of the accused at any time prior to the attachment of jeopardy. McIntyre v. State, 189 Ga. App. 764, 377 S.E.2d 532 (1989).

Nolle prosequi as adjudication of guilt or innocence. — Nolle prosequi does not adjudicate either the innocence

or guilt of the accused unless the accused has been placed in jeopardy. Hunter v. State, 104 Ga. App. 576, 122 S.E.2d 172 (1961).

For case to be considered submitted, jury must be impanelled and sworn. — Case is not submitted to the jury, within the meaning of this section, until the jury has been impanelled and sworn in the cause. Fortson v. State, 13 Ga. App. 681, 79 S.E. 746 (1913); Martin v. State, 73 Ga. App. 573, 37 S.E.2d 411, cert. denied, 329 U.S. 760, 67 S. Ct. 115, 91 L. Ed. 655 (1946).

Consent of the court is a necessity after the case has been submitted to the jury. Lascelles v. State, 90 Ga. 347, 16 S.E. 945, 35 Am. St. R. 216 (1892), aff'd, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 549 (1893).

Nolle prosequi cannot be entered without the consent of the trial court since such consent is conclusive upon the validity of the nolle-pros. State v. Davis, 159 Ga. App. 537, 284 S.E.2d 51 (1981).

To the extent that the state agrees to nolle prosequi certain charges, such agreement is not binding without a trial court's consent. Palmer v. State, 260 Ga. App. 670, 580 S.E.2d 539 (2003).

Court's consent is conclusive as to validity of nolle prosequi. Lascelles v. State, 90 Ga. 347, 16 S.E. 945, 35 Am. St. R. 216 (1892), aff'd, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 549 (1893); State v. Davis, 196 Ga. App. 785, 397 S.E.2d 58 (1990).

Rescission of approval of entry of nolle prosequi. — State can revive a prosecution by petitioning the trial court to vacate the court's order consenting to the entry of nolle prosequi. Buice v. State, 239 Ga. App. 52, 520 S.E.2d 258 (1999), aff'd, 272 Ga. 323, 528 S.E.2d 788 (2000).

An order of nolle prosequi may be vacated within the same term of court in which the order was rendered in those instances where the state has demonstrated a meritorious reason and there is no prejudice to the accused which would constitute a manifest abuse of the trial court's discretion in vacating the order. Buice v. State, 272 Ga. 323, 528 S.E.2d 788 (2000), affirming Buice v. State, 239 Ga. App. 52, 520 S.E.2d 258 (1999).

Nolle prosequi must go on the minutes with the court's cognizance thereof. Statham v. State, 41 Ga. 507 (1871).

Consent of accused not required. — Consent of the accused is not required if the case has not gone to the jury. Fortson v. State, 13 Ga. App. 681, 79 S.E. 746 (1913).

Consent of the accused is not required even if the case is on a rehearing after a reversal for lack of evidence to support the verdict. Lewis v. State, 101 Ga. 532, 28 S.E. 970 (1897).

Consent required when accused has been in jeopardy. — After the accused has been in jeopardy, the accused cannot again be prosecuted for the same offense if the nolle prosequi was without the accused's consent. Doyal v. State, 70 Ga. 134 (1883).

Conclusiveness of judgment entering nolle prosequi. — Judgment of the court allowing the entry of nolle prosequi has the same force and conclusiveness ordinarily incident to judgments, and cannot be collaterally attacked. Peeples v. Walker, 12 Ga. 353 (1852); Clark v. Black, 136 Ga. 812, 72 S.E. 251 (1911).

Nolle prosequi after mistrial doesn't result in acquittal. — Effect of a nolle prosequi of a bill of indictment is a termination of the case pending on that bill, with all recognizances and other incidents of that particular prosecution. Lamp v. Smith, 56 Ga. 589 (1876).

Nolle prosequi has the effect of preventing an appeal for error in overruling a demurrer to an indictment. Jones v. State, 115 Ga. 814, 42 S.E. 271 (1902).

Properly granted mistrial removes the case from the jury and a nolle prosequi entered after a mistrial, even without the consent of the defendant, does not have the effect of acquittal. Rhyne v. State, 209 Ga. App. 548, 434 S.E.2d 76 (1993), aff'd, 264 Ga. 176, 442 S.E.2d 742 (1994).

Nolle prosequi as to one codefendant but not others. — When a separate written order on a nolle prosequi is entered as to one codefendant, showing clearly that a count of the indictment was abandoned only as to that defendant, there is not a termination of the charge against the other codefendant. Williams v. State, 244 Ga. 485, 260 S.E.2d 879 (1979).

While the statute clearly establishes the authority of the prosecuting attorney and court and the right of the defendant involved, the statute gives no right to a codefendant to have a voice in the decision of whether to enter a nolle prosequi. Broomfield v. State, 264 Ga. 145, 442 S.E.2d 242 (1994).

Conclusion that the appellant has no standing to complain of the trial court's decision to consent to the entry of nolle prosequi to appellant's codefendant does not mean that the appellant cannot complain of the manner in which the situation was handled in the trial court. Broomfield v. State, 264 Ga. 145, 442 S.E.2d 242 (1994).

Reindictment after nolle prosequi. — When a nolle prosequi is entered by the prosecuting attorney with the consent of the court, a new indictment may be found within six months from the time the first indictment is quashed or the nolle prosequi entered and its effect therefore is not necessarily the ending of the prosecution, but the continuance of the prosecution. Not until the expiration of the six-month period within which a new indictment for the same offense may be preferred, or some other act or declaration which amounts to an abandonment, is the prosecution at an end. Earlywine v. Strickland, 145 Ga. App. 626, 244 S.E.2d 118 (1978); Bowens v. State, 157 Ga. App. 334, 277 S.E.2d 326 (1981).

When a nolle prosequi has been entered to an indictment before the indictment has been submitted to the jury, this is not a sufficient ground to sustain a plea in bar to a reindictment for the same offense. Bowens v. State, 157 Ga. App. 334, 277 S.E.2d 326 (1981).

When in superior court, before a jury is impaneled and sworn, the state enters a nolle prosequi of the indictment and, subsequently, one of the charges is transferred to the county solicitor's office where it subsequently is included in an accusation before the state court, this does not result in an improper termination or constitute the basis for prosecutorial misconduct such as to bar the prosecution based on double jeopardy. Newman v. State, 166 Ga. App. 609, 305 S.E.2d 123 (1983).

Prosecutor was entitled, with the permission of the recorder's court, to enter a nolle prosequi of the charges pending there against the defendant, which rendered those charges dead, but did not prevent the prosecutor from reaccusing the defendant for the same offenses; contrary to the finding of the state court, the fact that charges against the defendant were pending in both the recorder's court and the state court for one day did not render the state's conduct "improper." State v. Serio, 257 Ga. App. 369, 571 S.E.2d 168 (2002).

Because the defendant was never tried and convicted under a first indictment, jeopardy never attached as to that indictment; therefore, any failure to follow the procedures of O.C.G.A. § 17-8-3 in filling a nolle prosequi on the first indictment did not bar the defendant's subsequent conviction under the second indictment. Montgomery v. State, 259 Ga. App. 153, 575 S.E.2d 917 (2003).

Trial court did not abuse the court's discretion by granting the nolle prosequi as to a first indictment nor did the court err in denying the defendant's plea of former jeopardy and motion to dismiss a third indictment because under O.C.G.A. § 17-8-3 the state did not need the defendant's consent to obtain an order of nolle prosequi before the case was submitted to a jury and the state had the discretion to order the nolle prosequi, instead of quashing the indictment to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Entries of nolle prosequi do not trigger the bar to prosecution in O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Under O.C.G.A. § 17-8-3, the state does not need a defendant's consent to obtain an order of nolle prosequi before the case has been submitted to a jury and that the entry of such orders renders the motions to quash moot. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

When nolle prosequi bars subsequent indictment. — Entry of a nolle prosequi is a bar to a subsequent indictment only when entered after the case has gone to the jury and without the consent of the accused. Jones v. State, 55 Ga. 625 (1876); Doyal v. State, 70 Ga. 134 (1883); Jackson v. State, 76 Ga. 551 (1886).

Costs may not be demanded or received when case nol prossed. — No officer has the right to demand or receive of one accused of crime costs on a criminal case which has been nol prossed. Hunter v. State, 104 Ga. App. 576, 122 S.E.2d 172 (1961).

Failure to inform jury of plea agreement when jury is informed of nolle prosequi. — If in the prosecutor's opening statement the prosecutor informs the jury of the prosecutor's agreement to nol prosse the codefendant's indictment in exchange for that codefendant's testimony, the state's failure to inform the jury of its plea bargaining agreement with the codefendant, who testified against the appellant on behalf of the state, does not constitute reversible error. Williams v. State, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

Nolle prosequi after submission to jury is error and equivalent to acquittal. — After submission to the jury on a good indictment, a nolle prosequi without the consent of the accused is error and is equivalent to an acquittal on a plea of former jeopardy. Jones v. State, 55 Ga. 625 (1876).

Nolle prosequi on two counts after submission to jury required new trial. — Trial court erred in allowing the state to nolle prosequi the two methamphetamine possession charges over the defendant's objection and proceed only on a trafficking charge because the case had been submitted to the jury within the meaning of O.C.G.A. § 17-8-3. Also, this procedure essentially allowed the state to amend the indictment. Truelove v. State, 302 Ga. App. 418, 691 S.E.2d 549 (2010).

Cited in Price v. Cobb, 60 Ga. App. 59, 3 S.E.2d 131 (1939); Williams v. State, 126 Ga. App. 302, 190 S.E.2d 807 (1972); In re Pending Cases, 234 Ga. 264, 215 S.E.2d 473 (1975); Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976); Wood v. State, 242 Ga. 277, 248 S.E.2d 612 (1978); Albitus v. F & M Bank, 159 Ga. App. 406, 283 S.E.2d 632 (1981); Rhear v. State, 171 Ga. App. 435, 319 S.E.2d 895 (1984); Merrill v. State, 201 Ga. App. 671, 411 S.E.2d 750 (1991); Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Discretion of court in addressing motion. — As a general rule, a motion to nolle prosequi a state indictment can only be entered upon the court's consent. Whether to consent to the nolle prosequi is a matter addressed to the sound discretion of the court. 1988 Op. Att'y Gen. No. U88-21.

No disqualification of prosecuting attorney for denial of motion. — Once an indictment or accusation has been filed, a district attorney's motion to nolle prosequi or dead docket requires consent of the court. If the trial court refuses to grant the district attorney's motion to nolle prosequi or dead docket the case, the district attorney is not thereby disqualified. 1988 Op. Att'y Gen. No. U88-25.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 685 et seq.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 275 et seq.

ALR. — Power of court to enter nolle prosequi or dismiss prosecution, 69 A.L.R. 240.

Nolle prosequi or discontinuance of prosecution in one court and instituting new prosecution in another court of coordinate jurisdiction, 117 A.L.R. 423.

17-8-4. Procedure for trial of jointly indicted defendants; right of defendants to testify for or against one another; order of separate trials; acquittal or conviction where offense requires joint action or concurrence; number of strikes allowed defendants.

(a) When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the state shall waive the death penalty. When indicted for a capital felony when the death penalty is waived, or for a felony less than capital, or for a misdemeanor, such defendants may be tried jointly or separately in the discretion of the trial court. In any event, a jointly indicted defendant may testify for another jointly indicted defendant or on behalf of the state. When separate trials are ordered in any case, the defendants shall be tried in the order requested by the state. If the offense requires joint action and concurrence of two or more persons, acquittal or conviction of one defendant shall not operate as acquittal or conviction of others not tried.

(b) When two or more defendants are tried jointly for a crime or offense, such defendants shall be entitled to the same number of strikes as a single defendant if tried separately. The strikes shall be exercised jointly by the defendants or shall be apportioned among the defendants in the manner the court shall direct. In the event two or more defendants are tried jointly, the court, upon request of the defendants, shall allow an equal number of additional strikes to the defendants, not to exceed five each, as the court shall deem necessary, to the ends that justice may prevail. The court may allow the state additional strikes not to exceed the number of additional strikes as are allowed to the defendants.

History. — Laws 1836, Cobb's Digest, p. 841; Ga. L. 1855-56, p. 266, § 1; Ga. L. 1858, p. 99, § 1; Code 1863, § 4574; Code 1868, § 4595; Code 1873, § 4692; Ga. L. 1878-79, p. 59, § 1; Code 1882, § 4692; Penal Code 1895, § 969; Penal Code 1910, § 995; Code 1933, § 27-2101; Ga. L. 1971, p. 891, § 1; Ga. L. 1972, p. 618, § 1; Ga. L. 2005, p. 20, § 9/HB 170.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-5. Number of peremptory challenges, § 15-12-165.

Editor's notes. — Ga. L. 2005, p. 20, § 1/HB 170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB 170, not codified by the General Assembly, provides that the 2005 amendment applies to all trials which commence on or after July 1, 2005.

U.S. Code. — Joinder of offenses and of defendants, Federal Rules of Criminal Procedure, Rule 8.

JUDICIAL DECISIONS

Analysis

General Consideration
Separate Trials

Prejudice
Application
Juror Strikes in Joint Trials

General Consideration

Constitutionality of distinction between capital cases in which death penalty sought and other capital cases. — Distinction which former Code 1933, § 27-2101 (see O.C.G.A. § 17-8-4) drew between capital cases in which the state was seeking the death penalty and other capital cases did not constitute a violation of equal protection and due process. Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978).

Discretion of court to join or sever. — It is within the discretion of the trial court to try the defendants jointly or separately when two or more defendants are indicted for a capital felony in which the state does not seek the death penalty, and absent an abuse of discretion, denial of a motion to sever is not grounds for reversal. Mapp v. State, 258 Ga. 273, 368 S.E.2d 511 (1988).

It is well established that joinder of the codefendants is within the discretion of the trial court. Sheppard v. State, 205 Ga. App. 373, 422 S.E.2d 66 (1992).

Whether to grant a motion to sever the trial of some of the defendants is within the discretion of the trial court and the appellants were required to do more that raise the possibility that a separate trial would have given the appellants a better chance of obtaining an acquittal. The test is whether the number of defendants will create confusion during the trial; whether the strength of the evidence against one defendant will engulf the others with a "spillover" effect; and whether the defendants' claims are antagonistic to each other's rights. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Three factors for consideration on motion to sever. — In exercising the court's discretion on a motion to sever, the trial court must consider three factors: (1) whether the number of defendants creates confusion as to the law and evidence to be applied to each; (2) whether a danger exists that evidence admissible against one defendant might be considered against the other notwithstanding instructions to the contrary; and (3) whether the defenses are antagonistic to each other or each other's rights. Robinson v. State, 259 Ga. App. 555, 578 S.E.2d 214 (2003).

Guilt or innocence of joint defendants must be separately determined. — When two or more persons are indicted jointly each defendant is entitled to be considered separately as to that defendant's guilt or innocence. In considering the evidence the jury should not treat the defendants as a single entity or unit but should consider the guilt or innocence of each of the defendants as individuals and distinct from one another, and the guilt of any one of the defendants must be determined on the facts showing what part that defendant had in the commission of the crime charged, and the guilt of one person named in the indictment creates no presumption of the guilt of any other. Thomas v. State, 153 Ga. App. 686, 266 S.E.2d 335 (1980).

Court not compelled to try one defendant before a codefendant. — There is no authority for the argument that the court should compel the state to try one defendant before a codefendant, at least when there is an absence of evidence of actual prejudice to the codefendant. House v. State, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992).

Failure to instruct jury as to guilt or innocence of one who is being separately tried. — When the accused is being separately tried, it is not error for the trial judge to charge the jury that the jury is not concerned with the guilt or innocence of the codefendant. Bates v. State, 18 Ga. App. 718, 90 S.E. 481 (1916).

Although the trial court did not give the defendant's own particularized instruction regarding the possible motives of testifying witnesses, the court gave the pattern jury charge on testifying witnesses and, thus, the jury was properly in-

structed that the jurors were to decide the believability of the witnesses. Kitchens v. State, 296 Ga. 384, 768 S.E.2d 476 (2015).

Number of arguments allowed if tried jointly. — If two are tried together without objection, the two have a right to only one argument. Bloodworth v. State, 161 Ga. 332, 131 S.E. 80 (1925).

Length of argument in joint trial. — There is no error in the refusal of a court to grant counsel for the defendants two hours for the argument of a joint case. Curry v. State, 17 Ga. App. 377, 87 S.E. 685 (1915).

Prior acquittal of one joint defendant on underlying charge as affecting subsequent conspiracy trial. — Prior acquittal of one defendant of the offense jointly charged against that defendant and another does not determine in the second defendant's case that the defendants did not enter into a conspiracy to commit that offense. Weeks v. State, 66 Ga. App. 553, 18 S.E.2d 503 (1942).

Use of proof of conspiracy when one coconspirator has been acquitted. — Rule that the acquittal of one of two alleged conspirators negates the existence of the conspiracy does not apply if proof of the conspiracy is sought to be introduced merely as an evidentiary fact to sustain another charge, such as murder. In such case, the conspiracy may be inquired into notwithstanding the acquittal of one of the alleged conspirators. Weeks v. State, 66 Ga. App. 553, 18 S.E.2d 503 (1942).

Defendant's conviction for conspiracy is not invalidated by the fact that the only other conspirator named in the indictment is subsequently acquitted at a separate trial. Any language to the contrary in Weeks v. State, 66 Ga. App. 553, 18 S.E.2d 503 (1942), is mere dicta and is not authority for a contrary ruling. Smith v. State, 162 Ga. App. 821, 292 S.E.2d 423, aff'd, 250 Ga. 264, 297 S.E.2d 273 (1982), overruled on other grounds by Thornton v. State, 298 Ga. 709, 784 S.E.2d 417 (2016).

Issue of severance must be raised at trial. — First defendant did not show that the trial court erred in severing the first defendant's armed robbery trial from that of the second defendant as the first defendant did not join in the second defendant's motion to sever and did not raise the issue until appeal; although the trial court normally had discretion to determine whether a trial should be severed, the first defendant's failure to raise the issue in the trial court meant the issue was waived on appeal. Bennett v. State, 266 Ga. App. 502, 597 S.E.2d 565 (2004).

Issue of codefendants' testimony and severance was waived on appeal since the issue was not raised as a basis for the codefendants' pretrial severance motion, nor was there any place in the record when the defendants renewed the defendants' motion to sever in order to raise this issue and secure the trial court's ruling thereon. York v. State, 242 Ga. App. 281, 528 S.E.2d 823 (2000).

Any error waived if trial court did not rule. — Defendant waived any error in the trial court's failure to sever the defendant's trial from the trial of a codefendant as the defendant failed to obtain a ruling from the trial court on the defendant's motion to sever. Terrell v. State, 268 Ga. App. 173, 601 S.E.2d 500 (2004).

Joinder of offenses permitted. — Joinder of charges from 15 robberies was permitted since there were sufficient similarities in the crimes to show a pattern of conduct, and offenses were not joined solely because the offenses were of the same or similar character. Allen v. State, 268 Ga. App. 519, 602 S.E.2d 250 (2004).

Separate Trials

Severance not constitutional right. — While, as a general matter, courts should grant severance whenever it appears necessary to achieve a fair determination of the guilt or innocence of a defendant, severance is not a constitutional right. Glover v. State, 188 Ga. App. 330, 373 S.E.2d 39 (1988).

Considerations by court in exercising discretion. — Considerations for the court in exercising the court's discretion on a motion to sever are: whether the number of defendants will create confusion of the evidence and law applicable to each individual defendant; whether there is a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court; and whether the

Separate Trials (Cont'd)

defenses of the defendants are antagonistic to each other or to each other's rights. Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975); Jones v. State, 243 Ga. 584, 255 S.E.2d 702 (1979); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980); Ledford v. State, 173 Ga. App. 474, 326 S.E.2d 834 (1985); Lawrence v. State, 174 Ga. App. 788, 331 S.E.2d 600 (1985); Tanner v. State, 176 Ga. App. 77, 335 S.E.2d 133 (1985); Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920 (1989); Hill v. State, 193 Ga. App. 401, 387 S.E.2d 910 (1989); Bailey v. State, 203 Ga. App. 133, 416 S.E.2d 151 (1992); Griffin v. State, 273 Ga. 32, 537 S.E.2d 350 (2000).

Factors to be considered by the court in the court's exercise of discretion are as follows: (1) will the number of defendants create confusion as to evidence and law relative to the separate defendants; (2) is there a danger that evidence admissible against only one defendant (or, when there are more than two defendants, only against certain ones of the defendants) will nevertheless be considered against another; and (3) are the defendants' respective defenses antagonistic to the defenses or the rights of another. It is the defendant who has the burden of showing, on the defendant's motion to sever, that any of the named criteria are applicable so as to prejudice the defendant's defense. Causey v. State, 192 Ga. App. 294, 384 S.E.2d 674 (1989); Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845 (1992); Brown v. State, 262 Ga. 223, 416 S.E.2d 508 (1992).

In exercising discretion regarding the severance of trials of the codefendants, the trial court should consider: whether a joint trial will create confusion of evidence and law; whether there is a danger that evidence implicating one defendant will be considered against the other despite cautionary instructions to the contrary; and whether the codefendants will press antagonistic defenses. Jackson v. State, 249 Ga. 751, 295 S.E.2d 53 (1982); Owens v. State, 251 Ga. 313, 305 S.E.2d 102 (1983).

What necessary for motion for severance to be granted. — In order to have the defendant's motion for severance granted, the defendant must show not only that a codefendant will probably not testify at trial when the defendant could cross-examine that codefendant or elicit the testimony desired, but also that the testimony of the codefendant would tend to exculpate the defendant. Flores v. State, 159 Ga. App. 336, 283 S.E.2d 372 (1981); Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

Showing of harm is necessary before the court must sever. — Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975).

Defendant seeking severance must make a clear showing of harm or prejudice to the defendant and a consequent denial of due process that would result from a denial of the defendant's motion for severance. Jones v. State, 243 Ga. 584, 255 S.E.2d 702 (1979); Louis v. State, 185 Ga. App. 472, 364 S.E.2d 607 (1988); Brown v. State, 262 Ga. 223, 416 S.E.2d 508 (1992).

To mandate severance of trials it must be demonstrated that harm resulted from failure to sever. Tookes v. State, 159 Ga. App. 423, 283 S.E.2d 642 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982).

If consolidation of defendants at trial hinders a fair determination of each defendant's guilt or innocence, then the defendants must be tried separately. Magouirk v. State, 158 Ga. App. 517, 281 S.E.2d 283 (1981).

While certain evidence was introduced pertaining solely to the codefendant, since the appellant did not show how such evidence prejudiced the defendant's own case, it was not error to deny the motion to sever. Jackson v. State, 249 Ga. 751, 295 S.E.2d 53 (1982).

Since the defendant failed to articulate any specific reason for severance, the defendant failed to show any actual prejudice or denial of due process which resulted from the failure to sever, and the trial court did not err in denying the motion to sever. Majors v. State, 203 Ga. App. 139, 416 S.E.2d 156 (1992).

In an armed robbery prosecution, as the evidence and law against the defendant and the codefendant was nearly identical and all of the evidence admissible against

one was admissible against the other, the fact that the defendants' defenses were antagonistic was not alone sufficient to warrant severing the defendants' trials under O.C.G.A. § 17-8-4 absent a showing of harm. Bailey v. State, 295 Ga. App. 480, 672 S.E.2d 450 (2009).

When severance should be granted generally. — On motion, severance should be granted if severance is deemed appropriate to promote a fair determination of each defendant's guilt or innocence of each offense. Padgett v. State, 239 Ga. 556, 238 S.E.2d 92 (1977); Johnson v. State, 158 Ga. App. 398, 280 S.E.2d 419 (1981).

Severance generally should be granted if severance is necessary to achieve a fair determination of the guilt or innocence of a defendant. Padgett v. State, 239 Ga. 556, 238 S.E.2d 92 (1977).

Defendant entitled to separate trial if conviction is more likely to result from evidence against codefendants than from evidence against the defendant. Johnson v. State, 158 Ga. App. 183, 279 S.E.2d 483 (1981).

Codefendant's opposition to severance. — O.C.G.A. § 17-8-4 neither mentions any right to oppose a codefendant's request for severance nor provides a statutory procedure pursuant to which a defendant may seek the joinder of another defendant's trial. Broomfield v. State, 264 Ga. 145, 442 S.E.2d 242 (1994).

Testimony stronger against one defendant does not demand severance. — Mere fact that testimony as to one of two codefendants is stronger than that linking the other to the crime does not demand a finding that the denial of a motion to sever is an abuse of discretion. Martin v. State, 162 Ga. App. 703, 292 S.E.2d 864 (1982); Davis v. State, 244 Ga. App. 345, 535 S.E.2d 528 (2000).

Defendant and the first codefendant each consistently denied participation in crimes without directly implicating the other, and both equally sought to place responsibility on a second codefendant; thus, their defenses were not antagonistic, and the mere fact that the case against the defendant was stronger than the case against the first codefendant did not necessitate a separate trial; therefore, the trial court did not err in denying the defendant's motion to sever. Wicks v. State, 278 Ga. 550, 604 S.E.2d 768 (2004).

Denial of severance proper. — Trial court did not err in denying a codefendant's request for severance because a joint trial with the defendant did not present a significant likelihood of confusion of the evidence and law or the possibility that evidence introduced against the defendant could be improperly considered against the codefendant; the law applicable to the defendant and the codefendant was substantially the same, and the evidence at trial showed that the defendants acted together in killing the victim. Krause v. State, 286 Ga. 745, 691 S.E.2d 211 (2010).

Trial court did not abuse the court's discretion by denying the defendant's motion for severance because the defendant did not show any prejudice that could have been avoided by severing the trial; a codefendant said nothing to the police that contradicted witnesses regarding threats the witnesses heard the defendant make. Allen v. State, 288 Ga. 263, 702 S.E.2d 869 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was no danger of confusion when only two defendants were on trial in connection with the same occurrence, and there was no evidence admissible against the defendant that was not admissible against the codefendant; the fact that the codefendant elicited a witness's testimony concerning a coconspirator's out-of-court declarations as a coconspirator did not show prejudice, and the witness's testimony was admissible under former O.C.G.A. § 24-3-5 (see O.C.G.A. § 24-8-801). White v. State, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the defendant's trial from that of an accomplice because the defendant did not demonstrate any clear prejudice and denial of due process that could have been avoided by severing the trials; the testimony of the accomplice implicating the defendant would be admissible in a separate trial, as would evidence of the defendant's attempted flight and, under

Separate Trials (Cont'd)

certain circumstances, statements the defendant made while cooperating with the state. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Trial court did not err in denying the defendant's motion to sever the trial from that of the codefendant because the codefendant's testimony implicating the defendant would have been admissible in a separate trial; even if the defendant suffered some prejudicial effect from the admission of evidence of the codefendant's prior conviction, the admission did not amount to the denial of due process necessary to constitute an abuse of discretion that would make the denial of severance reversible error. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

It was not an abuse of discretion to deny the defendant's motion to sever the defendant's trial from that of the defendant's codefendant because: (1) the defendant did not show the evidence might have confused the jurors; (2) the defendant did not show the defendant's defenses were antagonistic to the defendant's codefendant's defenses or that any evidence admitted at trial was inadmissible against the defendant in a separate trial; and (3) the evidence showed the defendant's active participation in the crimes alleged. Jones v. State, 315 Ga. App. 427, 727 S.E.2d 216 (2012).

Trial court did not err in denying the defendant's pretrial motion to sever the defendant's trial from that of the codefendant, because the number of defendants was small enough so that the danger of confusion was minimal, especially as both were charged without jointly participating in the same offense. Jones v. State, 318 Ga. App. 26, 733 S.E.2d 72 (2012).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the defendant's trial from a codefendant because the defendant failed to meet the defendant's burden of showing clearly that the joint trial prejudiced the defendant's defense, resulting in a denial of due process, since the defendant did not point to any evidence that the defendant contended was not admissible against the defendant but was admissible against the codefendant, and the defendant did not claim that the defendant's defense was antagonistic to that of the codefendant. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Denial of the second defendant's request to sever was not erroneous because the trial court gave appropriate limiting instructions cautioning the jury that the similar transaction action could only be considered against the first defendant. Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (2013).

Trial court did not err in denying the first defendant's motion to sever because the evidence of the DVD player pawned by the second defendant did not prejudice the defense of the first defendant given the extensive nature of the evidence tying the first defendant to the victim's murder including all of the items belonging to the victim found in the first defendant's home. Perera v. State, 295 Ga. 880, 763 S.E.2d 687 (2014).

Trial court did not err in denying the second defendant's motion to sever as the defense of the second defendant was not harmed by the introduction of jailhouse letters written to the second defendant by the first defendant given the voluminous evidence linking the second defendant directly to the victim's murder; and because those letters would have been admissible against both of the defendants, even if the defendants had been tried separately as both of the defendants were part of a criminal conspiracy and the criminal project was still ongoing at the time the letters were written. Perera v. State, 295 Ga. 880, 763 S.E.2d 687 (2014).

Trial court did not err in denying the defendant's motion to sever as the defendant and the co-defendants were jointly tried for almost the same offenses, which involved the same witnesses, whose credibility the co-defendants jointly attacked, and the state's evidence indicated that the defendants acted in concert. Blackledge v. State, 299 Ga. 385, 788 S.E.2d 353 (2016).

Trial court did note err in failing to sever the trial or exclude post-arrest statements made by the codefendants as the defendants did not have antagonistic

defenses because the defendants all took the position that the defendants had no involvement in the robbery, and, since none of the defendants testified or presented evidence, there was no defense theory presented by one that was antagonistic to the others. Ray v. State, 338 Ga. App. 822, 792 S.E.2d 421 (2016).

Trial court did not err in denying the second defendant's motion to sever because the jury was not confused by the counts in the indictment as the jury returned a verdict of not guilty as to counts 65-80 of the indictment; and, had there been separate trials, evidence of the gang activities of the co-defendants would have been admissible at the second defendant's trial. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

In the defendant's trial for attempted armed robbery and aggravated assault arising out of a home invasion in which the victim was shot five times, the defendant failed to explain how trying the defendant together with a co-defendant could have confused the jury, given that the evidence showed a relatively brief and straightforward attempted robbery and the assault of a single victim by both defendants, and their defenses of alibi were not mutually exclusive. Cuyler v. State, 344 Ga. App. 532, 811 S.E.2d 42 (2018), cert. denied, No. S18C0874, 2018 Ga. LEXIS 482 (Ga. 2018).

Trial counsel was not ineffective for failing to seek severance of the defendant's trial from that of the second co-defendant because the mere fact that the case against the second co-defendant was stronger than the case against the defendant did not necessitate a separate trial; the defendant pointed to no evidence with regard to the murder that would have been excluded had the defendant's severance motion been granted and the defendant were tried alone; the defendant was being tried under the theory that the defendant was a party to the crime; and, even if counsel had filed a motion to sever, the court would not have abused the court's discretion in denying the motion as the defendant would not have been able to show prejudice from a joint trial. Green v. State, 302 Ga. 816, 809 S.E.2d 738 (2018).

Trial court did not err in severing the defendant's trial from the codefendant because the law applicable to both was substantially the same, all of the evidence presented at trial was admissible against both the defendants, and there was minimal risk of the jury being confused or of evidence being improperly considered against either of the defendants. Palmer v. State, 303 Ga. 810, 814 S.E.2d 718 (2018).

Trial court did not err in denying the defendant's motion to sever the defendant's trial from the defendant's child's trial as there was nothing particularly confusing about the evidence supporting the defendant's conviction for evidence tampering; and the jury demonstrated the jury's ability to decide each case separately, rather than assuming the defendant's guilt based solely on the criminal conduct of the defendant's child, because the jury acquitted the defendant of making false statements to police. Elkins v. State, 350 Ga. App. 816, 830 S.E.2d 345 (2019).

At the time of trial, trial counsel believed that the trial court had obviated any Bruton violation concerns, and trial counsel was entitled to rely on the steps the trial court had taken in formulating counsel's opinion about filing a motion to sever; thus, the second defendant's counsel did not perform deficiently by failing to file a motion to sever, and the second defendant was not entitled to a new trial on that basis. Hill v. State, 351 Ga. App. 58, 830 S.E.2d 478 (2019).

First defendant's counsel was not ineffective for failing to file a motion to sever as the first defendant did not show antagonistic defenses, that evidence admissible only against the second defendant was improperly used against the first defendant, or that the joint trial created confusion; and the first defendant's argument that had the trials been severed the first defendant would have been able to confront and cross-examine the second defendant's statements was specious as the statements the first defendant pointed to were made during a hearing outside the presence of the jury, and nothing prevented the first defendant from cross-examining the narcotics investigator about the statements as the jury would

Separate Trials (Cont'd)

not have heard that testimony. Hill v. State, 351 Ga. App. 58, 830 S.E.2d 478 (2019).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because the case involved only two codefendants, tried for the same crimes based on largely the same evidence, and the state's theory was that the defendants acted together. Thus, there was little likelihood that the issues to be tried would be confused or that evidence against one defendant would improperly be considered against the other. Floyd v. State, 307 Ga. 789, 837 S.E.2d 790 (2020).

Trial court did not err in denying the defendant's motion to sever because it was not required under the applicable law on party to a crime to show that any specific co-defendant physically possessed a weapon for that defendant to be convicted of felony murder or of the predicate offense of aggravated assault as a party to a crime; and the fact that the evidence as to one of the co-defendants was stronger did not demand a finding that the denial of a severance motion was an abuse of discretion since there was evidence showing that the defendants acted in concert. Smith v. State, 308 Ga. 81, 839 S.E.2d 630 (2020).

Prejudice

Burden on defendant to show prejudice. — Without a showing of prejudice, the fact that defenses are antagonistic will not require severance. Everett v. State, 238 Ga. 80, 230 S.E.2d 882 (1976).

Without a clear showing of prejudice and harm by movant, the mere fact that the codefendant's defenses are antagonistic is not sufficient in itself to warrant separate trials. Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

To warrant a severance, the defendants must show the probability of prejudice and may not present just argument that there is a better probability a separate trial would give the defendants a better chance of acquittal. To obtain a new trial at the appellate level the defendants must show actual prejudice and denial of due process. Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

There must be a clear showing of prejudice resulting from the joinder, rather than the mere possibility that a separate trial would improve a defendant's chance of acquittal, before severance will be required. Tanner v. State, 176 Ga. App. 77, 335 S.E.2d 133 (1985).

In making a motion for severance, the defendant had the burden to make a clear showing of prejudice and consequent denial of due process. Allen v. State, 255 Ga. 513, 340 S.E.2d 187 (1986).

Showing of clear prejudice required. — Trial court does not manifestly abuse the court's discretion by refusing to sever when appellants failed to make "a showing of clear prejudice" as required to warrant a severance. York v. State, 242 Ga. App. 281, 528 S.E.2d 823 (2000).

Defendant must clearly show prejudice and denial of due process. — Trial judge must exercise the judge's discretion in each particular case, but the burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give defendant a better chance of acquittal; the defendant must make a clear showing of prejudice and a consequent denial of due process. Majors v. State, 203 Ga. App. 139, 416 S.E.2d 156 (1992).

Because the defendant has made a clear showing of prejudice and consequent denial of due process based on the fact that the jury found the defendant guilty of a codefendant's crimes, for which the defendant was not even on trial, the trial court abused the court's discretion in overruling the defendant's motion to sever. Brooks v. State, 311 Ga. App. 857, 717 S.E.2d 490 (2011).

Defendant must establish prejudice from failure to sever. — When the death penalty is not sought, the severance of the defendants' trials is within the sound discretion of the trial court and the court's decision will not be disturbed unless there is an abuse of that discretion; under O.C.G.A. § 17-8-4, the burden is on the defendant moving for severance to

demonstrate more than the possibility that a separate trial would provide the defendant with a better chance of acquittal, and the defendant must establish a clear showing of prejudice. Robinson v. State, 259 Ga. App. 555, 578 S.E.2d 214 (2003).

Must show clear prejudice to justify severance. — Trial court did not err by denying the defendant's motion to sever the defendant's trial from that of the codefendants pursuant to O.C.G.A. § 17-8-4 because, even if there were antagonistic defenses, this mere fact was not sufficient in itself to warrant severance absent a showing of prejudice, and the defendant failed to show clear prejudice and denial of due process resulting from any antagonistic defenses. Taylor v. State, 285 Ga. App. 697, 647 S.E.2d 381 (2007), cert. denied, No. S07C1515, 2007 Ga. LEXIS 655 (Ga. 2007).

Failure to show avoidance of prejudice meant no severance. — Since there was ample evidence to show that the defendant was a party to the crime, and did not merely have a passive involvement, the defendant failed to show any prejudice that would have been avoided by a separate trial; therefore, the trial court did not abuse the courts discretion in denying severance. Harrell v. State, 253 Ga. 474, 321 S.E.2d 739 (1984).

Prejudice must be shown to establish abuse of discretion. — To find that a denial of the motion was an abuse of discretion it must appear that the defendant suffered prejudice amounting to a denial of due process. Aaron v. State, 145 Ga. App. 349, 243 S.E.2d 714 (1978).

Denial of a defendant's motion for severance is not an abuse of discretion in the absence of a clear showing of prejudice. Whitehead v. State, 149 Ga. App. 774, 256 S.E.2d 50 (1979); Depree v. State, 246 Ga. 240, 271 S.E.2d 155 (1980).

Ruling on severance reversed only if abuse of discretion shown. Since the grant or denial of a motion to sever is left to the discretion of the trial court, the court's ruling will be overturned only for an abuse of discretion. Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975); Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Graham v. State, 152 Ga. App. 233, 262 S.E.2d 465 (1979); Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980); Brown v. State, 262 Ga. 223, 416 S.E.2d 508 (1992).

Prejudice amounting to denial of due process required to disturb ruling on severance. — If defendants do not show on appeal in what manner the defendants were prejudiced by a joint trial, it cannot be said that the trial court's denial of the defendants' motions to sever was an abuse of discretion. Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

In the absence of a showing that the trial court abused the court's discretion in denying severance, causing the defendant to suffer prejudice amounting to a denial of due process, the trial court's ruling will not be disturbed on appeal. Carroll v. State, 147 Ga. App. 332, 248 S.E.2d 702 (1978); Smith v. State, 154 Ga. App. 258, 267 S.E.2d 863 (1980).

Specific and compelling prejudice required to overcome exercise of trial court's discretion. — Trial judge must weigh likelihood of prejudice against interests of judicial economy in ruling on a motion for severance; because that determination is discretionary, the Court of Appeals will disturb the trial court's ruling only when the defendant can show that the trial court abused the court's discretion and, in order to demonstrate an abuse of discretion, the defendant bears a heavy burden of showing specific and compelling prejudice. United States v. Morris, 647 F.2d 568 (5th Cir. 1981).

Prejudice not shown. — Defendant failed to meet the defendant's burden of showing that the defendant was prejudiced as required by law when the codefendant's testimony was admissible against the defendant whether the defendants were tried together or separately. Hill v. State, 212 Ga. App. 448, 442 S.E.2d 298 (1994).

Because the defendant failed to specify how evidence implicating a codefendant "spilled over" to prejudice the defendant's case, the defendant failed to show that the trial court erred in not severing the defendant's trial from that of the codefendant. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633 (2007).

Trial court did not err in denying a codefendant's request for severance be-

Prejudice (Cont'd)

cause the codefendant did not show specific prejudice from the presentation of antagonistic defenses; although the defendant and the codefendant raised antagonistic defenses, in the sense that each of the defendants pointed to the other as the shooter and the leader in killing the victim and disposing of the body, that alone was insufficient to require severance. Krause v. State, 286 Ga. 745, 691 S.E.2d 211 (2010).

Although the defendant complained that the defendant was not permitted to question a codefendant about the codefendant's possible past involvement in drug activity, absent a showing of prejudice to the defendant, the trial court did not err in denying the defendant's motion to sever. Williams v. State, 308 Ga. App. 464, 708 S.E.2d 32 (2011).

Defendant was not prejudiced by a joint trial based on the defendant and a codefendant's similar appearance because several of the witnesses had known the defendant and the codefendants for years, others were able to identify the defendant by the defendant's distinctive clothing, and any confusion at the joint trial was cleared up by the one witness who confused the defendant and the codefendant and did not amount to a denial of due process; the defendant and the codefendants urged defenses that were, for the most part, consistent; and, even to the extent that the defendant and the codefendants urged antagonistic defenses, the defendant failed to show that the joint trial denied the defendant due process. Thomas v. State, 293 Ga. 829, 750 S.E.2d 297 (2013).

Trial court did not abuse the court's discretion in denying the appellant's motion to sever because there was no showing of prejudice since there was no indication that the jury confused the evidence or the applicable law to the appellant and the co-defendant as all defendants were largely charged with the same offenses that stemmed from the same evidence and fact pattern. McClendon v. State, 299 Ga. 611, 791 S.E.2d 69 (2016).

Evidence insufficient to show prejudice from failure to grant separate trials. — See Tanner v. State, 176 Ga. App. 77, 335 S.E.2d 133 (1985); Berry v. State, 267 Ga. 605, 481 S.E.2d 203 (1997), cert. denied, 522 U.S. 852, 118 S. Ct. 144, 139 L. Ed. 2d 91 (1997); Dixon v. State, 268 Ga. 81, 485 S.E.2d 480 (1997); Leonard v. State, 228 Ga. App. 792, 492 S.E.2d 747 (1997); Slaughter v. State, 240 Ga. App. 758, 525 S.E.2d 130 (1999); Ricarte v. State, 249 Ga. App. 50, 547 S.E.2d 703 (2001); Boone v. State, 250 Ga. App. 133, 549 S.E.2d 713 (2001); Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001).

Application

Severance in aggravated sodomy cases. — There was no abuse of discretion in a trial court's denial of defendant's motion to sever the defendant's trial from that of a codefendant as the defendant was on trial for aggravated sodomy; the court found that the defendant failed to make a clear showing that joinder would result in prejudice amounting to denial of due process. Pitts v. State, 263 Ga. App. 322, 587 S.E.2d 811 (2003).

Severance in aggravated assault with intent to commit other crimes. — In a trial of two defendants for aggravated assault with intent to rob and aggravated battery, there was no showing of loss of due process due to confusion of evidence, antagonistic defenses, or unfair implication of one defendant by the other; therefore, the trial court did not abuse the court's discretion in joining the defendants. Autry v. State, 230 Ga. App. 773, 498 S.E.2d 304 (1998).

Severance in child molestation cases. — Denial of wife's motion to sever her trial for child molestation from that of her codefendant husband was not an abuse of discretion since the relevant evidence against both was unambiguous and the applicable law was straightforward, and the defenses were not antagonistic but were, in fact, mutually supportive. Story v. State, 194 Ga. App. 187, 390 S.E.2d 96 (1990).

In the prosecution of parents for child molestation involving their children, the trial court did not abuse the court's discretion when the court refused to sever the trial. Graham v. State, 239 Ga. App. 429, 521 S.E.2d 249 (1999).

Motions to sever in cruelty to a child proceedings. — Trial court did not err under O.C.G.A. § 17-8-4 in denying a defendant's motion to sever the defendant's trial for cruelty to a child and other offenses from that of a codefendant because the defendant did not establish that, if severance were granted, the defendant would have been able to call the codefendant to testify about a letter without the codefendant invoking rights under the Fifth Amendment to the United States Constitution; even if such questioning could have been conducted, the defendant did not show harm caused by the testimony's absence because it was uncontroverted that the codefendant wrote the letter at issue and there was no showing that the codefendant's testimony would have exculpated the defendant. White v. State, 281 Ga. 276, 637 S.E.2d 645 (2006).

Severance in cocaine cases. — There was no abuse of discretion in the trial court's denying the defendant's motion to sever since the defendant failed to show that a joint trial was confusing or misleading with regard to the law or the evidence, when there was no evidence admissible against one defendant that was not admissible against all of the defendants and when there was nothing antagonistic in the defendants' defenses; all defendants denied the charges relating to trafficking in cocaine and none of the defendants pointed to the other as having knowledge of the cocaine or of the large sum of money that was found at the apartment. Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920, cert. denied, 192 Ga. App. 902, 384 S.E.2d 920 (1989).

Motion to sever in conspiracy cases. — Denial of the defendant's motion for severance was proper since no antagonistic testimony existed and, because there was a considerable amount of testimony which authorized the jury to conclude that there was a conspiracy between the defendant and the codefendant, any testimony against the codefendant which would show the furtherance of a conspiracy was relevant as to the defendant. Hull v. State, 265 Ga. 757, 462 S.E.2d 596 (1995).

Trial court did not deprive the first and second defendants of due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5 in failing to sever, pursuant to O.C.G.A. § 17-8-4, the defendants' trials in a case involving the three defendants, who were allegedly involved in a conspiracy; because each defendant was implicated by each defendant's own statement, the defendants failed to show how the defendants were prejudiced by the joint trial, and there was no showing of antagonistic defenses. Brooks v. State, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Motions to sever if series of continuous acts. — Because the offenses committed by a defendant and a codefendant amounted to a series of continuous acts connected together both in time and the area in which committed, and there was no likelihood of confusion, the trial court did not abuse the court's discretion in denying the defendant's motion to sever the trial from that of the codefendant; furthermore, the mere fact that the codefendants' defenses were antagonistic was insufficient in itself to warrant separate trials. Diaz v. State, 280 Ga. App. 413, 634 S.E.2d 160 (2006).

Motions to sever in trial for crime of false statements. — Denial of the defendant's motion to sever the false statement charges against the defendant was proper as the false statement charges stemmed from the defendant's continuing efforts to conceal the defendant's participation in a robbery and a murder. Sampson v. State, 279 Ga. 8, 608 S.E.2d 621 (2005).

Motion to sever in murder cases. — When the defendant and the defendant's codefendant were charged with murder and related offenses, the denial of the defendant's motion to sever the defendant's trial from that of the defendant's codefendant was not an abuse of discretion because there was no likelihood of confusion as there were only two defendants who acted in concert, their defenses were not antagonistic in that the defendants both denied any involvement in the crimes, severance would not have limited the admission of evidence one defendant claimed was unduly prejudicial, and the

Application (Cont'd)

physical and testimonial evidence against one defendant was not overwhelming in comparison to the evidence against the other defendant. Styles v. State, 279 Ga. 134, 610 S.E.2d 23 (2005).

Two defendants, jointly tried and convicted of malice murder and aggravated assault and other related offenses, failed to meet the burden of showing that the defendants were clearly prejudiced by proceeding with a joint trial since both defendants testified and were cross examined, with each blaming the other for the shooting; even if the motion to sever had been granted, the defendant could have testified at each other's separate trials and related the same testimony, and the defendants had ample opportunity to cross-examine each other concerning the defendants' respective defenses. Appling v. State, 281 Ga. 590, 642 S.E.2d 37 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Denial of motions to sever murder trials under O.C.G.A. § 17-8-4(a) was proper because there was no showing of prejudice from the joint trial of the first defendant and the second defendant, the first defendant's statement to police about a prior altercation with the victim did not, standing alone, inculpate the second defendant in the charged crimes, there was no reasonable probability that the statement contributed to the guilty verdicts, and there was no danger of confusion in this case because there were only two defendants allegedly acting in concert and the evidence was not such that it confused the jury as to their individual participation in the crimes. Daniel v. State, 285 Ga. 406, 677 S.E.2d 120 (2009).

Trial court's refusal to sever two murder counts because the defendant was not involved in those murders was not an abuse of discretion because evidence regarding the subject murders was relevant to the gang's existence as a "criminal street gang" and to certain codefendants' participation in criminal street gang activity, and the jury was instructed on the purpose for which the evidence was offered. Morris v. State, 294 Ga. 45, 751 S.E.2d 74 (2013).

Defendant completely failed to show any specific prejudice such that the joint trial denied the defendant due process because there was little likelihood of actual juror confusion in the case since only four defendants were tried and the law and evidence that applied to each of the defendants were substantially the same and the trial court gave appropriate limiting instructions, indicating that the similar transaction evidence could be considered only as to each co-defendant against whom that evidence was admitted. Nwakanma v. State, 296 Ga. 493, 768 S.E.2d 503 (2015), overruled in part by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Whether to grant separate trials to co-defendants in a non-death penalty murder case is within the discretion of the trial court. The appellant failed to demonstrate the requisite prejudice from the denial of the motion to sever to establish that the trial court abused the court's discretion in denying the motion. Philpot v. State, 300 Ga. 154, 794 S.E.2d 140 (2016).

In a murder case, the trial court did not err in denying the defendant's motion for severance as the applicable law was the same for the defendant and the defendant's brother; the brother did not present an antagonistic defense; substantially the same evidence would have been introduced at both trials had the defendants been tried separately; and the eyewitness accounts and video evidence were admissible against both the defendant and the defendant's brother. Solomon v. State, 304 Ga. 846, 823 S.E.2d 265 (2019).

Severance in conspiracy to murder cases. — Trial court did not abuse the court's discretion by refusing to sever the defendant's trial from that of a codefendant since the state introduced sufficient evidence to establish a prima facie case that the two were involved in a conspiracy to murder or otherwise harm the victim. Brown v. State, 262 Ga. 223, 416 S.E.2d 508 (1992).

Motion to sever in kidnapping cases. — In a kidnapping prosecution, the defendant was not entitled to sever the codefendant from the trial. Since the codefendant testified and was available for

cross-examination, the codefendant's confession was admissible against both defendants; further, the codefendant's defense was not antagonistic to the defendant's as the codefendant simply denied making alleged statements to police or participating in the victim's death. Hunsberger v. State, 299 Ga. App. 593, 683 S.E.2d 150 (2009).

Motions to sever in robbery cases. — Trial court did not abuse the court's discretion when the court denied the defendant's motion to separate the defendant's trial from that of a codefendant. In a non-capital case, the decision whether to give codefendants separate trials is within the sound discretion of the trial court, and in the instant case there were only two codefendants, the issues were straightforward, and after the codefendant pled guilty, the codefendant testified on the defendant's behalf in an attempt to show that the defendant was forced to participate in an armed robbery; therefore, the defendant failed to make the requisite showing of harm. Gilbert v. State, 259 Ga. App. 371, 577 S.E.2d 35 (2003).

Denial of the defendant's motion to sever the trial of two armed robbery charges was upheld as the robberies were so similar that the robberies evinced a definite pattern: the crimes were committed in the same neighborhood on Friday evening, the robber on both cases showed the robber's gun to a male friend or acquaintance and announced the robber's intention to get a car moments before the crimes were committed, and both crimes were accomplished by a man wearing a fitted cap or "do-rag" and brandishing a handgun, surprising lone women as the women got into or out of a sport-utility vehicle, and demanding car keys. Johnson v. State, 265 Ga. App. 777, 595 S.E.2d 625 (2004).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever two offenses as: (1) the two armed robberies occurred within a short time, were of hotels in the same county, and had hotel clerks as victims; (2) both victims gave the same general description of the robber and the robber's disguise; and (3) there was nothing complex about the two robberies and either crime could have been introduced at a trial of the other which minimized any prejudice from the joint trial. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

For common plan or scheme in narcotics prosecution, see Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980).

Non-immunized defendant properly allowed to testify against codefendant. — Because the first of two defendants jointly tried voluntarily testified against the second defendant, and the second defendant had the opportunity to effectively cross-examine the first, or otherwise present evidence demonstrating innocence, it was pure speculation for the appeals court to assume that the first defendant's willingness to cooperate with the state without a promise of leniency or immunity would cause the jury to view the testimony presented in a positive light; thus, the trial court did not err in permitting the first defendant to testify for the state against the second defendant. Herberman v. State, 287 Ga. App. 635, 653 S.E.2d 74 (2007).

Defendant must do more than raise possibility of better chance of acquittal. — Burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give the defendant a better chance of acquittal. Bell v. State, 239 Ga. 146, 236 S.E.2d 47 (1977); Armour v. State, 151 Ga. App. 254, 259 S.E.2d 662 (1979); Robinson v. State, 164 Ga. App. 652, 297 S.E.2d 751 (1982).

Possibility for better chance for acquittal insufficient. — To be entitled to a severance, the defendants were required to do more than raise the possibility that separate trials would have given the defendants a better chance of obtaining acquittals; the defendants were required to make a clear showing of prejudice sufficient to establish a denial of due process. Cook v. State, 221 Ga. App. 831, 472 S.E.2d 686 (1996).

Evidence stronger against one defendant. — Based on trial counsel's testimony regarding a trial strategy to have the codefendants tried together, given the opinion that the evidence was stronger against the codefendants and counsel

Application (Cont'd)

wanted to distance the defendant from the codefendants, no abuse of discretion resulted from the trial court's failure to order severance. Adkins v. State, 280 Ga. 761, 632 S.E.2d 650 (2006).

Fact that evidence as to one of two codefendants is stronger does not demand a finding that denial of a motion to sever is an abuse of discretion if there is evidence showing the codefendants acted together. Whitehead v. State, 237 Ga. App. 551, 515 S.E.2d 866 (1999).

Motion to sever was properly denied even though the evidence against one conspirator was stronger than the evidence against the other conspirator but this gave no reason for severance and individual participation could be sorted out by the jury. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003).

Evidence that jury was able to consider each defendants case separately. — Trial court did not abuse the court's discretion in failing to sever the defendant's trial from that of four codefendants as no evidence was presented that the jurors were confused, that the defenses were antagonistic to each other, or that evidence admitted against the codefendants was improperly considered in the defendant's trial; indeed, the defendant was acquitted of kidnapping with bodily injury and aggravated assault of one of the victims, indicating that the jury was able to decide each case separately. Jordan v. State, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

Trial court did not abuse the court's discretion by denying a defendant's motion to sever the defendant's trial from the codefendant's trial, with regard to charges of armed robbery and theft by receiving stolen property involving stopping in front of a vehicle and taking the victim's purse by gunpoint as the defendant failed to show that the evidence against the codefendant was stronger since the victim identified the defendant as the driver of the vehicle that stopped in front of the victim's car. Further, the fact that the defendant and the codefendant shared the same last name (as siblings) did not confuse the jury as the case only involved the two defendants, the trial court instructed the jury to consider each of the defendants separately, and the fact that the jury acquitted the defendant of the theft by receiving stolen property crime while the codefendant, who was the owner of the vehicle, was convicted of that charge indicated that the jury had the ability to decide each charge and each of the defendants separately. Rabie v. State, 294 Ga. App. 187, 668 S.E.2d 833 (2008).

Trial court did not err in denying the defendant's motion to sever because the defendant cited only the "volatile relationships" and "irreconcilable differences" among the various defense attorneys, the prosecutor, and the lead detective; there was no indication that the jury confused the evidence or law. All three defendants were charged with identical crimes, and the jury, in reaching different verdicts as to each codefendant, proved itself amply capable of distinguishing the evidence relevant to each. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009).

No right to joint trial of coindictees. — Although the trial court has discretion to try coindictees for non-capital crimes together or separately under O.C.G.A. § 17-8-4, defendant's claim that the trial court erred by not trying the defendant and the accomplice together was rejected; the claim was not raised below and there was no right to be jointly tried with all coindictees. Holmes v. State, 265 Ga. App. 409, 593 S.E.2d 932 (2004).

Joinder allowing for uniformity. — Joinder, when offenses are part of a common scheme or plan, allows for uniformity in decision making; it eliminates a duplication of effort, saves time, and expedites the trial process. Magouirk v. State, 158 Ga. App. 517, 281 S.E.2d 283 (1981).

Joinder producing overlap. — Inherent in joinder or consolidation of defendants at trial is the possibility of overlap; that is, that culpatory evidence admitted against one defendant will be considered against another defendant. Magouirk v. State, 158 Ga. App. 517, 281 S.E.2d 283 (1981).

Joinder as restraining freedom of counsel in exercising trial strategy. — Joinder, if there is more than one counsel

representing the codefendants, affects or restrains freedom of counsel in employing and exercising counsel's particular trial strategy. Magouirk v. State, 158 Ga. App. 517, 281 S.E.2d 283 (1981).

Balance interests of state with defendants. — When joinder of offenses is allowable, the trial judge may balance the interest of the state and the accused by considering such factors as whether the same evidence would be necessary and admissible in each case and whether the joining of the counts in one trial might confuse the jury. Johnson v. State, 158 Ga. App. 398, 280 S.E.2d 419 (1981).

If defenses not antagonistic and testimony is essentially the same. — If appellants do not advance antagonistic defenses, but instead choose to testify and present essentially the same version of events concerning the only crime involved, and if the same witnesses would have testified if two trials had been held, the appellants can show neither prejudice nor an abuse of discretion by the trial court in refusing separate trials. Dixon v. State, 243 Ga. 46, 252 S.E.2d 431 (1979).

In the defendant's trial for home invasion and murder, denial of the defendant's motion to sever the defendant's trial from that of the co-defendant under O.C.G.A. § 17-8-4 was not error because there was no indication of confusion, both men were mostly charged with the same offenses that stemmed from the same evidence and fact pattern, and their defenses were not antagonistic. Harris v. State, 304 Ga. 276, 818 S.E.2d 530 (2018).

Codefendants with antagonistic defenses are tried together. — If codefendants assert antagonistic defenses, but the trial judge denies the defendant's motion for separate trial, the defendant is not denied the defendant's right to effective counsel or to confront the witnesses, despite the codefendants' ability to assert the privilege against self-incrimination on cross-examination in a joint trial, unless the defendant can show that the defendant was prejudiced. Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975).

Severance based on codefendants' antagonistic defenses. — Mere fact that codefendants' defenses are antagonistic is not sufficient in itself to warrant separate trials. Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975); Reaves v. State, 146 Ga. App. 409, 246 S.E.2d 427 (1978); Kennedy v. State, 253 Ga. 132, 317 S.E.2d 822 (1984).

Fact that the defenses of the codefendants jointly tried may be antagonistic does not in and of itself dictate the grant of separate trials. James v. State, 157 Ga. App. 763, 278 S.E.2d 696 (1981).

Fact of different defenses or even antagonistic defenses will not of itself require severance. Owens v. State, 251 Ga. 313, 305 S.E.2d 102 (1983).

Antagonism between codefendants is not enough in itself to require severance, rather the defendant must also demonstrate resulting harm, and if the defendant's own pre-trial statement admitting the defendant's own guilt was identical to a codefendant's statement such harm was not demonstrated. Harris v. State, 218 Ga. App. 472, 462 S.E.2d 425 (1995).

Even if the defendant's defenses are antagonistic, theoretically antagonistic defenses without harm do not warrant a reversal. Brown v. State, 268 Ga. 354, 490 S.E.2d 75 (1997).

Entry of guilty plea to one charge waives challenge to failure to sever. — Although the defendant complained that the court failed to sever the two counts of the indictment, but the defendant entered a guilty plea as to the charge of possession of a firearm by a convicted felon, thus the defendant was tried only for murder, and therefore this enumeration of error was without merit. Gentry v. State, 250 Ga. 802, 301 S.E.2d 273 (1983).

Severance must be demanded before a hearing on the evidence. Trowbridge v. State, 74 Ga. 431 (1885).

Severance argument waived. — Defendant waived any argument concerning severance because, although the codefendants moved to sever, the defendant failed to move to sever the defendant's case from that of the codefendants. Garrison v. State, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

Because the defendant made no motion to sever, made no motion to exclude the similar transaction evidence at trial or during the pretrial hearing on the issue, did not join a co-defendant's motions to

Application (Cont'd)

sever the trial or exclude the evidence, only raised the issues in a motion for new trial, and did not raise the issues at trial, the defendant waived the right to argue the issues regarding severance and the introduction of similar transaction evidence on appeal. Davis v. State, 331 Ga. App. 585, 771 S.E.2d 232 (2015), cert. denied, No. S15C1287, 2015 Ga. LEXIS 551 (Ga. 2015).

Right to sever is absolute unless the state waives the death penalty. Turner v. State, 136 Ga. App. 42, 220 S.E.2d 57 (1975).

If the state was seeking the death penalty, former Code 1933, § 27-2101 (see O.C.G.A. § 17-8-4) gave any defendant so electing the absolute right to be tried separately. Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978).

Factors considered when death penalty not sought. — Factors which the trial court must consider in exercising discretion in regard to a motion to sever in case in which the death penalty is not sought are: (1) whether the number of defendants will create confusion as to law and evidence applicable to each; (2) danger that evidence admissible against one defendant will be considered against the other despite the court's instructions; and (3) whether the defenses of the defendants are antagonistic to each other or to each other's rights. Kelley v. State, 248 Ga. 133, 281 S.E.2d 589 (1981); Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778 (1987), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

When the death penalty is waived, the decision of whether the defendants may be tried jointly is in the discretion of the trial judge. Owens v. State, 251 Ga. 313, 305 S.E.2d 102 (1983).

State may demand a severance if justice requires severance. Stewart v. State, 58 Ga. 577 (1877).

State may withdraw decision as to which defendant shall be tried first. Dixon v. State, 12 Ga. App. 17, 76 S.E. 794 (1912).

If a defendant is indicted separately, the defendant has a right to be tried separately under the law unless the defendant voluntarily waives that right. State v. Connelly, 138 Ga. App. 121, 225 S.E.2d 519 (1976).

Joint trial of persons indicted separately for same offense. — By voluntary waiver, persons indicted separately for a joint offense may be tried together. Towns v. State, 149 Ga. 613, 101 S.E. 678 (1919).

Court not required to sever trials if no motion made. — There was no authority under former Code 1933, § 27-2101 (see O.C.G.A. § 17-8-4) to require the court to sever the trial of a defendant who made no motion to sever. Way v. State, 239 Ga. 316, 236 S.E.2d 655 (1977).

Motion for separate trials is addressed to the discretion of the trial court. Dixon v. State, 243 Ga. 46, 252 S.E.2d 431 (1979).

Denial of a motion to sever the defendants pursuant to O.C.G.A. § 17-8-4 is a matter within the sound discretion of the trial court, and the court's ruling will not be disturbed absent a clear abuse of such discretion. Dover v. State, 192 Ga. App. 429, 385 S.E.2d 417 (1989).

Whether to sever the trials of the codefendants is a matter of discretion with the trial judge, and, absent abuse, the judge's decision will not be disturbed by the appellate court. Causey v. State, 192 Ga. App. 294, 384 S.E.2d 674 (1989).

Grant or denial of a motion to sever is within the discretion of the trial court and absent an abuse of discretion, denial of a motion to sever is not grounds for reversal. Freeman v. State, 205 Ga. App. 112, 421 S.E.2d 308 (1992).

No abuse for failure to sever. — Defendant's motion to sever the defendant's trial was properly denied since: (1) three defendants was not so numerous that the jury would be likely to confuse the facts and law applicable to each; (2) the relevant evidence against each codefendant was unambiguous, the applicable law was straightforward, and there was no evidence of any spillover effect from one codefendant to another; (3) defendant made no showing of prejudice and a consequent denial of due process; and (4) the fact that the evidence was not as strong against defendant as that against the co-

defendants did not warrant severance. Further, the burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give the defendant a better chance of acquittal; the defendant must make a clear showing of prejudice and a consequent denial of due process. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Trial court properly denied the defendant's motion to sever a joint trial as: (1) each of the codefendants was jointly charged with the same offenses, and the offenses were committed simultaneously; (2) there was no danger of confusion as to the law and evidence applicable to each as virtually all of the evidence tended to show the defendants joint guilt; (3) severance was not required solely because each of the three defendants shared the same last name; and (4) the defenses were complimentary, not antagonistic, in that all argued that the state had charged the wrong men and had failed to prove the case. Hence, the defendant failed in the burden of showing prejudice and a denial of due process. Adkins v. State, 281 Ga. 301, 637 S.E.2d 714 (2006).

Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of a codefendant; the defendant stated that the defendant could not meet the criteria to have severance granted in order to call the codefendant as a witness, and although the defendant later wanted it known that the codefendant had prior convictions, the defendant never asserted this as a basis for the defendant's motion to sever. Lee v. State, 284 Ga. App. 435, 644 S.E.2d 196 (2007).

It was not error for the trial court to refuse to sever the defendant's trial from that of a codefendant because of evidence regarding the codefendant's prior incarceration. The evidence was not complex and the defenses of the defendant and the codefendant were not antagonistic; moreover, admission of evidence suggestive of the codefendant's bad character, even if improper, was harmless in light of the overwhelming evidence of the defendant's guilt. Walker v. State, 282 Ga. 703, 653 S.E.2d 468 (2007).

Because a codefendant could have testified against the defendant in a separate trial if the defendant's motion to sever had been granted, the defendant failed to show harm from the denial of the motion to sever. Accordingly, the trial court did not abuse the court's discretion in denying the defendant's motion to sever due to antagonistic defenses. Hendrix v. State, 284 Ga. 420, 667 S.E.2d 597 (2008).

Trial court did not err in failing to grant a defendant's motion for severance of defendants under O.C.G.A. § 17-8-4(a); because a witness did not exculpate the defendant, but implicated the defendant as a party, the defendant was not prejudiced by the codefendants' attempts to discredit the witness. As for a second defendant, failure to grant a severance was harmless in light of the overwhelming evidence of guilt. Metz v. State, 284 Ga. 614, 669 S.E.2d 121 (2008), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

With regard to several defendants challenging the trial court's denial of the defendants' motions to sever the cases from the other defendants, the defendants failed to show that the trial court abused the court's discretion by denying the motions as the defendant did not make a clear showing of prejudice sufficient to establish a denial of due process since each defendant was charged with a Georgia Racketeering Influenced and Corrupt Organization Act (RICO) violation, thus, all of the evidence was admissible against all the defendants, and would have been admissible even if they had separate trials on the RICO violations. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Trial court did not err in denying the defendant's motion to sever under O.C.G.A. § 17-8-4(a). The danger of confusion from three defendants appeared minimal; there appeared to be no danger that the evidence against one would be considered against the others, especially as the three were charged with jointly participating in the same offenses and as the offenses were committed as part of the same crime scheme; and the defenses were not antagonistic when the motion was considered, although the defenses

Application (Cont'd)

later became so when one defendant chose to testify against the others. Lankford v. State, 295 Ga. App. 590, 672 S.E.2d 534 (2009).

Trial court did not abuse the court's discretion by denying the defendant's motion to sever the defendant's trial from the codefendant's trial because the law applicable to each defendant was substantially the same, and the evidence at trial showed that the defendant and the codefendant acted together in killing the victim. Moreover, the defendant did not clearly show that a joint trial prejudiced the defendant's defense, resulting in a denial of due process. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the defendant's trial from that of the codefendants because the familial and personal interrelationships of the three defendants and one of the victims were not so confusing as to warrant separate trials; the relationships went to motive for the shootings and would have been admissible had the codefendants been tried separately. Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of the codefendant as the defenses of the defendant and the codefendant were not antagonistic and the jury was instructed that the defendants were on trial only for the offenses charged in the indictment and not for any other acts or occurrences. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Trial court did not err in failing to sever the defendant's trial from that of the codefendant as the evidence showed they acted together, the law applicable to each was the same, and the defendant failed to point to evidence that would not have been admitted in a separate trial. Coe v. State, 293 Ga. 233, 748 S.E.2d 824 (2013).

Trial court did not err in denying a motion to sever because the law applicable to each defendant was substantially the same, the evidence showed the defendants acted together, and there was no showing of prejudice from the presentation of antagonistic defenses. Flournoy v. State, 294 Ga. 741, 755 S.E.2d 777 (2014).

Defendant failed to show that the trial court abused the court's discretion in failing to sever the defendant's trial from the co-defendant's because the defendant failed to show that the evidence may have been confusing to the jurors, especially since there were only two co-defendants involved in the case and the evidence showed that the defendant acted in concert with the co-defendant by driving the getaway vehicle. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was little likelihood of jury confusion as there were only two defendants at trial and no difference in the law applied to the two defendants; the jury addressed the defendants' indictments separately and returned a separate verdict for each defendant; and antagonistic defenses alone were not sufficient to mandate severance. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Trial court did not err in denying the first defendant's motion to sever as there was little likelihood of jury confusion given that there were only two defendants and no difference in the law applied to the defendants and evidence that the second defendant was a gang member would have been admissible against the first defendant in a separate trial. Zamudio v. State, 332 Ga. App. 37, 771 S.E.2d 733 (2015).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever as the presence of antagonistic defenses alone was insufficient to require severance and the defendant made no showing that the codefendant would have been likely to offer testimony exculpatory to the defendant if the offenses had been tried separately. Marquez v. State, 298 Ga. 448, 782 S.E.2d 648 (2016).

No showing of harm for failure to sever. — Because a second of two defendants failed to show the presence of any confusion engendered by the number of defendants or the law, the defenses were not antagonistic, and accomplice testimony against the first defendant did not involve or incriminate the second defendant, the trial court did not abuse the

court's discretion in denying the second defendant's motion to sever the trial from that of the first defendant; hence, the second defendant failed to show that the court's refusal to sever caused prejudice or a due process violation. Williams v. State, 280 Ga. 584, 630 S.E.2d 370 (2006).

Trial court did not err in denying a defendant's motion to sever the defendant's trial for cruelty to a child and other offenses from that of a codefendant because the mere fact that the defendants' defenses were antagonistic was not sufficient to warrant the grant of separate trials absent a showing of harm; the defendant made no such showing because the codefendant's only witness had previously testified for the state, and that evidence, as well as evidence flowing from the codefendant's cross-examinations of witnesses that arguably could have been construed as implicating the defendant, was merely cumulative of the state's evidence against the defendant. White v. State, 281 Ga. 276, 637 S.E.2d 645 (2006).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the defendant's case from the codefendant's case as the defendant made no argument that there was a confusion of law or facts, that the evidence against the codefendant had a "spillover" effect, or that the defendant's defense was antagonistic to the codefendant's defense. Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417 (2004).

Decision not to sever held not abuse of discretion. — Since a robbery victim was exceedingly clear in identifying codefendants separately, in selecting one defendant's photo from a lineup, and in testifying that that defendant and not the other was the one who physically assaulted the victim, the jury could not logically confuse the roles played by the two codefendants; thus, the trial court did not abuse the court's discretion in deciding not to sever the trials of the codefendants. Sims v. State, 195 Ga. App. 631, 394 S.E.2d 422 (1990).

Trial court did not abuse the court's discretion in denying a motion for severance. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707, cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991); Nanthabouthdy v. State, 245 Ga. App. 456, 538 S.E.2d 101 (2000); Robinson v. State, 259 Ga. App. 555, 578 S.E.2d 214 (2003).

Denial of the defendant's motion to sever was not an abuse of discretion since there was no evidence admissible against one defendant which was inadmissible against the other and there was no danger of confusion based on the number of defendants because there were only two. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Court's discretion to grant or deny severance motion. — Grant or denial of a motion for severance lies within the sound discretion of the trial court, and the court's ruling will not be reversed absent a clear abuse of such discretion. Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990); Rivers v. State, 178 Ga. App. 310, 342 S.E.2d 781 (1986).

Refusal to sever the trial of the defendants who had antagonistic defenses was not an abuse of discretion because even if the cases had been severed, the codefendant could have given the same testimony at the defendant's separate trial. Heard v. State, 274 Ga. 196, 552 S.E.2d 818 (2001).

Trial court did not abuse the court's discretion in denying a second defendant's motion to sever the trial from that of the first as the court aptly determined that: (1) there was no persuasive argument that evidence offered against one defendant might be considered improperly against another, and no evidence of antagonistic defenses that would jeopardize each other's right to a fair trial, though the court acknowledged the possibility of the codefendants finger-pointing at one another; and (2) the second defendant was a member of the first defendant's organization and provided security for the first defendant. Oree v. State, 280 Ga. 588, 630 S.E.2d 390 (2006).

No likelihood of confusion for failure to grant severance. — Denial of the defendant's severance motion was not an abuse of discretion because there was no likelihood of confusion as the defendant and codefendant acted in concert and their defenses were not antagonistic, sub-

Application (Cont'd)

stantially similar evidence was presented against the defendants, and the codefendant's statements would have been admissible in a separate trial as statements of a coconspirator. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11 (2005).

Review of court's denial of severance. — Trial judge's ruling in denying severance will not be disturbed if there is no showing that the defendant suffered prejudice which amounts to a denial of due process. Harper v. State, 166 Ga. App. 797, 305 S.E.2d 488 (1983).

In light of the numerous witnesses called by the state who identified the defendant as the person who shot the victim, and because antagonism between the codefendants was insufficient to require severance, the defendant failed to show the clear prejudicial harm necessary to overturn the trial court's denial of a motion to sever the trial. Rivers v. State, 283 Ga. 1, 655 S.E.2d 594 (2008).

Severance in order to call codefendant as witness. — In order to be entitled to a severance on the ground defendant wishes to call a codefendant as a witness, the movant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) the testimony's exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. Given such a showing, the court should: (1) examine the significance of the testimony in relation to the defendant's theory of defense; (2) assess the extent of prejudice caused by the absence of the testimony; (3) pay close attention to judicial administration and economy; and (4) give weight to the timeliness of the motion. Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

One of the grounds for granting a severance is the need of one defendant to use the exculpatory testimony of a codefendant. House v. State, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992).

Offenses which are part of common scheme or plan may be tried together. — Two or more defendants charged with different offenses may be tried jointly when the offenses are part of a common scheme or plan. Padgett v. State, 239 Ga. 556, 238 S.E.2d 92 (1977); Allen v. State, 144 Ga. App. 233, 240 S.E.2d 754 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 264, 58 L. Ed. 2d 247 (1978); Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980).

When two or more defendants are charged with identical crimes or with different offenses which are part of a common scheme or plan, the defendants may be jointly tried in the discretion of the trial court. Arnsdorff v. State, 152 Ga. App. 515, 263 S.E.2d 176 (1979).

Trial judge has discretion concerning severance of trial when there is evidence of two or more offenses based on same conduct or on series of connected acts or constituting parts of single scheme or plan. Johnson v. State, 158 Ga. App. 398, 280 S.E.2d 419 (1981).

Offenses which are part of a common plan or scheme may be tried together; provided such a trial does not hinder a fair determination of each defendant's guilt or innocence. Arnsdorff v. State, 152 Ga. App. 515, 263 S.E.2d 176 (1979).

Ability to make fair determination of each party's guilt. — If a joint trial does not prevent or hinder a fair determination of each defendant's guilt, there is no abuse of discretion in denying severance. Allen v. State, 144 Ga. App. 233, 240 S.E.2d 754 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 264, 58 L. Ed. 2d 247 (1978).

Substantial similarity of law and juror confusion. — Defendant was charged with molesting two sisters in the same manner and place and although some acts occurred while the defendant was alone with one child, other acts were conducted on the children simultaneously; therefore, the trial court did not abuse the court's discretion in denying severance. Davidson v. State, 231 Ga. App. 605, 499 S.E.2d 697 (1998).

Joinder of crimes solely on grounds of similar character. — When two or more crimes, joined solely on the ground that the crimes are of the same or similar character, are committed at different times and places, and involve transactions with different persons, it is mandatory that the trial judge, upon the defendant's

motion, order separate trials for each of the crimes charged. Padgett v. State, 239 Ga. 556, 238 S.E.2d 92 (1977).

If two or more offenses have been joined solely on the ground that the offenses are of the same or similar character, the trial judge, upon the defendant's motion for severance, must order separate trials for each of the offenses charged. Johnson v. State, 158 Ga. App. 398, 280 S.E.2d 419 (1981).

Severance of one count in indictment not allowed. — When codefendants A and B were charged with aggravated assault, armed robbery, and criminal damage to property and B was also charged with aggravated assault on B's spouse in the same indictment, a motion by A to sever the latter charge against B from the rest of the charges in the indictment was properly denied; A's rights in regard to that count were limited to a motion to sever the trial under O.C.G.A. § 17-8-4. Durden v. State, 219 Ga. App. 732, 466 S.E.2d 641 (1995).

Prejudicial testimony by codefendant. — Claim that codefendant's testimony implicating the defendant was prejudicial did not amount to the clear showing of prejudice and denial of due process necessary to require a severance. Kennedy v. State, 253 Ga. 132, 317 S.E.2d 822 (1984).

If harm shown, failure to sever trials is error. — While the mere fact that codefendants' defenses are antagonistic is not sufficient in itself to warrant separate trials, if the defendant can demonstrate harm resulting from the failure to sever, then such failure to sever becomes error. Price v. State, 155 Ga. App. 206, 270 S.E.2d 203 (1980), vacated in part on other grounds, 157 Ga. App. 687, 278 S.E.2d 195 (1981).

Motion for severance if codefendant will not testify at defendant's trial. — In order to have the defendant's motion for severance granted, the defendant must show not only that the codefendant will probably not testify at trial if the defendant could cross-examine the codefendant or elicit the testimony desired, but also that the testimony of the codefendant would tend to exculpate the defendant. Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975); Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

If a defendant moves for a separate trial, the trial judge should consider whether the codefendant would be more likely to testify if the codefendant was tried separately. Cain v. State, 235 Ga. 128, 218 S.E.2d 856 (1975); Stevens v. State, 165 Ga. App. 814, 302 S.E.2d 724 (1983), overruled on other grounds, Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

Joinder with repeat offender does not require reversal for prejudice. — There is no rule of law in Georgia that prejudice requiring reversal accrues to one defendant by virtue of being tried with a repeat offender who has prior convictions alleged against the defendant in the indictment. Davis v. State, 129 Ga. App. 796, 201 S.E.2d 345 (1973).

Denial of severance not an abuse of discretion if same crime and same witnesses involved. — Trial judge did not abuse the discretion given the judge in refusing to grant a severance as to the appellant since the codefendants were jointly indicted for the same crime, which involved the same witnesses, the evidence of each of which would be admissible on the trial of the others. Deuser v. State, 138 Ga. App. 211, 225 S.E.2d 758 (1976).

Trial judge does not abuse the discretion delegated to the judge by refusing severance to codefendants who are jointly indicted for the same offenses, involving the same witnesses, and the evidence indicates that the defendants acted in concert. Hall v. State, 143 Ga. App. 706, 240 S.E.2d 125 (1977).

Count against codefendant different from common count. — If a count of an indictment against a codefendant alone involves a different crime and victim than that contained in the common count, denial of a motion to sever constitutes an abuse of judicial discretion. Burden v. State, 131 Ga. App. 522, 206 S.E.2d 533 (1974).

Failure to grant severance not error. — See Mulkey v. State, 250 Ga. 444, 298 S.E.2d 487 (1983).

Since the codefendant did testify, allow-

Application (Cont'd)

ing the defendant the opportunity to cross-examine the codefendant concerning both the codefendant's trial testimony and in-custody statements, there was no abuse of discretion in the trial court's denial of the defendant's motion for a separate trial. Belcher v. State, 207 Ga. App. 117, 427 S.E.2d 88 (1993).

Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of a codefendant as the defendant offered no evidence of juror confusion, the defendant did not show that the defendant's and the codefendant's defenses were antagonistic to each other, that evidence against the codefendant was improperly considered against the defendant, or that the defendant's guilt or innocence could not otherwise be fairly determined. Moore v. State, 261 Ga. App. 752, 583 S.E.2d 588 (2003).

Admission of similar crimes evidence against a codefendant did not mandate severance since the trial judge gave specific limiting instructions regarding that evidence and the evidence itself did not implicate the defendant directly. Banks v. State, 230 Ga. App. 881, 497 S.E.2d 821 (1998).

Notice requirements on motions to sever. — Grant of the state's motion for severance without notice to the defendant and without a hearing was not a denial of due process since the defendant failed to show any harm resulting therefrom. Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Burden on the defendant making motion to sever. — When making a motion to sever, the burden is on the defendant to do more than raise the possibility that a separate trial would give the defendant a better chance of acquittal; the defendant must make a clear showing of prejudice and consequent denial of due process and in the absence of this showing, the trial court's denial of a motion to sever will not be disturbed. Harris v. State, 218 Ga. App. 472, 462 S.E.2d 425 (1995).

Order of trial of defendants. — State was within the state's statutory right under O.C.G.A. § 17-8-4, when the state proceeded with the trial against the defendant before that of the codefendant; the defendant failed to show that the defendant was prejudiced by the order of the trials, what the substance of the codefendant's proposed testimony was, or that it was more likely the codefendant would testify on behalf of the defendant if the cases were severed. Avellaneda v. State, 261 Ga. App. 83, 581 S.E.2d 701 (2003).

When the defendant was one of the people indicted in a multiple-murder case in which the state sought capital punishment, the defendant did not show that a 38-month delay between the defendant's indictment and trial was "presumptively prejudicial," because it was necessary for each coindictee to be tried separately, and this triggered the state's statutory right, under O.C.G.A. § 17-8-4, to elect which defendant to try first; therefore, when the state elected to try the defendant's coindictee first, the defendant's case was prosecuted with the promptness customary for death penalty cases involving multiple defendants, and the trial court did not have to balance the factors considered in deciding whether the defendant's right to a speedy trial was violated, given the lack of presumptive prejudice. Wimberly v. State, 279 Ga. 65, 608 S.E.2d 625 (2005).

Loss of the right to open and close arguments under O.C.G.A. § 17-8-71 because another defendant presented evidence was held not to be grounds for severance under O.C.G.A. § 17-8-4. Robinson v. State, 164 Ga. App. 652, 297 S.E.2d 751 (1982).

No harm from order of closing argument. — Trial court did not err in denying a defendant's motion to sever the defendant's trial for cruelty to a child and other offenses from that of a codefendant because the defendant showed no harm resulting from evidence against the codefendant that might have spilled over to the defendant or from the fact that the defendant was required to give a closing argument before the codefendant; the mere fact that the evidence against the codefendant might have been stronger than the evidence against the defendant did not mandate severance, and no harm was shown by the order of closing argu-

ments. White v. State, 281 Ga. 276, 637 S.E.2d 645 (2006).

Redaction from codefendant's statement sufficient. — Court's denial of the defendant's motion to sever the defendant's trial from that of a codefendant was not error as the state agreed to redact from any codefendants' statements references to the defendant and this was done. Cain v. State, 212 Ga. App. 531, 442 S.E.2d 279 (1994).

Denial of defendant's motion for severance was proper, since, although the defendant testified as to statements made to the defendant by the codefendants while they were incarcerated together, the defendant never mentioned another defendant's name when testifying to a statement by one defendant. Satterfield v. State, 256 Ga. 593, 351 S.E.2d 625 (1987).

Trial court did not err by failing to grant the defendant's motion for severance requesting a separate trial from a codefendant since the codefendant failed to articulate any specific reason for severance and failed to show any actual prejudice or denial of due process which resulted from the failure to sever. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845 (1992).

When it could not be said that the number of defendants created confusion, there was no danger that evidence that was inadmissible against one defendant was admissible against another defendant, and the defendant's and codefendant's defenses were not antagonistic, the trial court did not abuse the court's discretion in denying the motion to sever. Carson v. State, 208 Ga. App. 534, 431 S.E.2d 156 (1993).

Because the evidence with which each defendant took issue was admissible against both of them inasmuch as each played a separate role in the crimes, and the evidentiary facts and the law applicable to each were substantially the same, a trial court did not err in refusing to grant the defendants' motions to sever. Bolden v. State, 278 Ga. 459, 604 S.E.2d 133 (2004).

Second defendant failed to show harm from the trial court's failure to sever the second defendant's trial from that of the two codefendants as there was no evidence that the codefendants would have been willing to testify at a separate trial, that the codefendants' testimony would have corroborated the second defendant's defense of alibi, or that the number of defendants caused confusion. Griffin v. State, 292 Ga. 321, 737 S.E.2d 682 (2013).

Defendant waived any error in failure to sever. — Defendant waived any error in the failure to sever the trial from the codefendant's trial as the defendant did not move to sever nor join in the codefendant's motion to sever. Robertson v. State, 277 Ga. App. 231, 626 S.E.2d 206 (2006).

Eleventh circuit test for review. — Test in fifth (now eleventh) circuit for reviewing denial of severance is that the defendant must be unable to obtain a fair trial without severance and must demonstrate compelling prejudice against which the trial court will be unable to afford protection. United States v. Morris, 647 F.2d 568 (5th Cir. 1981).

Right to counsel when state seeks death penalty against any one codefendant. — If the state seeks the death penalty against any one defendant in a criminal transaction, a defendant and a codefendant must be provided with separate and independent counsel. Fleming v. State, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

Counsel not prepared as to all defendants. — If defendants' counsel is prepared as to one defendant and totally unprepared as to another, it is an abuse of trial court discretion to deny a motion for severance or to fail to continue the joined case. Grant v. State, 131 Ga. App. 759, 206 S.E.2d 709 (1974).

Failure to request severance not ineffective assistance. — Trial counsel's failure to file a motion to sever a defendant's case from a codefendant's case did not amount to ineffective assistance of counsel; since trial counsel testified that counsel made a tactical decision not to file a motion to sever after consultation with the defendant, and since the defendant had not shown that the defendant would have benefited from a separate trial, there was evidence to support the trial court's conclusion that trial counsel rendered effective assistance. Hubbard v. State, 274 Ga. App. 184, 617 S.E.2d 167 (2005).

Application (Cont'd)

Because a codefendant's statements were non-custodial and were made in furtherance of a conspiracy, the trial court did not abuse the court's discretion in finding that the statements were admissible under former O.C.G.A. § 24-3-5 (see O.C.G.A. § 24-8-801) and did not violate Bruton; consequently, the defendant failed to demonstrate that counsel's failure to request a severance constituted ineffective assistance. Hankerson v. State, 275 Ga. App. 545, 621 S.E.2d 772 (2005).

Counsel's defense strategy in failing to move for severance of the defendant's armed robbery trial from that of a codefendant did not amount to ineffective assistance of counsel as such was reasonable, even if it wasn't successful, given that: (1) the jury was unlikely to confuse the evidence applicable to either defendants; (2) the defenses were not mutually antagonistic; and (3) the defendant might have actually benefitted from being able to point to the codefendant as being the controlling figure in the robberies. Lee v. State, 281 Ga. App. 479, 636 S.E.2d 547 (2006).

With regard to a defendant's conviction for trafficking cocaine, the defendant was not rendered ineffective assistance of counsel by defense counsel failing to request that the defendant's trial be severed from a codefendant's trial since, as testified to by defense counsel at the defendant's motion for a new trial, there were no legal grounds for a severance. Namely, it was completely permissible that the codefendant testified against the defendant; the codefendant's testimony would have been admissible against the defendant even if there would have been two trials, and the defendant made no showing otherwise; and the codefendant's testimony was consistent with the defendant's theory of defense, specifically, that both tried to place the blame for the presence of the drugs exclusively on another. Mosley v. State, 296 Ga. App. 746, 675 S.E.2d 607 (2009), cert. denied, No. S09C1188, 2009 Ga. LEXIS 322 (Ga. 2009).

Trial counsel's failure to renew a motion to sever did not constitute deficient performance because the strategic decision fell within the wide latitude of presumptively reasonable conduct engaged in by trial attorneys; counsel testified that counsel did not renew the motion to sever because counsel had impeached the codefendant on cross-examination and believed that the trial court would not grant severance at that stage of the proceedings. Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

Trial counsel was not ineffective for failing to move to sever the first defendant's prosecution from that of the other defendants because, during the hearing on the first defendant's motion for new trial, trial counsel testified that counsel believed it was a better course of action to ensure that the first defendant would not be tried separately; and counsel noted that the first defendant had been offered — and had rejected — a favorable plea deal, and that counsel had reason to believe that if the first defendant were tried alone, a co-defendant would accept a deal similar to the one offered to the first defendant, and would testify against the first defendant. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Juror Strikes in Joint Trials

Number of strikes allowed joint defendants generally. — When two or more defendants are tried jointly for a crime or offense, the defendants collectively are entitled to the same number of strikes as a single defendant tried separately, to be exercised either jointly or proportionately at the trial judge's direction, in view of Ga. L. 1972, p. 618, § 1, rather than each being entitled to that defendant's full statutory allowance as was previously the law. Munsford v. State, 129 Ga. App. 547, 199 S.E.2d 843 (1973), overruled on other grounds, Lowe v. State, 133 Ga. App. 420, 210 S.E.2d 869 (1974).

No equal protection violation. — O.C.G.A. § 17-8-4(b), which allows defendants tried jointly 14 peremptory challenges (while O.C.G.A. § 15-12-165 allows a defendant tried alone nine such challenges), does not violate equal protection as there are valid reasons for discriminating between the peremptory challenges of

single defendants and codefendants: the avoidance of undue delay and a needless burden on the public. Dixon v. State, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

Construction with former Code 1933, § 59-805 (see O.C.G.A. § 15-12-165) as to total strikes allowed joint defendants. — Former Code 1933, § 27-2101 (see O.C.G.A. § 17-8-4), which must be construed in pari materia with former Code 1933, § 59-805 (see O.C.G.A. § 15-12-165), allows only a total of 20 peremptory challenges to two or more defendants when tried jointly. Taylor v. State, 140 Ga. App. 447, 231 S.E.2d 364 (1976).

When former Code 1933, §§ 27-2101 and 59-805 (see O.C.G.A. §§ 15-12-165 and 17-8-4) were construed in pari materia, joint defendants in the same case were entitled to a total of 20 strikes to be exercised by all of the defendants. Allen v. State, 235 Ga. 709, 221 S.E.2d 405 (1975).

Additional strikes when number of defendants exceeds number of strikes. — Under former Code 1933, § 27-2101 (see O.C.G.A. § 17-8-4), if more than 20 defendants are indicted and tried jointly for a felony, it does not mean that some of the defendants would have no strikes, since the trial judge is allowed to allot up to five additional strikes per defendant in excess of the number of strikes specified in former Code 1933, § 59-805 (see O.C.G.A. § 15-12-165). Albert v. State, 235 Ga. 718, 221 S.E.2d 413 (1975).

Denial of motion for additional jury strikes generally. — If nothing in the record indicates that the denial of a motion for allowance of additional jury strikes is an abuse of the court's sole discretion, that denial will be upheld. Merrill v. State, 130 Ga. App. 745, 204 S.E.2d 632 (1974); Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983).

Refusal to allow additional strikes if defendants have not exhausted strikes. — If the record shows that defendants have not exhausted the peremptory strikes to which the defendants are entitled, error, if any, in the trial court's refusal to allow additional peremptory strikes is harmless. Smith v. State, 154 Ga. App. 258, 267 S.E.2d 863 (1980).

Trial court did not abuse discretion by not allowing additional strikes. — Record did not indicate that the trial court abused the court's discretion by failing to allow additional jury strikes for the defense since the two defendants were being tried jointly. Majors v. State, 203 Ga. App. 139, 416 S.E.2d 156 (1992).

There was no abuse by the trial court in a joint trial by failing to allow additional jury strikes to a defendant since the defendant would have used the strikes to remove prospective jurors on the basis of race; the assertion of prejudice was without foundation because such strikes are forbidden. Adams v. State, 264 Ga. 71, 440 S.E.2d 639 (1994), overruled on other grounds by Carr v. State, 281 Ga. 43, 635 S.E.2d 767, 2006 Ga. LEXIS 640 (2006).

There was no merit to the defendant's contention that the trial court erroneously denied the defendant's motion for additional peremptory challenges in a trial in which the defendant was tried with a codefendant; O.C.G.A. § 17-8-4 gave the trial court discretion as to whether to grant additional challenges, and defendant alleged no harm resulting from the selection of the jury. Denny v. State, 281 Ga. 114, 636 S.E.2d 500 (2006).

Allotment of peremptory challenges between cocounsel. — An appropriate procedure when separate counsel representing codefendants fail to agree on a method of sharing peremptory challenges is to divide the 20 strikes between the defendants and exercise discretion whether to allot up to five additional strikes to each. The exercise of those strikes should be as follows: the first juror should be placed on the state and if accepted, then on defendant A. If accepted by defendant A, then on defendant B. The second juror should be placed on the state and if accepted, then on defendant B. If accepted by defendant B, then on defendant A. Defendants A and B should be alternated in this manner and this procedure followed until the jury is selected. Henry v. State, 256 Ga. 313, 348 S.E.2d 640 (1986).

Although the political affiliations of joint defendants were not synonymous, additional strikes were not needed

Juror Strikes in Joint Trials (Cont'd)

to remove potential members of the jury antagonistic to the political philosophy of each since undue prejudice was not shown. Monroe v. State, 250 Ga. 30, 295 S.E.2d 512 (1982).

Additional strikes for state. — Trial court properly granted the state two additional jury strikes after the court gave defendants four additional strikes, two for each defendant. While it is true that O.C.G.A. § 17-8-4 is silent on the question of additional strikes for the state, the statute is to be construed in pari materia with former Code 1933, § 59-805 (see O.C.G.A. § 15-12-165), which provides that the state "shall be allowed one-half the number of peremptory challenges allowed to the accused." Gerald v. State, 189 Ga. App. 155, 375 S.E.2d 134 (1988).

Jointly selected jury proper. — Trial court did not err by forcing the defendant to proceed to trial with a jury that was jointly selected. Swain v. State, 275 Ga. 150, 563 S.E.2d 122 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 157 et seq., 172 et seq.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 534 et seq. 50A C.J.S., Juries, §§ 335 et seq., 427 et seq., 441 et seq., 474 et seq., 515 et seq.

ALR. — Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf, 33 A.L.R. 826.

Right to severance where two or more persons are jointly accused, 70 A.L.R. 1171; 104 A.L.R. 1519; 131 A.L.R. 917.

Successful defense by one codefendant, or a finding for "defendants," as inuring to benefit of defaulting defendant, 78 A.L.R. 938.

Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

Husband or wife as competent witness for or against co-offender with spouse, 90 A.L.R.2d 648.

Jury: number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together, 21 A.L.R.3d 725.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 A.L.R.3d 245.

Right of defendants in prosecution for criminal conspiracy to separate trials, 82 A.L.R.3d 366.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor, 9 A.L.R.4th 972.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.4th 1189.

Antagonistic defenses as ground for separate trials of codefendants in state homicide offenses — Factual applications, 16 A.L.R.6th 329.

Antagonistic defenses as ground for separate trials of codefendants in criminal cases — state narcotics offenses, 19 A.L.R.6th 115.

Antagonistic defenses as ground for separate trials of codefendants in state homicide offenses — applicable standard and extent of antagonism required, 24 A.L.R.6th 591.

Desire of accused to testify on just one of multiple charges as basis for severance of trials, 32 A.L.R.6th 385.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.6th 295.

Judicial removal for cause and peremptory strike validity under Batson against jurors based upon viewing police procedural programs, live television trials, reality legal television, or other crime and legal based television programs, 84 A.L.R.6th 229.

Antagonistic defenses as ground for separate trials of codefendants in criminal case — Federal homicide offenses, 7 A.L.R. Fed. 2d 415.

Antagonistic defenses as ground for separate trials of codefendants in criminal

case — Federal cocaine offenses, 7 A.L.R. Fed. 2d 491.

Antagonistic defenses as ground for separate trials of codefendants in criminal case — Federal marijuana offenses, 34 A.L.R. Fed. 2d 509.

Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in Federal Criminal Prosecution, 40 A.L.R. Fed. 3d Art. 4.

Supreme Court Jurisprudence on Article III Standing, 41 A.L.R. Fed. 3d Art. 5.

17-8-5. Recordation of testimony in felony cases; entering testimony on minutes of court where guilty verdict found; preparation of transcript where death sentence imposed; preparation of transcript where mistrial results in felony case.

(a) On the trial of all felonies the presiding judge shall have the testimony taken down and, when directed by the judge, the court reporter shall exactly and truly record or take stenographic notes of the testimony and proceedings in the case, except the argument of counsel. In the event of a verdict of guilty, the testimony shall be entered on the minutes of the court or in a book to be kept for that purpose. In the event that a sentence of death is imposed, the transcript of the case shall be prepared within 90 days after the sentence is imposed by the trial court. Upon petition by the court reporter, the Chief Justice of the Supreme Court of Georgia may grant an additional period of time for preparation of the transcript, such period not to exceed 60 days. The requirement that a transcript be prepared within a certain period in cases in which a sentence of death is imposed shall not inure to the benefit of a defendant.

(b) In the event that a mistrial results from any cause in the trial of a defendant charged with the commission of a felony, the presiding judge may, in his discretion, either with or without any application of the defendant or state's counsel, order that a brief or transcript of the testimony in the case be duly filed by the court reporter in the office of the clerk of the superior court in which the mistrial occurred. If the brief or transcript is ordered, it shall be the duty of the judge, in the order, to provide for the compensation of the reporter and for the transcript to be paid for as is provided by law for payment of transcripts in cases in which the law requires the testimony to be transcribed, at a rate not to exceed that provided in felony cases.

History. — Laws 1833, Cobb's 1851 Digest, p. 841; Code 1863, § 4578; Code 1868, § 4599; Code 1873, § 4696; Ga. L. 1876, p. 133, § 1; Code 1882, § 4696; Penal Code 1895, § 981; Penal Code 1910, § 1007; Ga. L. 1925, p. 101, § 1; Code 1933, § 27-2401; Ga. L. 1973, p. 159, § 6; Ga. L. 1976, p. 991, § 1.

Cross references. — Powers and duties of Judicial Council with regard to reporting of judicial proceedings, § 15-5-20 et seq.

Law reviews. — For article surveying Georgia criminal law cases from June 1979 through May 1980, see 32 Mercer L. Rev. 35 (1980). For article surveying de-

velopments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981).

JUDICIAL DECISIONS

"Proceedings" defined. — Intent of the term "proceedings" in former Code 1933, § 27-2401 (see O.C.G.A. § 17-8-5) was to refer to objections, rulings, and other matters which occur during the course of the evidence as well as any post-trial procedures. State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980).

This section related only to the testimony so taken down by the court reporter. Hughes v. State, 59 Ga. App. 885, 2 S.E.2d 513 (1939).

This section did not apply to guilty pleas. Jones v. Lee, 244 Ga. 837, 262 S.E.2d 130 (1979).

Transcript of habeas corpus hearing. — There is no clear legal duty to file the transcript of a habeas corpus hearing within a particular period of time, but the court should exercise sound discretion in inquiring into the cause for the delay in transcription and so base the court's decision for or against dismissal of complaint seeking mandamus. Everett v. Rewis, 244 Ga. 427, 260 S.E.2d 336 (1979).

All proceedings except argument must be reported. — Construing Ga. L. 1965, p. 18, § 10 (see O.C.G.A. § 5-6-41) with former Code 1933, § 27-2401 (see O.C.G.A. § 17-8-5), it would appear that in a felony case all testimony and proceedings in the case must be reported, except the argument of counsel. Graham v. State, 153 Ga. App. 658, 266 S.E.2d 316, rev'd on other grounds, 246 Ga. 341, 271 S.E.2d 627 (1980).

Completion of record. — When the transcript does not fully disclose what transpired at trial, it is the duty of the complaining party to have the record completed pursuant to O.C.G.A. § 5-6-41. Mapp v. State, 204 Ga. App. 647, 420 S.E.2d 615 (1992).

Supreme court could not review the defendant's claim that the trial court set pretrial bond in an excessive and unreasonable amount because the defendant failed to have the record completed pursuant to O.C.G.A. § 5-6-41; testimony at the hearing on the motion for new trial was not a sufficient substitute for a transcript, and without a transcript of the bond hearing or a statutorily authorized substitute, the supreme court had to assume that the trial court's judgment was correct. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Unrecorded voir dire. — Defendant's contention that possible error occurred during voir dire or defense counsel may have been ineffective and that because of the lack of a record the defendant will never know if there was error was not sufficient basis to require a new trial. Primas v. State, 231 Ga. App. 861, 501 S.E.2d 28 (1998).

Trial court did not abuse the court's discretion in denying the defendant's motion for a change of venue because although the court reporter transcribed the motion for change of venue and the trial court's ruling, the actual questions and answers of the prospective jurors were not reported, and defense counsel made no motion at that time to include the responses in the record or to have the responses reconstructed for the record; since voir dire was not transcribed, it was assumed that the jurors who were not excused for cause did not have such fixed opinions that the jurors could not be impartial judges of the defendant's guilt. Walden v. State, 289 Ga. 845, 717 S.E.2d 159 (2011).

Failure to record voir dire in capital case. — Failure to record the voir dire examination of prospective jurors as to the jurors' feelings about imposing the death penalty in a case in which the sentence of death is imposed is reversible error. Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1975).

Counsel's duty to request recording of final arguments. — If counsel wants the final arguments recorded, it is the counsel's duty to see that it is done, inasmuch as it is not required. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L.

Ed. 2d 251 (1977), sentence vacated, 243 Ga. 244, 253 S.E.2d 707 (1979).

Counsel not ineffective for failing to transcribe opening and closing statements and voir dire. — Trial counsel was not ineffective for failing to have the opening and closing statements and voir dire transcribed because the arguments of counsel at trial are not required to be transcribed; and although objections and rulings thereon made during jury selection are required to be reported and made part of the trial record, there is no requirement that the entire jury selection be reported and made part of the record in a nondeath penalty felony case. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Absent request, reporter is not required to record argument. — In the absence of a timely request that the argument of counsel be recorded, the court reporter is not required to do so. Montgomery v. State, 140 Ga. App. 286, 231 S.E.2d 108 (1976).

When the record shows no timely request that the argument of counsel be recorded and, in the absence of such a request, a court reporter is not required to record the argument of counsel. Franklin v. State, 146 Ga. App. 429, 246 S.E.2d 442 (1978).

Closing arguments should be recorded when state seeks death penalty. — Even though not required by statute, closing arguments of counsel should be taken down in a case in which the state is seeking the death penalty. However, the failure to transcribe the closing argument of counsel does not, without a showing of prejudice and harm, require the death penalty automatically be set aside. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

State has duty to have proceedings reported and transcribed. — Under Ga. L. 1965, p. 18, § 10 and former Code 1933, § 27-2401 (see O.C.G.A. §§ 5-6-41 and 17-8-5), it was the duty of the state in all felony cases to have the transcript of evidence and proceedings reported and prepared and, after a guilty verdict had been returned, to file the transcript. Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975), overruled on other grounds, Mathis v. State, 147 Ga. App. 148, 248 S.E.2d 212 (1978).

State has duty to request that proceedings be transcribed and to bear costs. — This section clearly stated that, in the event of a felony conviction, it was the duty of the state, at the state's own expense and through the agency of the presiding judge, to request the court reporter to transcribe the reported testimony. State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980); Ivory v. State, 199 Ga. App. 283, 405 S.E.2d 90 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 90 (1991); Whitt v. State, 215 Ga. App. 704, 452 S.E.2d 125 (1994).

No time limit on state's duty to have transcript prepared. — Under this section, the state had the duty to see that the transcript was prepared and filed, though there was no time limit on this duty. State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980).

While the defendant alleged prejudice in the delay of the production of the trial transcript, the defendant pointed to none, and failed to identify the witnesses the defendant claims were lost by the delay; and O.C.G.A. § 17-8-5, governing the recordation of testimony in felony cases, provided no timeline for the preparation of the transcript. Morrison v. State, 303 Ga. 120, 810 S.E.2d 508 (2018).

Defendant has duty under § 5-6-42 to request transcript on appeal. — Appellant who appeals a felony conviction and states in the notice of appeal that a transcript is to be transmitted as part of the appellate record has a continuing duty under Ga. L. 1965, p. 18, § 11 (see O.C.G.A. § 5-6-42) to request the court reporter to transcribe the reported testimony at the same time that the appellant files the notice of appeal. State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

Duty not relieved by state's duty to request transcript. — It is the duty of the state to request the court reporter to transcribe the reported testimony and then file the transcript after a guilty verdict has been returned in a felony case. However, the state's duty to request the court reporter to transcribe the reported testimony in a felony conviction has no

time limit and thus cannot relieve an appellant in a felony conviction of the appellant's duty under Ga. L. 1965, p. 18, § 11 (see O.C.G.A. § 5-6-42) to request the court reporter to transcribe the reported testimony at the same time that the appellant files a notice of appeal. State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

State's failure to file transcript denies appellant the right of appeal. — Appellant is effectively denied the right to appeal if a transcript of the trial is not available to the appellant. Wade v. State, 231 Ga. 131, 200 S.E.2d 271 (1973).

Failure of the state to file the transcript, or a correct transcript, even when caused by the state's inability to file the transcript, and not by the appellant's fault, effectively denies the appellant the right to appeal because a complete and correct transcript of the appellant's trial is not available to the appellant. Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975), overruled on other grounds, Mathis v. State, 147 Ga. App. 148, 248 S.E.2d 212 (1978).

Indigent entitled on appeal to free copy of transcript. — Indigent, on appeal, is entitled as a matter of right to a free copy of the transcript of the trial court proceedings in which the indigent has been a party. Stalling v. State, 231 Ga. 37, 200 S.E.2d 121 (1973).

Transcript of trial ending in mistrial. — Trial court erred in denying the defendant's motion for a free transcript since the defendant inquired about a transcript after the defendant's first trial ended in a mistrial and the motion was made after defense counsel was made aware that the state had ordered a limited transcript of defense witnesses only. Miller v. State, 231 Ga. App. 869, 501 S.E.2d 42 (1998).

Indigent rights when proceedings adequately reviewed in habeas corpus. — Duty to provide on appeal a free copy of the transcript of the trial proceeding does not arise when the original criminal trial proceedings have been adequately reviewed in habeas corpus proceedings brought by the appellant and affirmed by the Supreme Court. Stalling v. State, 231 Ga. 37, 200 S.E.2d 121 (1973).

Reading of stenographer's notes when court and counsel differ as to testimony. — When court and counsel differ as to what a witness testifies to, it is not error for the court to require the stenographer to read from the stenographer's notes the exact words of the witness. Vann v. State, 83 Ga. 44, 9 S.E. 945 (1889).

Failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence absent showing of harm by the defendant. Corn v. Zant, 708 F.2d 549 (11th Cir. 1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670, 81 L. Ed. 2d 375 (1984), vacated in part on other grounds sub nom., Corn v. Kemp, 772 F.2d 681 (11th Cir. 1985), judgment vacated, 478 U.S. 1016, 106 S. Ct. 3326, 92 L. Ed. 2d 732 (1986), remanded for further consideration in light of Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), aff'd, 837 F.2d 1474 (1987), cert. denied, 486 U.S. 1023, 108 S. Ct. 1997, 100 L. Ed. 2d 228 (1988).

Failure to transcribe closing arguments at the sentencing phase of a death penalty case is not a per se violation of constitutional due process. Morgan v. Zant, 582 F. Supp. 1026 (S.D. Ga.), aff'd in part, rev'd in part on other grounds, 743 F.2d 775 (11th Cir. 1984), overruled on other grounds, 784 F.2d 1479 (11th Cir.), cert. denied, 478 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986), 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

Trial court did not err by refusing the defendant's request to have the closing arguments of counsel recorded and transcribed. Brooks v. State, 171 Ga. App. 55, 318 S.E.2d 785 (1984).

In absence of request, trial court does not err in failing to order recordation of voir dire, opening statements, and closing arguments. Simmons v. State, 160 Ga. App. 391, 287 S.E.2d 338 (1981).

Motion for new trial is part of "proceedings" as contemplated by O.C.G.A. § 17-8-5. Hall v. State, 162 Ga. App. 713, 293 S.E.2d 862 (1982), overruled in part by Worthen v. State, 304 Ga. 862, 823 S.E.2d 291 (2019).

Denial of complete trial transcript to indigent defendant for use upon retrial. — Trial court did not err in refus-

ing to furnish the defendant, an indigent, with a copy of the transcript of the defendant's first trial, to be used at retrial for the purposes of impeaching and pointing out discrepancies in the testimony of witnesses, since the defendant failed to show harm attributable to such decision. Gann v. State, 190 Ga. App. 82, 378 S.E.2d 369 (1989).

If no harm from lost transcript, no new trial. — Loss of transcripts and tapes from certain pretrial proceedings did not entitle the defendants to a new trial as the defendants did not prove harm resulting from the loss. Robinson v. State, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Providing portions of transcript with objections or rulings sufficient compliance. — Court did not err in providing appellant a transcript not including the complete voir dire and argument of counsel; provision of those portions of the voir dire in which objections were made or rulings were made by the trial court was a sufficient compliance with the requirements of O.C.G.A. § 17-8-5, as was limiting transcription of counsel's argument to those matters to which objection was made. Gardner v. State, 172 Ga. App. 677, 324 S.E.2d 535 (1984).

Absence of a complete trial transcript in a collateral post-conviction proceeding does not automatically require a new trial. Montgomery v. Tremblay, 249 Ga. 483, 292 S.E.2d 64 (1982).

Before a habeas court may grant a new trial on grounds of absence of a complete trial transcript, the court must find that a complete transcript is necessary to reach the merits of the habeas petition and that the necessary portions cannot be reconstructed pursuant to O.C.G.A. § 5-6-41(g), relating to reporting, preparing, and disposing of transcripts generally. Montgomery v. Tremblay, 249 Ga. 483, 292 S.E.2d 64 (1982).

Prejudicial closing arguments. — O.C.G.A. § 17-8-5 does not require that a transcript of the district attorney's alleged prejudicial closing argument be made. Ford v. State, 160 Ga. App. 707, 288 S.E.2d 39 (1981).

Harmless statements to jurors in defendant's absence. — When, after a lunch break during the guilt phase of the trial, the trial court made a few remarks to the jury while awaiting the return of the defendant, and the trial judge later restated the judge's comments as well as the judge could remember the comments, into the record, relating that the judge had told the jury that the trial would be slightly delayed because the defendant had eaten late, and had congratulated one of the jurors for having been elected to the board of education, there was no violation of O.C.G.A. § 5-6-41, regarding reporting of proceedings generally, or O.C.G.A. § 17-8-5, and any possible constitutional error relating to a defendant's right to be present during all stages of defendant's trial was clearly harmless beyond a reasonable doubt. Westbrook v. State, 256 Ga. 776, 353 S.E.2d 504 (1987).

Delay in entering mistrial order on minutes. — When the first trial ended with the grant of the defendant's motion for mistrial and the order declaring the mistrial was not reduced to writing and entered on the minutes of the court until after the second trial, and when the court's written order merely perfected the record in this regard and the delay in no way affected the defendant's rights, no double jeopardy defense is established. Swafford v. State, 161 Ga. App. 139, 291 S.E.2d 3 (1982).

No right to transcript when no testimony given. — Provision to indigent appellant of transcript of continuance hearing was unnecessary for appeal from denial of motion for continuance when no testimony had been given at hearing. Miller v. State, 165 Ga. App. 487, 299 S.E.2d 174 (1983).

Probation revocation proceeding is not a felony proceeding under O.C.G.A. § 17-8-5. Smith v. State, 167 Ga. App. 94, 306 S.E.2d 73 (1983).

Charge conference is not a matter which occurs during the presentation of evidence and is not considered part of the "proceedings." Ricarte v. State, 249 Ga. App. 50, 547 S.E.2d 703 (2001).

Defendant failed to show prejudice. — Defendant failed to demonstrate that the loss of two videotapes had harmed the defendant or precluded the appellate court from reviewing any of the issues raised on appeal with regard to the defen-

dant's convictions for multiple offenses relating to the sexual molestation and exploitation of two minors. Significantly, although the videotapes were missing, the parties had stipulated to the contents of the tapes at the bench trial and to the proffered testimony of the minor victims. Mitchell v. State, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

Reconstruction of lost transcript proper. — In a mother and son trial for the murder of the son's wife, after the first day's transcript was lost, the trial court properly complied with O.C.G.A. § 5-6-41(f) and (g) in reconstructing the transcript with testimony from all five original witnesses, the Clerk of Court, and the only living prosecutor. Defendants could not refuse to participate in the reconstruction and then complain that the reconstruction was inadequate. Bamberg v. State, 308 Ga. 340, 839 S.E.2d 640 (2020).

Cited in Burnett v. State, 87 Ga. 622, 13 S.E. 552 (1891); Walden v. Nichols, 201 Ga. 568, 40 S.E.2d 644 (1946); Sawyer v. State, 112 Ga. App. 885, 147 S.E.2d 60 (1966); Aiken v. State, 226 Ga. 840, 178 S.E.2d 202 (1970); Clay v. State, 122 Ga. App. 677, 178 S.E.2d 331 (1970); Robinson v. J.C. Penney Co., 124 Ga. App. 221, 183 S.E.2d 782 (1971); Munsford v. State, 129 Ga. App. 547, 199 S.E.2d 843 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974); M.K.H. v. State, 135 Ga. App. 565, 218 S.E.2d 284 (1975); Allen v. State, 235 Ga. 709, 221 S.E.2d 405 (1975); Ellis v. State, 137 Ga. App. 834, 224 S.E.2d 799 (1976); Godwin v. State, 138 Ga. App. 131, 225 S.E.2d 723 (1976); Newell v. State, 237 Ga. 488, 228 S.E.2d 873 (1976); Newman v. State, 239 Ga. 329, 236 S.E.2d 673 (1977); Lynch v. State, 143 Ga. App. 188, 238 S.E.2d 122 (1977); Brown v. State, 242 Ga. 602, 250 S.E.2d 491 (1978); Jackson v. State, 155 Ga. App. 386, 271 S.E.2d 32 (1980); Mason v. Balkcom, 487 F. Supp. 554 (M.D. Ga. 1980); Williams v. State, 217 Ga. App. 636, 458 S.E.2d 671 (1995); Hampton v. State, 272 Ga. 284, 527 S.E.2d 872 (2000); Woolums v. State, 247 Ga. App. 306, 540 S.E.2d 655 (2000); Countryman v. State, No. A20A0556, 2020 Ga. App. LEXIS 360 (June 18, 2020).

OPINIONS OF THE ATTORNEY GENERAL

Duties and compensation of court reporter. — Based upon a reading of Ga. L. 1965, p. 18, § 10 and former Code 1933, § 27-2401 (see O.C.G.A. §§ 5-6-41 and 17-8-5), in a felony trial resulting in conviction the court reporter was under a duty to transcribe the testimony and proceedings, except for the argument of counsel, and to file the original and one copy with the clerk of the convicting trial court. The compensation of the court reporter for the filing of this original and one copy was either a charge against the public funds or included within the reporter's salary, as the individual case may be. 1968 Op. Att'y Gen. No. 68-513.

Custody of notes and recordings taken by court reporter. — Since this section imposed on the judge presiding at a felony trial an absolute duty to have the testimony taken down, notes and recordings taken by a court reporter in felony cases remain in the judge's custody, but subject to control by the court. 1978 Op. Att'y Gen. No. U78-1.

Appellant requesting that transcript be filed on appeal responsible for court reporter fees. — When appellant requests that a transcript be filed as part of the record on appeal in a nonindigent criminal case, appellant is responsible for payment of court reporter fees for preparation of the transcript. 1981 Op. Att'y Gen. No. U81-22.

When county must pay for transcripts. — O.C.G.A. § 17-8-5 makes it the duty of the court, or county officials, to require that testimony be taken down and that a written record be filed with the clerk, but does not require that all transcripts be paid for by the county. If no appeal was filed by the defendant, then the county would be the requesting party responsible for preparation of transcript

and for payment of court reporter fees under that section. 1981 Op. Att'y Gen. No. U81-22.

RESEARCH REFERENCES

ALR. — Use in state court by counsel or party of tape recorder or other electronic device to make transcript of criminal trial proceedings, 67 A.L.R.3d 1013.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 A.L.R.5th 704.

17-8-6. Authority of municipal court to seal criminal records.

(a) Any judge of a municipal court of any municipality of this state or any judge hearing cases for any such court wherein a municipal court is a court of first instance in criminal cases shall have the authority to seal, to all persons except criminal justice officials, all criminal records of the municipality, including, but not limited to, records of arrest, fingerprints, and photographs, whether maintained in the police agency of the municipality or elsewhere in the municipality, related to any individual, upon a finding by such a judge that one of the following conditions exists:

(1) When, upon the call of a case for trial, criminal charges against the individual are dismissed either:

(A) Upon the motion of the arresting officer; or

(B) Because of the lack of prosecution of such charges by the arresting officer or the municipality; or

(2) When criminal charges against the individual are the subject of a pretrial disposition by the municipal prosecutor, provided that the terms and conditions of the pretrial disposition are satisfied.

(b) Any order sealing the records of an individual, as provided for in subsection (a) of this Code section, shall in no way constitute an adjudication of any illegal or wrongful action on the part of the arresting officer or the municipality.

History. — Ga. L. 1980, p. 1683, § 1.

JUDICIAL DECISIONS

Cited in Quintana v. State, 276 Ga. 731, 583 S.E.2d 869 (2003).

ARTICLE 2

CONTINUANCES

17-8-20. Showing of due diligence required of applicants for continuances generally.

In all cases, the party making an application for a continuance must show that he has used due diligence.

History. — Orig. Code 1863, § 3457; Code 1868, § 3477; Code 1873, § 3528; Code 1882, § 3528; Civil Code 1895, § 5135; Penal Code 1895, § 965; Civil Code 1910, § 5721; Penal Code 1910, § 991; Code 1933, § 81-1416.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-166.

JUDICIAL DECISIONS

Diligence required of defendants at large and incarcerated compared. — If defendant is at large under bond, a greater degree of diligence on the defendant's part is required than if the defendant has been incarcerated and unable personally to prepare the defendant's case for trial. Watts v. State, 14 Ga. App. 600, 81 S.E. 902 (1914); Amerson v. State, 18 Ga. App. 176, 88 S.E. 998 (1916).

Refusal of postponement when witness not subpoenaed. — If the witness has not been subpoenaed nor other statutory requirements met, it is not an abuse of discretion to refuse a postponement of the hearing in order to subpoena these persons. Hulett v. State, 150 Ga. App. 367, 258 S.E.2d 48 (1979).

Necessary to show due diligence before granting continuance. — Nothing in our law either requires or permits defendants to rely solely on information provided by the state for the defendants' pretrial investigation, and before the defendants are entitled to a continuance, the defendants must show the exercise of due diligence. Davis v. State, 204 Ga. App. 657, 420 S.E.2d 349 (1992).

If the trial court granted the accused at least one previous continuance to secure the same witness, and the accused offered no evidence that the witness was properly subpoenaed, the court did not abuse the court's discretion in denying a motion for continuance. Brandon v. State, 236 Ga. App. 203, 511 S.E.2d 573 (1999).

Trial court did not abuse the court's discretion in denying defense counsel's motion for continuance after the defendant stated on the morning of the trial that the defendant could identify the perpetrator; the defendant failed to use due diligence under O.C.G.A. § 17-8-20 in applying for a continuance as the defendant did not show that the defendant did not and could not have known earlier the information the defendant gave counsel on the morning of the trial. Westmoreland v. State, 281 Ga. App. 497, 636 S.E.2d 692 (2006).

If need for additional time to prepare defense not stated, no continuance granted. — When defendant's counsel had over six weeks between the grant of the defendant's motion for a psychiatric examination and the beginning of the trial, yet during that period said nothing to the district attorney or the court about needing additional time to prepare the defense, and, to the contrary, filed a demand for a speedy trial in that period, there was no error in the trial court's refusal to grant a continuance as the party requesting such continuance failed to establish that the party used "due diligence." O'Neal v. State, 254 Ga. 1, 325 S.E.2d 759 (1985).

No abuse of discretion when defendant given time to amend motion. — Trial court did not err in requiring the defendant to proceed in the presentation and argument of the defendant's motion for a new trial with less than 24 hours to review the trial transcript of the proceedings, since the court gave the defendant a week to review the transcript and amend the motion to present additional grounds. Brown v. State, 214 Ga. App. 733, 449 S.E.2d 136 (1994).

No continuance when no excuse offered for delay in retaining counsel. — Because a criminal trial had been continued for six months to give the defendants time to hire counsel, the motion made by the defendants' attorney based upon the attorney's having been hired only ten minutes previously was properly denied on the ground that no excuse had been offered by the defendants for the defendants delay in retaining counsel. Patterson v. State, 202 Ga. App. 440, 414 S.E.2d 895 (1992).

Trial court properly denied the defendant's motion for a continuance because it was a rule of criminal procedure that in all cases the party making an application for a continuance must show that the party has used due diligence, O.C.G.A. § 17-8-20; defendant was given ample time to obtain counsel and call witnesses before trial, and the defendant did not offer a valid excuse for the defendant's failure to obtain counsel. Branton v. State, 258 Ga. App. 221, 573 S.E.2d 475 (2002).

Following a mistrial in the defendant's trial for attempted child molestation, although there was only about a week until the second trial, the defendant did not explain why the defendant waited until the start of the second trial to seek to hire new counsel and the defendant did not articulate why the defendant was partially displeased with appointed counsel's performance in the first trial; therefore, the trial court did not err in denying the defendant's last-minute request for a continuance. Shaum v. State, 844 S.E.2d 863, No. A20A0228, 2020 Ga. App. LEXIS 343 (2020).

No abuse of discretion when defendant fails to show due diligence in obtaining transcript. — When the trial court granted one continuance to obtain the requested transcript of the preliminary hearing, and the defendant failed to show diligence in obtaining such transcript and failed to show a need for the transcript, there is no abuse of discretion in denial of the motion for a continuance. Hammonds v. State, 157 Ga. App. 393, 277 S.E.2d 762 (1981).

When defense counsel moves for a continuance based on the fact that defense counsel did not receive a tape or transcript of the committal hearing until approximately 24 hours before the trial and that as a consequence defense counsel was unable to adequately prepare to cross-examine or impeach the prosecution's witnesses, but defense counsel was informed some days earlier that defense counsel might pick up the tape and transcript at counsel's convenience, and defense counsel did not do so until the day preceding the trial, and by counsel's own admission defense counsel was present at the committal hearing and therefore can be presumed to know what took place there, the court does not abuse the court's discretion in denying the motion. Gaskin v. State, 166 Ga. App. 331, 303 S.E.2d 778 (1983).

Lack of due diligence clearly demonstrated. — See Lucas v. State, 174 Ga. App. 580, 330 S.E.2d 792 (1985); Mojica v. State, 210 Ga. App. 826, 437 S.E.2d 806 (1993); McTaggart v. State, 225 Ga. App. 359, 483 S.E.2d 898 (1997); Judge v. State, 240 Ga. App. 541, 524 S.E.2d 4 (1999).

Continuance properly denied. — In a burglary case, a court did not err by denying a continuance after the defendant made no showing of any attempt to hire new counsel after expressing the defendant's displeasure with the attorney and the defendant did not suggest what evidence the defendant would have put forth. McConnell v. State, 263 Ga. App. 686, 589 S.E.2d 271 (2003).

Under O.C.G.A. § 17-8-20, because the court had wide discretion as to whether to grant a continuance and because the defendant was unable to show that the defendant used due diligence in preparing for trial or provide specific information as to why the defendant needed a continuance, and failed to show any harm as a

result of the court's ruling, there was no abuse of discretion in refusing the continuance. Woodward v. State, 262 Ga. App. 363, 585 S.E.2d 687 (2003).

Trial court did not err in denying the defendant's motion for a continuance because, after the defendant's first request for a continuance was denied, the defendant had 13 days to subpoena witnesses or to reconstruct a transcript from the pre-arrest warrant hearing; further, the second application for a continuance was based on speculation about a witness's testimony. Kuykendoll v. State, 278 Ga. App. 369, 629 S.E.2d 32 (2006).

Because the defendant's family was aware that the defendant desired a private attorney, as evidenced by the fact that the first attorney was privately retained, and once the defendant requested and was appointed an attorney by the court, several months passed, during which the defendant did nothing to inform the court of a desire to retain an attorney, the trial court did not abuse the court's discretion in denying a continuance for the defendant to hire a private attorney. Bakyayita v. State, 278 Ga. App. 624, 629 S.E.2d 539 (2006).

Trial court did not abuse the court's discretion by denying the defendant's motion for a continuance with regard to the defendant's motion for funds for expert assistance as defense counsel waited approximately five months before making the request for funds for expert assistance until after plea negotiations had broken down and shortly before the case was placed on the trial calendar. Under those circumstances, the defendant failed to show that due diligence was exercised and, thus, failed to demonstrate entitlement to a continuance. Fincher v. State, 289 Ga. App. 64, 656 S.E.2d 216 (2007).

Because the record on appeal showed that defense counsel had more than a week before trial to review the state's discovery, had reviewed the material with the defendant, and had also had time before trial to hire an expert, the appeals court could not conclude that the grounds alleged in support of a continuance of the trial was compelling. Robbins v. State, 290 Ga. App. 323, 659 S.E.2d 628 (2008).

Trial court did not err in denying a defendant's motion to continue a new trial hearing so that the defendant could develop evidence regarding trial counsel's failure to engage in reciprocal discovery. The court was authorized to conclude that the defendant, who knew before the hearing that trial counsel had not engaged in discovery but failed to voice concerns until after trial counsel testified, had exercised little diligence in pursuing the discovery issue and that the ends of justice did not require a continuance. Anuforo v. State, 293 Ga. App. 1, 666 S.E.2d 50 (2008).

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance on the ground that an expert witness was not available, and the defendant needed to find another witness because the record did not demand a finding that the defendant exercised diligence under O.C.G.A. § 17-8-20 in light of the fact that trial counsel was appointed some months before the trial; the defendant made no showing as to the expert's identity, no proffer of the expected testimony, and no showing of how that testimony would benefit the defendant. Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333, cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance, filed on the morning of trial, to obtain a private attorney as the defendant had months to hire an attorney, the case had already been continued, and it appeared that appointed counsel had worked diligently on the case and was ready to proceed. Percell v. State, 346 Ga. App. 219, 816 S.E.2d 344 (2018).

Cited in Cruce v. State, 59 Ga. 83 (1877); Glover v. State, 89 Ga. 391, 15 S.E. 496 (1892); Smith v. State, 43 Ga. App. 353, 158 S.E. 770 (1931); Reese v. State, 44 Ga. App. 251, 161 S.E. 156 (1931); Whatley v. State, 162 Ga. App. 106, 290 S.E.2d 316 (1982); Sams v. State, 162 Ga. App. 118, 290 S.E.2d 321 (1982); Hill v. State, 169 Ga. App. 940, 315 S.E.2d 480 (1984); Hunt v. State, 173 Ga. App. 638, 327 S.E.2d 500 (1985); Heaton v. State, 175 Ga. App. 735, 334 S.E.2d 334 (1985); Burgan v. State, 258 Ga. 512, 371 S.E.2d 854 (1988); Johnson v. State, 188 Ga. App.

411, 373 S.E.2d 93 (1988); Fowler v. State, 195 Ga. App. 874, 395 S.E.2d 33 (1990); Rhodes v. State, 200 Ga. App. 193, 407 S.E.2d 442 (1991); Annison v. State, 206 Ga. App. 861, 427 S.E.2d 5 (1992); Harden v. State, 211 Ga. App. 1, 438 S.E.2d 136 (1993); Strickland v. State, 212 Ga. App. 170, 441 S.E.2d 494 (1994); Marion v. State, 224 Ga. App. 413, 480 S.E.2d 869 (1997); Stocks v. State, 224 Ga. App. 433, 481 S.E.2d 230 (1997); Minor v. State, 232 Ga. App. 246, 501 S.E.2d 576 (1998); Mays v. State, 238 Ga. App. 507, 519 S.E.2d 290 (1999); Couch v. State, 256 Ga. App. 822, 570 S.E.2d 57 (2002).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7A Am. Jur. Pleading and Practice Forms, Continuance, §§ 1, 106.

C.J.S. — 17 C.J.S., Continuances, § 79 et seq.

ALR. — Continuance of civil case because of illness or death of party, 68 A.L.R.2d 470.

Continuances at instance of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial, 16 A.L.R.4th 1283.

17-8-21. When showing for continuance required of state.

In all cases in which the defendant cannot, according to law, demand a speedy trial, a continuance shall not be granted to the state, except upon a reasonable showing therefor.

History. — Ga. L. 1862-63, p. 138, § 1; Code 1863, § 4592; Code 1868, § 4613; Code 1873, § 4710; Code 1882, § 4710; Penal Code, § 960; Penal Code, § 985; Code 1933, § 27-2001; Ga. L. 2006, p. 893, § 4/HB 1421.

JUDICIAL DECISIONS

Denial of speedy trial depends on facts and circumstances. — Whether a defendant has been denied a speedy trial is not merely a matter of time but depends upon the facts and circumstances of each case. Newman v. State, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

Absence of witness. — It was not an abuse of discretion for the trial court to grant a continuance to the state based on the absence of a police officer witness, who was not under subpoena but had been served with a notice, since the officer was prevented from testifying because the officer was placed on administrative leave. Hicks v. State, 221 Ga. App. 735, 472 S.E.2d 474 (1996).

Defendant's courses of action when trial unreasonably delayed by state. — If the defendant believes the state has delayed beyond a reasonable time in bringing the defendant to trial, the defendant can make a motion that the defendant be tried, or that the indictment be dismissed for want of prosecution, and call upon the court to apply this section and deny the state a continuance unless it shows sufficient cause for it. State v. King, 137 Ga. App. 26, 222 S.E.2d 859 (1975).

Continuance not presumed erroneous when there is no showing that it was not justified. — If there is a mistrial and the case continued until the next term, there being nothing to show that there were other jurors present, or that there was not sufficient ground for such continuance, error will not be presumed on that account. Armor v. State, 125 Ga. 3, 53 S.E. 815 (1906).

Cited in Blevins v. State, 113 Ga. App. 413, 148 S.E.2d 192 (1966); Blevins v. State, 113 Ga. App. 702, 149 S.E.2d 423 (1966); Butler v. State, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Continuance, § 1 et seq. 21A Am. Jur. 2d, Criminal Law, § 1041.

C.J.S. — 17 C.J.S., Continuances, § 1 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 567 et seq.

ALR. — Continuance of criminal case because of illness of accused, 66 A.L.R.2d 232.

17-8-22. Consideration of motion for continuance by court generally; allowance of counter-showing to motion.

All applications for continuances are addressed to the sound legal discretion of the court and, if not expressly provided for, shall be granted or refused as the ends of justice may require. In all cases the presiding judges may, in their discretion, admit a counter-showing to a motion for a continuance and, after a hearing, may decide whether the motion shall prevail.

History. — Orig. Code 1863, § 3460; Code 1868, § 3480; Ga. L. 1871-72, p. 49, § 1; Ga. L. 1872, p. 41, § 1; Code 1873, § 3531; Code 1882, § 3531; Civil Code 1895, § 5138; Penal Code 1895, § 966; Civil Code 1910, § 5724; Penal Code 1910, § 992; Code 1933, § 81-1419.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-167.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For comment on Cannady v. State, 190 Ga. 227, 9 S.E.2d 241 (1940), see 3 Ga. B.J. 55 (1940).

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Practice and Procedure
Appellate Review

General Consideration

Discretion of court. — Motions for continuance generally lie within the discretion of the trial judge. Hulett v. State, 150 Ga. App. 367, 258 S.E.2d 48 (1979); Cole v. Jordan, 158 Ga. App. 200, 279 S.E.2d 497 (1981).

Grant or denial of a continuance to a criminal defendant is in the sound discretion of the court, especially when the defendant is in jail. Gann v. State, 166 Ga. App. 172, 303 S.E.2d 510 (1983); Davis v. State, 190 Ga. App. 178, 378 S.E.2d 519 (1989).

Motion for continuance is addressed to the sound discretion of the trial court, and the Court of Appeals will not interfere unless it is clearly shown that the court abused the court's discretion. Gignilliat v. State, 196 Ga. App. 773, 397 S.E.2d 52 (1990).

Judge must weigh facts and circumstances of each case. — Trial judge, in the exercise of the judge's discretion to grant or refuse a continuance, has to consider the facts and circumstances of each case to determine what the ends of justice require. Foster v. State, 213 Ga. 601, 100 S.E.2d 426 (1957), cert. denied, 355 U.S. 967, 78 S. Ct. 559, 2 L. Ed. 2d 542 (1958).

Movant must show some legal ground for a continuance. James v.

State, 158 Ga. 524, 123 S.E. 880 (1924).

Failure to make continuance. — If no motion for continuance is made, and no testimony under oath as to the necessity of a continuance is offered, a new trial will not be granted for failure to grant a continuance. Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

Objection to jurors as grounds for continuance. — It is not a ground for continuance that some of the jurors impaneled to try a second case against the defendant were present at a part of the first trial. This point should have been made by a challenge to the polls. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506 (1958).

This section applies when there have been prior continuances of the case. Nail v. State, 142 Ga. 595, 83 S.E. 226 (1914); Paulk v. State, 148 Ga. 304, 96 S.E. 417 (1918).

Defendant's inaction with respect to retained counsel. — Trial court's refusal to continue trial was not an abuse of discretion when it was justified by the defendant's inaction with respect to counsel, since at arraignment and subsequently, the defendant insisted on retained counsel but none ever appeared and the defendant never showed the defendant had made arrangements for counsel. Vincent v. State, 210 Ga. App. 6, 435 S.E.2d 222 (1993), aff'd, 264 Ga. 234, 442 S.E.2d 748 (1994).

Continuance to retain private counsel. — Trial court did not abuse the court's discretion in denying the second defendant's motion for a continuance to hire counsel as the trial began ten months after the indictment and seven weeks after the defendant requested appointed counsel, yet the first day of trial was the first time the defendant expressed an intention to retain private counsel. Partlow v. State, 346 Ga. App. 473, 816 S.E.2d 474 (2018).

Cited in Malone v. State, 49 Ga. 210 (1873); Johnson v. State, 65 Ga. 94 (1880); Kimberly v. State, 4 Ga. App. 852, 62 S.E. 571 (1908); Johnson v. State, 16 Ga. App. 287, 85 S.E. 204 (1915); Smith v. State, 21 Ga. App. 237, 94 S.E. 265 (1917); Parks v. State, 21 Ga. App. 506, 94 S.E. 628 (1917); Fordham v. State, 148 Ga. 758, 98 S.E. 267 (1919); Kelley v. State, 151 Ga. 551, 107 S.E. 488 (1921); Boatright v. State, 27 Ga. App. 292, 108 S.E. 130 (1921); Sims v. State, 177 Ga. 266, 170 S.E. 58 (1933); Walker v. State, 52 Ga. App. 108, 182 S.E. 524 (1935); Roth v. State, 70 Ga. App. 93, 27 S.E.2d 473 (1943); Bentley v. State, 70 Ga. App. 494, 28 S.E.2d 658 (1944); Cochran v. State, 212 Ga. 245, 91 S.E.2d 601 (1956); Jones v. State, 214 Ga. 828, 108 S.E.2d 327 (1959); Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960); Britten v. State, 221 Ga. 97, 143 S.E.2d 176 (1965); Neal v. State, 119 Ga. App. 218, 166 S.E.2d 740 (1969); Terrell v. State, 136 Ga. App. 645, 222 S.E.2d 641 (1975); Shaw v. State, 239 Ga. 690, 238 S.E.2d 434 (1977); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Campbell v. State, 240 Ga. 352, 240 S.E.2d 828 (1977); Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978); Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979); Lakes v. State, 244 Ga. 217, 259 S.E.2d 469 (1979); McEachin v. State, 245 Ga. 606, 266 S.E.2d 210 (1980); Park v. State, 154 Ga. App. 348, 268 S.E.2d 401 (1980); Graham v. State, 171 Ga. App. 242, 319 S.E.2d 484 (1984); O'Neal v. State, 254 Ga. 1, 325 S.E.2d 759 (1985); Heaton v. State, 175 Ga. App. 735, 334 S.E.2d 334 (1985); Brock v. State, 177 Ga. App. 430, 339 S.E.2d 403 (1986); Green v. State, 178 Ga. App. 203, 342 S.E.2d 386 (1986); Appling v. State, 256 Ga. 36, 343 S.E.2d 684 (1986); McGuire v. State, 185 Ga. App. 233, 363 S.E.2d 850 (1987); Turner v. State, 258 Ga. 97, 365 S.E.2d 822 (1988); Johnson v. State, 185 Ga. App. 475, 364 S.E.2d 609 (1988); Rhodes v. State, 200 Ga. App. 193, 407 S.E.2d 442 (1991); Roberts v. State, 208 Ga. App. 64, 430 S.E.2d 175 (1993); Stocks v. State, 224 Ga. App. 433, 481 S.E.2d 230 (1997); McTaggart v. State, 225 Ga. App. 359, 483 S.E.2d 898 (1997); Haselrigs v. State, 225 Ga. App. 873, 485 S.E.2d 555 (1997); Minor v. State, 232 Ga. App. 246, 501 S.E.2d 576 (1998); Mays v. State, 238 Ga. App. 507, 519 S.E.2d 290 (1999); Johnson v. State, 271 Ga. 375, 519 S.E.2d 221 (1999); Roberts v. State, 272 Ga. 822, 537 S.E.2d 86 (2000); Roberts v. State, 272 Ga. 822, 537 S.E.2d 86 (2000); Choat v. State, 246 Ga. App. 475, 540 S.E.2d 289 (2000); Lucas v. State, 274 Ga. 640, 555

General Consideration (Cont'd)

S.E.2d 440 (2001); Blackshear v. State, 285 Ga. 619, 680 S.E.2d 850 (2009); Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012); Danenberg v. State, 291 Ga. 439, 729 S.E.2d 315 (2012).

Application

Continuance based on witness' absence. — Section applies to a continuance based on absence of witnesses. Woolfolk v. State, 85 Ga. 69, 11 S.E. 814 (1890); McCain v. State, 23 Ga. App. 320, 98 S.E. 191 (1919).

Continuance based on counsel's illness. — This section applies to a continuance based on the illness of counsel. Siegel v. State, 79 Ga. App. 410, 53 S.E.2d 686, aff'd on other grounds, 206 Ga. 252, 56 S.E.2d 512 (1949).

When counsel personally makes a motion for continuance on account of counsel's own illness, the court may take into consideration counsel's physical appearance and all circumstances which may appear regarding the court's judgment as to the physical condition of such attorney, and when the motion is overruled, the Court of Appeals will not reverse the judgment of the lower court unless it clearly appears that the court abused the court's discretion. Siegel v. State, 79 Ga. App. 410, 53 S.E.2d 686, aff'd on other grounds, 206 Ga. 252, 56 S.E.2d 512 (1949).

Defendant's voluntary decision to substitute new counsel. — Trial court did not abuse the court's discretion in denying a continuance sought on the ground that the defendant's new counsel had insufficient time to prepare when the short time period arose from the defendant's voluntary decision to substitute new counsel. Cunningham v. State, 244 Ga. App. 231, 535 S.E.2d 262 (2000).

Continuance for recently hired counsel. — Trial court did not abuse the court's discretion in denying a motion for a continuance made by recently hired cocounsel minutes before jury selection, particularly given that counsel was assisted at trial by an attorney who had been involved in the case for several months. Burrowes v. State, 296 Ga. App. 629, 675 S.E.2d 518 (2009), overruled on other grounds by McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

Continuance to obtain presence of absent witness. — It is not an abuse of discretion to refuse to grant a continuance upon the ground of the absence of a witness, if it appears that the absent witness was not subpoenaed, and that the applicant by exercise of due diligence, could have had the witness subpoenaed. Clark v. State, 52 Ga. App. 61, 182 S.E. 195 (1935).

Continuance requested by the defendant in order to obtain the presence at trial of a material witness is properly denied if the defendant has not been diligent in attempting to procure the attendance of the absent witness. Burney v. State, 244 Ga. 33, 257 S.E.2d 543, cert. denied, 444 U.S. 970, 100 S. Ct. 463, 62 L. Ed. 2d 385 (1979).

Trial court erred in denying the defendant's motion for a continuance of the hearing on the defendant's motion for new trial so that the defendant could produce an alibi witness to testify at that hearing because counsel did not properly serve a subpoena on the alibi witness as email was not a proper means of serving a subpoena, and the defendant made no assertion that the defendant attempted to subpoena the alibi witness as statutorily required. Smith v. State, 308 Ga. 81, 839 S.E.2d 630 (2020).

One hour continuance for state's witness. — In a prosecution for driving under the influence, when at least one of two absent law enforcement witnesses for the state had been issued a subpoena, the trial court did not abuse the court's discretion in granting a one-hour postponement due to the absence of the witness. Minicucci v. State, 214 Ga. App. 468, 448 S.E.2d 34 (1994).

Court properly denied a continuance based on the absence of witnesses when it appeared that the defendant did not exercise due diligence in securing the presence of the witnesses. Halthon-Howard v. State, 234 Ga. App. 229, 506 S.E.2d 415 (1998).

In a child molestation case, the trial court properly denied the defendant a continuance under O.C.G.A. § 17-8-22 based on the absence of the defendant's mother overseas; the defendant did not

comply with several of the requirements of O.C.G.A. § 17-8-25, including the materiality requirement, and other witnesses testified that the witnesses saw no improper contact between the defendant and the teenagers involved. Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, No. S07C1788, 2007 Ga. LEXIS 745 (Ga. 2007).

Continuance to review witness' statements. — That the state had not produced copies of its witnesses' written statements to police, which defense counsel discovered shortly before voir dire, did not oblige the trial court to grant the defendant a continunace, as: (1) the state did not withhold the evidence; (2) the case was recessed so counsel could examine the statements; and (3) the defendant did not show what the defendant would have accomplished if the defendant had been provided more time. Burrowes v. State, 296 Ga. App. 629, 675 S.E.2d 518 (2009), overruled on other grounds by McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

Continuance request for absent physician denied. — When the defendant's attorney was unable to show the actual existence, much less the identity, of the doctor sought as a witness and was unable to show whether the doctor was within the jurisdiction of the court, and the trial court tried to accommodate the defendant by offering to take a recess at some point in the proceeding so that the attorney could contact another source for any information regarding the other doctor, the trial court did not abuse the court's discretion in denying the motion for continuance. Payne v. State, 207 Ga. App. 312, 428 S.E.2d 103 (1993), overruled on other grounds, Sims v. State, 266 Ga. 418, 467 S.E.2d 576 (1996).

Witness residing beyond jurisdiction of court. — It is not error to refuse to continue a case in order to procure the testimony of a witness who resides beyond the jurisdiction of the court. Smith v. State, 193 Ga. App. 208, 387 S.E.2d 419 (1989).

Continuance to interview witnesses. — Even though counsel learned of a supplemental list of additional witnesses only the day before trial, denial of a continuance was not an abuse of discretion because the trial court gave counsel the opportunity to interview the witnesses prior to trial. Downs v. State, 240 Ga. App. 740, 524 S.E.2d 786 (1999).

Continuance to obtain expert witness. — Defendant contended that a continuance should have been granted for the defendant to obtain an expert witness; however the defendant failed to show that the defendant could not have obtained an expert to examine the photographs at an earlier date. Strickland v. State, 212 Ga. App. 170, 441 S.E.2d 494 (1994).

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance on the ground that an expert witness was not available, and the defendant needed to find another witness because the record did not demand a finding that the defendant exercised diligence under O.C.G.A. § 17-8-20 in light of the fact that trial counsel was appointed some months before the trial; the defendant made no showing as to the expert's identity, no proffer of the expected testimony, and no showing of how that testimony would benefit the defendant. Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333, cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Continuance in child molestation cases. — In a prosecution for child molestation, when the defendant failed to identify a theory under which a prior act of molestation of the victim would be admissible, the court did not abuse the court's discretion in refusing to grant a continuance. Gilstrap v. State, 215 Ga. App. 180, 450 S.E.2d 436 (1994).

Late notice of a scientific report. — Trial court did not abuse the court's discretion in denying a motion for a continuance based on the time remaining before presentation of the state's case and measures taken to permit the defense to prepare for the state's anticipated scientific evidence. Pace v. State, 271 Ga. 829, 524 S.E.2d 490 (1999), cert. denied, 531 U.S. 890, 121 S. Ct. 101, 148 L. Ed. 2d 60 (2000).

Continuance for expert to test evidence denied. — In the defendant's trial for malice murder and other crimes for stabbing the defendant's domestic part-

Application (Cont'd)

ner, the trial court did not err in denying the defendant's motion for a continuance to allow testing of evidence because the state timely complied with discovery, the DA had an open file policy, counsel had filed a speedy trial request, and the defendant did not show diligence. Phoenix v. State, 304 Ga. 785, 822 S.E.2d 195 (2018).

Continuance to review officer's personnel file not permitted. — With regard to a defendant's trial for obstruction of a police officer and other related crimes, the trial court did not abuse the court's discretion by denying the defendant's motion for a continuance to review the personnel file of the officer involved after defense counsel announced ready as, in response, the trial court reviewed the officer's personnel file in camera and determined that the file did not contain any evidence relevant to the defendant's defense. Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510 (2009).

Insufficient time for preparation of counsel. — Motion for a continuance predicated on the basis that counsel has not had sufficient time to prepare for trial addresses itself to the sound discretion of the trial judge, and a ruling denying such a motion will not be interfered with unless the judge has abused the judge's discretion in denying the motion. Cantrell v. State, 154 Ga. App. 725, 270 S.E.2d 12 (1980); Snow v. State, 178 Ga. App. 842, 344 S.E.2d 762 (1986).

Motion for continuance for additional time to adequately prepare a defense addresses itself to the discretion of the trial court and the exercise of that discretion will not be disturbed on appeal unless that discretion has been clearly abused. Babb v. State, 157 Ga. App. 757, 278 S.E.2d 495 (1981), overruled on other grounds, Motes v. State, 161 Ga. App. 173, 288 S.E.2d 256 (1982).

Trial court did not err in denying the defendant's motion for a continuance after defense counsel learned that a plea offer would not be accepted; defense counsel claimed that counsel had not had insufficient time to investigate and to prepare the defense, but counsel did not specifically state what else counsel would have done to prepare for trial, other than to set up a trial notebook, which the trial court gave counsel time to do when the court denied the continuance. Jones v. State, 285 Ga. App. 866, 648 S.E.2d 183 (2007).

As the charges against the defendant had been pending for more than two years before trial; defense counsel had early access to both the list of state's witnesses and the autopsy report when it was completed more than ten months prior to trial; and hospital and emergency medical technician reports not contained in the state's file were provided to defense counsel when they were requested, the defendant failed to demonstrate any harm from the denial of a motion for continuance to give counsel more time to examine those reports. Carter v. State, 285 Ga. 394, 677 S.E.2d 71 (2009).

Defendant showed no harm resulting from the trial court's denial of the defendant's motions for a continuance on the ground that the defendant had insufficient time to prepare for trial because the defendant did not identify any additional witnesses or evidence in mitigation that the defendant could have presented had the defendant been granted a continuance; the trial court authorized additional time and funds to enable defense counsel to obtain the assistance of a third attorney, at least three investigators, and a secretary and/or a paralegal devoted to the defendant's case. Loyd v. State, 288 Ga. 481, 705 S.E.2d 616, cert. dismissed, 565 U.S. 971, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance because the record did not indicate that the state played a role in delaying the production of medical records; the defendant's expert witness testified that the expert had reviewed all of the medical records that the expert had been given, including those produced in preparing for the trial, and while the defendant asserted that a continuance would have afforded trial counsel more time to work with the expert witness to thoroughly prepare cross-examinations of the state's witnesses, the defendant made no showing that trial counsel's cross-examinations were somehow inade-

quate, nor did the defendant point to any additional challenges or defenses that could have been presented on the defendant's behalf. Eskew v. State, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Lack of preparedness by counsel. — For case when lack of preparedness did not justify continuance, see Trammell v. State, 183 Ga. 711, 189 S.E. 529 (1937).

Trial court did not abuse the court's discretion under O.C.G.A. § 17-8-22 in denying the defendant's motion for continuance based on counsel's lack of preparation because, for approximately two months leading up to trial, the defendant did not respond to the defendant's trial counsel's efforts to communicate with the defendant because the defendant wanted other counsel. Priester v. State, 350 Ga. App. 200, 828 S.E.2d 439 (2019).

Sudden withdrawal of counsel. — Neither sudden withdrawal of retained counsel nor lack of preparation of new counsel is ipso facto a ground for continuance. Horton v. State, 132 Ga. App. 407, 208 S.E.2d 186 (1974).

Counsel with scheduling conflict. — Defendant's Sixth Amendment right to counsel was not violated when the trial court denied the defendant's request for a continuance to allow the defendant to be represented by a lawyer who was scheduled to try another case at the same time as the defendant was represented by an experienced capital defender, familiar with the case, and two other experienced lawyers. McCullough v. State, 304 Ga. 290, 818 S.E.2d 520 (2018).

Time to permit appointed counsel to prepare for trial. — If counsel is appointed by the state to defend the accused, a continuance should be granted to permit preparation for trial. Harris v. State, 119 Ga. 114, 45 S.E. 973 (1903); Cummings v. State, 151 Ga. 593, 107 S.E. 771 (1921).

Counsel unprepared because counsel had been handling other cases. — Trial judge does not abuse the judge's discretion in refusing a continuance when counsel has been employed for two weeks and is unprepared because counsel had been handling other cases. Corbin v. State, 212 Ga. 231, 91 S.E.2d 764, cert. denied, 351 U.S. 987, 76 S. Ct. 1057, 100 L. Ed. 1501 (1956).

Physical beating of counsel. — When a deputy sheriff threatens and beats an attorney representing a defendant and the attorney moves for postponement, and states that due to the beating the attorney is unable to represent the client on that day, the ends of justice require that the motion be granted. Smith v. State, 239 Ga. 477, 238 S.E.2d 116 (1977).

Review of police radio transmissions as justification for continuance. — Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance of the trial, given that trial counsel had several days to review copies of police radio transmissions before trial, but did not do so, characterizing the transmissions only as a "lead," and hence such did not present a compelling reason for a continuance. Hartley v. State, 283 Ga. App. 388, 641 S.E.2d 607 (2007).

Continuance to obtain transcript denied. — Although the defendant stated that obtaining the trial transcript from the defendant's prior counsel was necessary for an adequate and effective review of the sentencing issues involved, the defendant did not contend or show that the defendant was harmed at the resentencing hearing by the denial of a continuance and not having access to the transcript, and there could be no reversible error when no harm was shown. Levin v. State, 334 Ga. App. 71, 778 S.E.2d 238 (2015).

Practice and Procedure

Continuance because the state had not complied with the misdemeanor discovery statute was properly denied since defendant could not show harm. Christian v. State, 244 Ga. App. 713, 536 S.E.2d 600 (2000).

Party must show record of motion in order to complain of motion's denial. — In order for a party successfully to complain of a ruling which the party contends to have been a denial of a continuance, the party must be able to show a formal and proper motion in the record as the basis of the asserted error. This rule is technically construed. Horton v. State, 132 Ga. App. 407, 208 S.E.2d 186 (1974).

Practice and Procedure (Cont'd)

Motion to obtain access to papers in possession of attorney hired by prosecutrix. — When the defense complains of the overruling of an "omnibus motion" which requested access to unidentified papers allegedly in the possession of an attorney hired by the prosecutrix, and the solicitor (now district attorney) states in the solicitor's place that the solicitor does not want or accept assistance from that attorney, does not know what, if anything, the attorney has in the attorney's file, and makes no use of any papers which that attorney may have, any error in overruling the motion is under these circumstances harmless, and no cause is shown requiring the grant of a continuance. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405 (1979).

Possibility of finding evidence of defendant's insanity as grounds for continuance. — Trial judge does not abuse the judge's discretion in refusing to grant a continuance when the only reason offered by counsel is counsel's information and belief that counsel might be able to find evidence to show the defendant insane and no showing is made that the defendant was possibly insane. Harris v. State, 211 Ga. 327, 85 S.E.2d 770 (1955).

Continuance to allow state to obtain mental evaluation and IQ test of defendant proper. — Trial court's grant of an eight-day continuance to the state in a trial for murder and related crimes was proper because the defense counsel retained a psychologist to test and evaluate the defendant with regard to mental retardation, and the continuance was to permit the state to retain the state's own expert to evaluate the defendant's mental state and to administer an IQ test. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

Quashing of indictment and issuance of new indictment as grounds for continuance. — When the defendant on the morning of the trial announced ready as to an indictment, and where, during the morning, this indictment was quashed and another returned identical in all respects with the first, except that certain facts were described in technical rather than their colloquial terminology, it is not an abuse of discretion for the trial court to deny a continuance on the ground that sufficient time has not been granted counsel to examine the new indictment and prepare a defense thereunder. Guinn v. State, 91 Ga. App. 869, 87 S.E.2d 367 (1955).

Cross-examination of defendant on motion. — It is not reversible error to permit the defendant to be cross-examined on the defendant's motion for a continuance. Bell v. State, 36 Ga. App. 111, 135 S.E. 521 (1926).

Change by state in date of alleged commission of crime. — If the state in the indictment changes the date that the alleged offense was committed, thereby destroying the defendant's alibi defense, the defendant is entitled to a continuance affording the defendant sufficient time to prepare a defense to meet the new date. Geckles v. State, 177 Ga. App. 70, 338 S.E.2d 473 (1985).

No continuance required due to absence of counsel when second chair was present. — In the defendant's murder trial, there was no violation of the defendant's right to counsel when the trial court proceeded with trial in the absence of the defendant's lead counsel, who had failed to appear, because the defendant's second chair counsel was in court and representing the defendant, and the defendant did not allege any specific errors in the second chair counsel's representation. Wainwright v. State, 305 Ga. 63, 823 S.E.2d 749 (2019).

Amount of time necessary to prepare case. — There is no fixed rule as to the number of days that should, of right, be allowed counsel for the defendant after counsel's employment or appointment in a criminal case to prepare the case for trial, but the trial judge, in the exercise of the judge's discretion to grant or refuse a continuance, has to consider the facts and circumstances of each case to determine what the ends of justice require. Babb v. State, 157 Ga. App. 757, 278 S.E.2d 495 (1981), overruled on other grounds, Motes v. State, 161 Ga. App. 173, 288 S.E.2d 257 (1982).

Trial court properly denies continuance when party shows lack of diligence. — Trial court did not abuse the court's discretion in denying continuance of a summary judgment hearing when fault lay in the appellants' lack of diligence in obtaining evidence to oppose the motions, and appellants had done essentially no discovery prior to the hearing. Cole v. Jordan, 158 Ga. App. 200, 279 S.E.2d 497 (1981).

Motion for continuance denied. — Defendant's motion for continuance was properly denied since the defendant presented no evidence regarding the automobile accident or the resulting medical treatment at the time defendant made the motion for continuance. Smalls v. State, 242 Ga. App. 39, 528 S.E.2d 560 (2000).

Trial court did not err in denying the defendant's motion for a continuance to obtain experts because the defendant did not provide details sufficient for the court to assess the need for the witnesses and the delay. Manning v. State, 273 Ga. 744, 545 S.E.2d 914 (2001).

Trial court properly denied the defendant's request for a continuance; pursuant to O.C.G.A. § 17-8-22, applications for continuances were addressed to the sound legal discretion of the court, and the defendant failed to show a compelling reason why more time to prepare for trial should have been granted as the trial court granted additional time to prepare for the cross-examination of one witness and additional time to interview supplemental witnesses listed by the state. Gilbert v. State, 259 Ga. App. 371, 577 S.E.2d 35 (2003).

Trial court did not err in denying the defendant's motion for a continuance because, after the defendant's first request for a continuance was denied, the defendant had 13 days to subpoena witnesses or to reconstruct a transcript from the pre-arrest warrant hearing; further, the second application for a continuance was based on speculation about a witness's testimony. Kuykendoll v. State, 278 Ga. App. 369, 629 S.E.2d 32 (2006).

Trial court did not err in denying a defendant's motions for continuance. The out-of-state witnesses whose attendance the defendant sought to secure ultimately appeared and testified at trial, and the defendant did not show any reason for the defendant's failure to prepare the witnesses during the lengthy period of time in which the case remained pending, over a year. French v. State, 288 Ga. App. 775, 655 S.E.2d 224 (2007).

Trial court properly denied a defendant a continuance after the defense learned that a witness would testify for the state: because the witness had been named in the indictment, the defendant had notice that the witness might be called by the state; moreover, defense counsel interviewed the witness, thoroughly cross-examined the witness, and impeached the witness. Gassett v. State, 289 Ga. App. 792, 658 S.E.2d 366 (2008).

Trial court did not abuse the court's discretion when the court denied the defendant's motion for a continuance because the state did not call the witness whose identity was not made known to trial counsel until the day before trial, and the defendant was given the opportunity to interview the witness before the trial commenced. Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

Defendant failed to show prejudice as a result of the denial of a motion for a continuance under O.C.G.A. § 17-8-22 as there was no showing that the defense would have benefitted in any way by further questioning of an officer about what the officer did with a particular shirt or the whereabouts of the shirt at the time of trial; accordingly, it was not shown to have been a material piece of evidence that was missing. Williams v. State, 317 Ga. App. 248, 730 S.E.2d 726 (2012).

Trial court did not abuse the court's discretion by denying the defendant's motion for a continuance because the defendant failed to present any evidence or testimony at the motion for new trial hearing implicating a different perpetrator nor specifically identified what evidence or witnesses the defendant would have put forth in defense if counsel had been given more time to prepare as speculation and conjecture were not enough. Calhoun v. State, 327 Ga. App. 683, 761 S.E.2d 91 (2014).

Defendant's request for a continuance on the day of trial after the defendant

Practice and Procedure (Cont'd)

fired a fourth attorney was properly denied because the defendant was offered time to review the victim's medical records, which the discharged attorney had handed to the defendant at the beginning of the proceeding, and the defendant did not explain how more time would have helped; although the defendant argued for a motion for continuance to obtain witnesses, the defendant did not make the required proffer of what the witnesses would testify about or who the witnesses were; and, although the defendant argued for a continuance based on the defendant's mental illness, the defendant pointed to no record evidence supporting the assertion that the defendant was mentally ill. Lewis v. State, 330 Ga. App. 650, 768 S.E.2d 821 (2015).

Trial court did not abuse the court's discretion in refusing to grant a continuance because the defendant's attorneys went to jail so that the defendant could listen to the recordings but the defendant not only refused to do so but fired the attorneys and told the attorneys to leave. In addition, counsel testified that counsel had reviewed the recordings and were prepared to address the recordings. Sullins v. State, 350 Ga. App. 83, 828 S.E.2d 142 (2019).

Suicide of witness. — It was not error to deny a motion for continuance in order to allow defense counsel an opportunity to get other witnesses after a potential witness committed suicide since defense counsel failed to show the names of any witnesses who might be obtained and whether or not the witnesses would be subject to subpoena. Wilcoxen v. State, 162 Ga. App. 800, 292 S.E.2d 905 (1982).

Errors in issuing subpoena. — When a witness was under a subpoena that did not specify a date for trial, but obligated the witness to be ready to testify at any time in the indefinite future, the trial court did not abuse the court's discretion in excusing the witness from the requirements of the subpoena and denying the defendant's motion for a continuance to secure the witness's attendance. Clark v. State, 225 Ga. App. 851, 485 S.E.2d 543 (1997).

Appellate Review

Abuse of discretion generally. — Continuances being for the determination of the trial judge in the exercise of the judge's discretion will not be controlled unless manifestly abused. Eberhart v. State, 47 Ga. 598 (1873); Smith v. State, 7 Ga. App. 252, 66 S.E. 556 (1909), later appeal, 7 Ga. App. 802, 68 S.E. 334 (1910); Tucker v. State, 133 Ga. 470, 66 S.E. 250 (1909); Hightower v. State, 9 Ga. App. 236, 70 S.E. 1022 (1911); Tyree v. State, 74 Ga. App. 229, 39 S.E.2d 441 (1946); Manners v. State, 77 Ga. App. 843, 50 S.E.2d 158 (1948); Powell v. State, 85 Ga. App. 208, 68 S.E.2d 177 (1951).

Refusal of a motion to continue will not be reversed unless it is manifest that there has been an abuse of discretion on the part of the trial judge. Anderson v. State, 190 Ga. 455, 9 S.E.2d 642 (1940); McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949); Blackston v. State, 209 Ga. 160, 71 S.E.2d 221 (1952); Butts v. State, 211 Ga. 16, 83 S.E.2d 610 (1954); Harris v. State, 211 Ga. 327, 85 S.E.2d 770 (1955); Anderson v. State, 222 Ga. 561, 150 S.E.2d 638 (1966); McLendon v. State, 123 Ga. App. 290, 180 S.E.2d 567 (1971); Marshall v. State, 239 Ga. 101, 236 S.E.2d 58 (1977); Kelly v. State, 241 Ga. 190, 243 S.E.2d 857 (1978); Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978); Felts v. State, 244 Ga. 503, 260 S.E.2d 887 (1979); Howard v. Harn, 163 Ga. App. 771, 295 S.E.2d 349 (1982).

All applications for continuances are addressed to the trial judge's sound discretion, which will not be controlled except for flagrant abuse. Terhune v. State, 117 Ga. App. 59, 159 S.E.2d 291 (1967).

Motions for a continuance are addressed to the discretion of the trial judge and the judge's discretion will not be controlled unless grossly abused. Atkins v. State, 228 Ga. 578, 187 S.E.2d 132 (1972).

Motion for continuance is addressed to the sound discretion of the trial court and the refusal to grant a continuance will not be disturbed unless there is a clear abuse of discretion. Young v. State, 237 Ga. 852, 230 S.E.2d 287 (1976), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Granting of a motion for continuance is

within the sound discretion of the trial judge, and the Court of Appeals will not interfere unless it is clearly shown that the judge has abused the judge's discretion. Hammonds v. State, 157 Ga. App. 393, 277 S.E.2d 762 (1981).

Grant or denial of a continuance is within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. Wilson v. State, 158 Ga. App. 174, 279 S.E.2d 345 (1981); Hammock v. State, 201 Ga. App. 614, 411 S.E.2d 743, cert. denied, 201 Ga. App. 903, 411 S.E.2d 743 (1991).

Trial court did not abuse the court's broad discretion in denying yet another defense motion for a continuance because the trial court noted that the case had been on the trial docket since August 2016 and the defendant had more than a month to retain any expert that the defense deemed necessary for the defense in the case and otherwise prepare the case for trial. Keller v. State, 308 Ga. 492, 842 S.E.2d 22 (2020).

Appellate courts reluctant to find error in denial because of interests which must be balanced. — Counterbalancing the court's duty to ensure that the defendant is not brought to trial with unnecessary haste and with possible prejudice to the defendant's defense is the obligation to prevent the defendants from trifling with the operation of the trial courts in an attempt to obtain delay or some other perceived advantage. For this reason, the appellate courts will find the denial of requests for continuance to be error only with great reluctance. Williams v. State, 144 Ga. App. 410, 241 S.E.2d 261 (1977).

Review of trial judge's ruling when there is no conflict in the evidence. — Although the discretion of the trial judge will not be controlled unless manifestly abused, when there is no conflict in the evidence, and only legal rules as declared by the laws and the principles of justice stated by the Bill of Rights of the federal and state Constitutions are to be applied, an erroneous application of such rules and principles will be reviewed and corrected. Edwards v. State, 204 Ga. 384, 50 S.E.2d 10 (1948).

Review of denial of continuance based on unpreparedness and inability to use a witness. — Court of Appeals will not interfere with the discretion of the trial judge in refusing to grant a continuance on a motion based generally on two grounds: inadequate time for counsel to prepare for trial; and the inability to use a witness present at the scene of the crime who was accused of participating. Mack v. State, 125 Ga. App. 639, 188 S.E.2d 828 (1972).

Denial of motion upheld. — Trial court did not err in failing to grant a motion for continuance because, several hours prior to the call of the case for trial, defense counsel was served by the state with a supplemental list of witnesses, one of whom, during the trial, defense counsel objected to, when defense counsel had been allowed the opportunity to interview the witness. Saylors v. State, 251 Ga. 735, 309 S.E.2d 796 (1983).

Trial court did not err in denying a request for continuance. See Harrison v. State, 251 Ga. 837, 310 S.E.2d 506 (1984).

Trial court did not err in denying appellant's motion for continuance when appellant was arrested and tried within eight days because denial of a continuance merely because of shortness of time will not reflect an abuse of discretion, and appellant did not show that appellant was prevented from obtaining and producing any witnesses or evidence, nor that the case was complicated and required more time in preparation, or that further delay would have gained the appellant any palpable advantage. Tucker v. State, 172 Ga. App. 86, 321 S.E.2d 817 (1984).

When the basis for a requested continuance was counsel's claim that counsel had insufficient time to show the defendant was either not competent to stand trial or to appreciate the criminal nature of the defendant's alleged acts, but counsel offered only counsel's belief that further investigation would yield supporting evidence, based upon information that the defendant had in the past received drug/psychological counseling in three different cities, there was an insufficient showing of a necessity for a continuance. Lucas v. State, 174 Ga. App. 580, 330 S.E.2d 792 (1985).

Appellate Review (Cont'd)

When there is no indication that the continuance would have benefited the defendant, it cannot be said to be necessary. Johnson v. State, 255 Ga. 703, 342 S.E.2d 312 (1986); Martin v. State, 268 Ga. 682, 492 S.E.2d 225 (1997).

When the record did not appear to include the purportedly illegible documents produced and the defendant did not show how those documents would have assisted the defendant in the preparation of the defendant's case and the record does not show that the documents were subject to disclosure under O.C.G.A. § 17-7-210 [repealed] or O.C.G.A. § 17-7-211 [repealed], that the documents were provided by the state, or that the state delayed the documents' production in any way; there was no showing of an abuse of discretion on the part of the trial court in denying a motion for continuance on this ground. Strickland v. State, 212 Ga. App. 170, 441 S.E.2d 494 (1994).

With regard to a defendant's conviction for trafficking in cocaine, the trial court did not abuse the court's discretion in denying the defendant's motion for a continuance, or in the alternative, for a mistrial, which the defendant requested as a remedy for the state's failure to disclose an officer who took the drugs to the crime lab and whose testimony and the admission of a new crime lab report was not provided to the defendant because the officer's name was not previously provided on the state's witness list, in violation of discovery rules. The trial court found that the state apparently did not know about the officer's involvement in the case prior to trial, as the issue was raised during cross-examination of another officer, and the defendant presented no evidence of bad faith, therefore, it was within the trial court's discretion to allow defense counsel the opportunity to talk to the officer before the officer testified as a remedy for the discovery violation as opposed to granting a new trial or a mistrial. Scott v. State, 298 Ga. App. 376, 680 S.E.2d 482 (2009).

Trial court did not deprive the defendant of the defendant's constitutional right to testify because the defendant consulted with the defendant's lawyer and the defendant fully understood the benefits and consequences of testifying; after engaging the defendant in a colloquy about the defendant's right, the trial court gave the defendant a full opportunity to do so, and the defendant voluntarily chose not to testify at that time; and the trial court did not abuse the court's discretion in refusing to grant a continuance to the defendant until the next morning as the defendant did not explain to the trial court why a continuance was necessary, and the trial court reasonably could have believed that any delay would have been fruitless. Terrell v. State, 304 Ga. 183, 815 S.E.2d 66 (2018).

Trial court did not abuse the court's discretion in denying the appellant's motion for a continuance based on the state untimely serving a portion of a witness's custodial interview three days prior to trial because the appellant's contention that proper cross-examination questioning was prevented was unsupported by the evidence and the appellant did not present the testimony of any potential witnesses or offer any other evidence to show that any prejudice resulted from the denial of the motion. Easley v. State, 352 Ga. App. 1, 833 S.E.2d 591 (2019).

State's failure to comply with discovery obligations did not necessitate a continuance since the state provided the newly discovered evidence to defendant as soon as practicable, the defendant was given time to interview the witnesses before the witnesses testified, and there was no showing of bad faith on the part of the state of prejudice to the defense. Browner v. State, 265 Ga. App. 788, 595 S.E.2d 610 (2004).

It was not an abuse of discretion to deny the defendant's motion for a continuance as the defendant had twice stated that the defendant was ready for trial and, in lieu of a continuance of the entire trial, the trial court allowed the attorneys to pick a jury and then continue the case until the next morning. Walker v. State, 268 Ga. App. 669, 602 S.E.2d 351 (2004).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 5.

ALR. — Refusal of continuance in criminal trial, asked for on account of occurrences during trial, as abuse of discretion, 5 A.L.R. 914.

Physical condition or conduct of party, his family, friends, or witnesses during trial, tending to arouse sympathy of jury, as ground for continuance or mistrial, 131 A.L.R. 323.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 A.L.R.3d 725.

17-8-23. Absence of party as grounds for granting continuance.

If either party is providentially prevented from attending the trial of any case and the counsel of the absent party will state in his place that he cannot go safely to trial without the presence of the absent party, the case shall be continued, provided his continuances are not exhausted.

History. — Orig. Code 1863, § 3453; Code 1868, § 3473; Code 1873, § 3524; Code 1882, § 3524; Civil Code 1895, § 5131; Civil Code 1910, § 5717; Code 1933, § 81-1412.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-154.

JUDICIAL DECISIONS

Inability of counsel to move for continuance because counsel does not know reason for client's absence. — If counsel, because counsel does not know the reason for the client's absence, is unable to make the requisite formal and proper motion for continuance, the trial judge may assume that the defendant has voluntarily been absent from the trial, thereby waiving the defendant's confrontation rights. Smith v. State, 139 Ga. App. 515, 228 S.E.2d 705 (1976).

Voluntary absence of accused. — When an accused is present at the beginning of the trial, but thereafter voluntarily is absent from the proceeding, the defendant waives the defendant's right to be present at the remainder of the trial. Stell v. State, 210 Ga. App. 662, 436 S.E.2d 806 (1993).

Surety should be allowed to prove that principal is absent because of providential cause. Russell v. State, 45 Ga. 9 (1872).

Court may deny continuance when defendant in poor physical condition. — When the defendant is unable to withstand the rigors of trial because of the defendant's physical condition and it appears that the defendant will not be in better condition at the next trial term, the trial court may properly deny the continuance and proceed with the trial; while it may not fairly be said that the defendant bears any culpability for the illness, neither may it be said that the state has in any way prevented the defendant from appearing and defending oneself. Dasher v. State, 157 Ga. App. 664, 278 S.E.2d 465 (1981).

Cited in Mell v. State, 69 Ga. App. 302, 25 S.E.2d 142 (1943); Hammond v. State, 303 Ga. App. 176, 692 S.E.2d 760 (2010).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 40, 50.

ALR. — Continuance of criminal case because of illness of accused, 66 A.L.R.2d 232.

Sufficiency of showing defendant's "voluntary absence" from trial for purposes of state criminal procedure rules or statutes authorizing continuation of trial notwithstanding such absence, 19 A.L.R.6th 697.

17-8-24. Absence or illness of counsel as grounds for granting continuance.

The illness or absence, from providential cause, of counsel where there is but one, or of the leading counsel where there are more than one, shall be a sufficient ground for continuance, provided that the party making the application will swear that he cannot go safely to trial without the services of the absent counsel, that he expects his services at the next term, and that the application is not made for delay only.

History. — Orig. Code 1863, § 3454; Code 1868, § 3474; Code 1873, § 3525; Code 1882, § 3525; Civil Code 1895, § 5132; Penal Code 1895, § 964; Civil Code 1910, § 5718; Penal Code 1910, § 990; Code 1933, § 81-1413.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-155.

JUDICIAL DECISIONS

Discretion of court. — Granting or refusing a continuance is a matter within the discretion of the trial court, and unless abused, such discretion will not be controlled. Scott v. State, 151 Ga. App. 840, 262 S.E.2d 198 (1979).

Motion for continuance is addressed to the sound discretion of the trial court, and a denial will not be disturbed in the absence of a manifest abuse of discretion. Blair v. State, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Defendant's duty as regards employment of counsel. — It is the defendant's duty to employ counsel to aid in the preparation of a defense in advance of the trial of the case. Scott v. State, 151 Ga. App. 840, 262 S.E.2d 198 (1979).

Strict compliance. — Former Civil Code 1910, § 5717 (see O.C.G.A. § 17-8-23) must be strictly complied with, especially if counsel other than absent counsel is procured. Curry v. State, 17 Ga. App. 377, 87 S.E. 685 (1915); New v. State, 26 Ga. App. 5, 105 S.E. 50, cert. denied, 26 Ga. App. 801 (1921); Caswell v. State, 27 Ga. App. 78, 107 S.E. 562, cert. denied, 27 Ga. App. 835 (1921).

Strict compliance is required to justify a continuance. Wallis v. State, 137 Ga. App. 457, 224 S.E.2d 91 (1976); Rogers v. State, 167 Ga. App. 322, 306 S.E.2d 393 (1983).

If attorney is neither sole attorney nor lead counsel, O.C.G.A. § 17-8-24 is inapplicable. Putman v. State, 251 Ga. 605, 308 S.E.2d 145 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984).

Cocounsel not covered by section. — While O.C.G.A. § 17-8-24 provides as a ground for a continuance the illness or absence of a party's sole or lead counsel, the statute does not extend to cocounsel. Vining v. State, 195 Ga. App. 816, 395 S.E.2d 17 (1990).

Motion must show the services of absent counsel are expected at the next term. McLendon v. State, 123 Ga. App. 290, 180 S.E.2d 567 (1971).

Verdict not set aside when affidavit filed after conviction. Childs v. State, 18 Ga. App. 782, 90 S.E. 723 (1916).

Sworn statement that continuance is not for delay. — Showing for a continuance on the ground of the absence and illness of leading counsel is not complete without a statement on oath that the application is not made for delay only. Roth v. State, 70 Ga. App. 93, 27 S.E.2d 473 (1943).

There is an absolute requirement that the application must show on oath that the motion is not made for delay. McLendon v. State, 123 Ga. App. 290, 180 S.E.2d 567 (1971).

Absence of counsel. — Continuance based on absence of counsel is not favored. Allen v. State, 10 Ga. 85 (1851); Curry v. State, 17 Ga. App. 377, 87 S.E. 685 (1915); Wallis v. State, 137 Ga. App. 457, 224 S.E.2d 91 (1976); Blair v. State, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Mere absence alone is not sufficient. Giles v. State, 66 Ga. 344 (1881); Wilson v. State, 6 Ga. App. 16, 64 S.E. 112 (1909).

Absence of counsel is not a favored excuse for not proceeding to trial and excuses of this sort should be discountenanced. Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979).

What constitutes illness. — Illness of counsel contemplated by law is such a physical condition resulting from sickness, ailment, malady, or disease as would prevent counsel from properly attending to counsel's duties as such. Rawlins v. State, 124 Ga. 31, 52 S.E. 1 (1905), aff'd, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906); McKenzie v. State, 72 Ga. App. 208, 33 S.E.2d 539 (1945).

Authority to decide whether illness qualifies for continuance. — Counsel is not, under all circumstances, the judge of whether a counsel was merely indisposed, or whether counsel's illness is such as is contemplated in this section for the court is the tribunal vested with the authority to decide from the facts and circumstances of the case as to whether the illness was a legal illness. McKenzie v. State, 72 Ga. App. 208, 33 S.E.2d 539 (1945).

Counsel weary but able to perform to usual ability. — Trial court did not abuse the court's discretion in denying a continuance where the only contention was that the leading counsel was weary but it appeared that he conducted the case with his usual ability. Holland v. State, 9 Ga. App. 831, 72 S.E. 290 (1911).

If counsel is ill when employed, a continuance because of such illness will not be granted. Scott v. State, 151 Ga. App. 840, 262 S.E.2d 198 (1979).

Temporary postponement rather than continuance when illness not expected to be lengthy. — If counsel is ill on the day of trial, counsel is required to seek a temporary postponement, and not a continuance for the term, unless a showing is made that counsel will be ill for a lengthy period. McLendon v. State, 123 Ga. App. 290, 180 S.E.2d 567 (1971).

Withdrawal of counsel or lack of preparation of new counsel. — Neither sudden withdrawal of retained counsel nor lack of preparation of new counsel is ipso facto a ground for continuance. The conduct of the party is obviously relevant and is a proper consideration for the judge in the exercise of the judge's discretion. The reason for this is to prevent a party from using discharge and employment of counsel as a dilatory tactic. Huckaby v. State, 127 Ga. App. 439, 194 S.E.2d 119 (1972).

Absence of counsel through no fault of defendant. — If the defendant has retained counsel who does not appear when the case is called and the defendant is free from fault in the absence, it is an abuse of the trial judge's discretion to refuse a motion for continuance. Wallis v. State, 137 Ga. App. 457, 224 S.E.2d 91 (1976).

Absence of counsel through honest mistake. — Continuance should be granted when the absence of counsel is due to an honest and almost justifiable mistake as to time of holding court. Delk v. State, 100 Ga. 61, 27 S.E. 152 (1896); Johnson v. State, 1 Ga. App. 729, 57 S.E. 1056 (1907).

Action against counsel who is absent through negligence. — When the facts warrant it, appropriate action should be taken against counsel who is absent through negligence. Wallis v. State, 137 Ga. App. 457, 224 S.E.2d 91 (1976).

Attorney's right to appear pro hac vice in criminal prosecution. — An out-of-state lawyer has no property inter-

est cognizable under U.S. Const., amend. 14, which requires automatic recognition of a right to appear pro hac vice in a criminal prosecution. Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436 (1980).

Absence based upon attendance at trial of case pending in another court. — Postponement of the trial of a case on account of the absence of counsel without leave for the purpose of engaging in the trial of a case in another court in another state is in the discretion of the court, but a postponement for such cause is not favored. Keith v. State, 87 Ga. App. 308, 73 S.E.2d 595 (1952).

If defendant and another individual were jointly indicted, both employed the same counsel and on the call of the case elected to sever, and if the employed counsel associated with the local counsel and tried one case with the assistance of such counsel, and leading counsel, at the conclusion of the case, requests a continuance on the ground that it is necessary for counsel to appear in a United States district court the next morning, although associate counsel would be present in the court, it is entirely within the discretion of the court whether to grant the continuance, on terms or otherwise. Keith v. State, 87 Ga. App. 308, 73 S.E.2d 595 (1952).

If absence of counsel is based upon attendance at the trial of a case pending in another court, this furnishes no ground for continuance, especially if competent counsel other than the absent counsel is present in court, and it is not shown that the defendant would be injured by the absence of defendant's leading counsel. Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979).

As to counsel attending cases in Supreme Court or Court of Appeals, see Austin v. State, 160 Ga. 509, 128 S.E. 791 (1925).

Absence of counsel after expiration of leave of absence. — Continuance will not be granted for the absence of counsel after counsel's leave of absence has expired. Robinson v. State, 82 Ga. 535, 9 S.E. 528 (1889).

If it does not appear that the absent counsel had ever been employed or been known before the case, it is an insufficient showing for a continuance. Wise v. State, 34 Ga. 348 (1866).

If competent counsel other than the absent counsel is secured, no continuance will be granted. Curry v. State, 17 Ga. App. 377, 87 S.E. 685 (1915).

This section requires a continuance when a sufficient showing is made. Chivers v. State, 5 Ga. App. 654, 63 S.E. 703 (1909).

Refusal of continuance not error when O.C.G.A. § 17-8-24 not complied with. — If the movant does not comply with the requirements of this section the refusal to grant a continuance is not error. Joiner v. State, 30 Ga. App. 342, 118 S.E. 222 (1923).

If movant complies with this section refusal to grant motion for continuance is error. Thomas v. State, 92 Ga. 1, 18 S.E. 44 (1893).

If none of the statutory requirements necessary for the granting of a continuance were put forth by cocounsel when the case was called, and there has been no showing that the defendant was injured by the absence of the defendant's lead counsel, there was no merit in the complaint that the trial court erred in denying the defendant's motion for continuance because of the absence of counsel and that the defendant had been denied the defendant's Sixth Amendment right to counsel and the defendant's Fifth Amendment right to due process as guaranteed by the state and federal Constitutions. Blair v. State, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Trial court did not abuse discretion in denying motion for continuance on grounds of attorney's ill health. Kirk v. State, 168 Ga. App. 226, 308 S.E.2d 592 (1983), aff'd, 252 Ga. 133, 311 S.E.2d 821 (1984).

Cited in Bagwell v. State, 56 Ga. 406 (1876); Robinson v. State, 82 Ga. 535, 9 S.E. 528 (1889); Burnett v. State, 87 Ga. 622, 13 S.E. 552 (1891); O'Neal v. State, 29 Ga. App. 51, 113 S.E. 43 (1922); Rogers v. State, 30 Ga. App. 636, 118 S.E. 757 (1923); Austin v. State, 160 Ga. 509, 128 S.E. 791 (1925); Evans v. State, 167 Ga. 261, 145 S.E. 512 (1928); Sams v. State, 162 Ga. App. 118, 290 S.E.2d 321 (1982); King v. State, 238 Ga. App. 575, 519

S.E.2d 500 (1999); King v. State, 242 Ga. App. 642, 530 S.E.2d 744 (2000); Turman v. State, 272 Ga. App. 570, 613 S.E.2d 126 (2005).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 50.

ALR. — Right to continuance because counsel is in attendance at another court, 112 A.L.R. 593.

Sufficiency of showing defendant's "voluntary absence" from trial for purposes of Criminal Procedure Rule 43, authorizing continuance of trial notwithstanding such absence, 141 A.L.R. Fed 569.

17-8-25. Absence of witness as grounds for granting continuance.

In all applications for continuances upon the ground of the absence of a witness, it shall be shown to the court that the witness is absent; that he has been subpoenaed; that he does not reside more than 100 miles from the place of trial by the nearest practical route; that his testimony is material; that the witness is not absent by the permission, directly or indirectly, of the applicant; that the applicant expects he will be able to procure the testimony of the witness at the next term of the court; that the application is not made for the purpose of delay but to enable the applicant to procure the testimony of the absent witness; and the application must state the facts expected to be proved by the absent witness.

History. — Orig. Code 1863, § 3451; Code 1868, § 3471; Code 1873, § 3522; Code 1882, § 3522; Civil Code 1895, § 5129; Penal Code 1895, § 962; Civil Code 1910, § 5715; Penal Code 1910, § 987; Code 1933, § 81-1410; Ga. L. 1959, p. 342, § 1.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-160.

JUDICIAL DECISIONS

Analysis

General Consideration
Evidence
Practice and Procedure
Appellate Review

General Consideration

O.C.G.A. § 17-8-25 not applicable to sentencing hearing. — O.C.G.A. § 17-8-25 is not applicable to the scheduling of the post-verdict nonjury sentencing hearing; rather, the scheduling of this hearing rests within the sound discretion of the trial court. Scott v. State, 216 Ga. App. 692, 455 S.E.2d 609 (1995).

This section imposes requirements that must accompany an application for a continuance. Oliver v. State, 146 Ga. App. 798, 247 S.E.2d 487 (1978).

Former Code 1933, § 81-1410 especially applicable in civil cases. — Former Code 1933, § 81-1410 (see O.C.G.A. §§ 9-10-160 and 17-8-25), which states as one of the requirements for an application for continuance on the ground of absence

General Consideration (Cont'd)

of a material witness that it must be shown the witness has been subpoenaed, applies especially to civil cases. Waters v. State, 85 Ga. App. 79, 68 S.E.2d 233 (1951).

Requirements of this section are absolute, and failure to comply therewith results in the court's refusal to consider the absence of the witness. McLendon v. State, 123 Ga. App. 290, 180 S.E.2d 567 (1971); Eze v. State, 195 Ga. App. 503, 393 S.E.2d 758 (1990); Knox v. State, 227 Ga. App. 447, 489 S.E.2d 582 (1997).

Each of the statutory requirements must be met before an appellate court may review a trial judge's discretion in denying a motion for continuance based upon the absence of a witness. Brown v. State, 169 Ga. App. 520, 313 S.E.2d 777 (1984); Curry v. State, 177 Ga. App. 609, 340 S.E.2d 250 (1986); Dorsey v. State, 203 Ga. App. 397, 416 S.E.2d 879 (1992); Caver v. State, 215 Ga. App. 711, 452 S.E.2d 515 (1994); Redd v. State, 222 Ga. App. 595, 474 S.E.2d 651 (1996); Choat v. State, 246 Ga. App. 475, 540 S.E.2d 289 (2000), recons. denied, overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Continuances in criminal cases are not governed by the strict rules of civil cases and the motion should be granted whenever the principles of justice appear to demand a postponement. Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767 (1973).

Discretion of court. — In civil and criminal cases alike, there is some discretion upon the part of the trial court, and the reviewing court is limited to the decision merely of whether the decision as made constitutes an abuse of discretion. Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767 (1973).

Absence of material witness overseas. — In a child molestation case, the trial court properly denied the defendant a continuance under O.C.G.A. § 17-8-22 based on the absence of the defendant's mother overseas; the defendant did not comply with several of the requirements of O.C.G.A. § 17-8-25, including the materiality requirement, and other witnesses testified that the witnesses saw no improper contact between the defendant and the teenagers involved. Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, No. S07C1788, 2007 Ga. LEXIS 745 (Ga. 2007).

Defendant received constitutionally ineffective assistance of counsel because counsel was deficient in failing to subpoena a defense witness because the defendant was not able to have the trial continued if the defense witness did not appear; the defense witness's testimony would have called into question the credibility of the state's witness as the defense witness told defense counsel that the defense witness saw the state's witness flashing a revolver while looking for the victim to collect on a debt two or three days before the shooting; and defense counsel's deficient performance prejudiced the defendant as the lynchpin of the state's case against the defendant was the credibility of the state's witness. Fisher v. State, 299 Ga. 478, 788 S.E.2d 757 (2016).

Denial of second continuance held proper. — In light of the facts that a defendant had seven months since being incarcerated to establish an alibi defense, that the defendant had previously been granted a continuance for the same reason, and that the defendant had two months from the time of that continuance to identify an alibi witness, the trial court did not err in denying the defendant's second motion for a continuance. Matthews v. State, 285 Ga. App. 859, 648 S.E.2d 160 (2007).

If the subpoena appears to be valid, the subpoena is sufficient. Horton v. State, 112 Ga. 27, 37 S.E. 100 (1900).

Denial of motion for failure to make required allegations. — When the defendant establishes that the witness is absent without permission and has been subpoenaed, but fails to establish that the testimony is material and that the defendant would be able to procure that witness for the next term of court and also fails to state the facts expected to be proved by such witness and that the motion is not made for delay, there is no error in denial of the application for continuance. Oliver v. State, 146 Ga. App. 798, 247 S.E.2d 487 (1978).

Denial of the defendant's motion for continuance based upon an absent witness was proper because the defendant failed to show that the witness was subpoenaed, and that the witness resided within 100 miles of the place of trial. Edwards v. State, 224 Ga. App. 332, 480 S.E.2d 246 (1997).

Subpoena insufficient when not alleged not to be for delay. — Showing for a continuance upon the ground of the absence of a witness is insufficient if it omits to state that the application is not made for the purpose of delay. Newsome v. State, 61 Ga. 481 (1878); Buckner v. State, 33 Ga. App. 559, 127 S.E. 154 (1925); Sutton v. State, 70 Ga. App. 499, 28 S.E.2d 663 (1944).

Even if showing is complete in other respects the application must show that the application was not made for purposes of delay. Cobb v. State, 110 Ga. 314, 35 S.E. 178 (1900); Long v. State, 25 Ga. App. 22, 102 S.E. 359, cert. denied, 25 Ga. App. 840 (1920).

Defendant need not testify as to defendant's intention, if it is apparent from the evidence adduced in behalf of the defendant's motion that it is not the defendant's purpose to delay the case but only to procure the attendance of witnesses. Brooks v. State, 3 Ga. App. 458, 60 S.E. 211 (1908).

Not sufficient that subpoena has been sued out for the witness. — It must appear that the witness has been subpoenaed and it is not sufficient that a subpoena has been sued out for the witness. Edwards v. State, 69 Ga. 737 (1882).

Not sufficient that interrogatories exist. Cogswell v. State, 49 Ga. 103 (1873); Kidd v. State, 101 Ga. 528, 28 S.E. 990 (1897); Walker v. State, 118 Ga. 34, 44 S.E. 850 (1903).

Mere showing of absence of subpoenaed material witness insufficient. — Showing that witness was absent, that the witness had been subpoenaed, and that the witness's testimony was material fell short of the requirements in O.C.G.A. § 17-8-25 for grant of a continuance. Tomlin v. State, 170 Ga. App. 123, 316 S.E.2d 570 (1984).

Refusal to grant continuance based on absence of victim of assault not error. — Trial court did not err in refusing to grant the defendant a continuance based on the absence of the victim because the defendant made no specific showing that the victim's testimony was material, and only speculated that the victim may not have wanted to prosecute the case. Anthony v. State, 276 Ga. App. 107, 622 S.E.2d 450 (2005).

Delay in subpoena of witnesses and failure to allege their expected testimony. — When a defendant, out on bond, knows that a case of the state against the defendant is to be tried during a coming term of court and waits until the day before the trial of the case to subpoena witnesses, and upon a motion made by the defendant for a continuance because of the absence of witnesses makes no showing as to the expected testimony of the witnesses, the trial court does not err in refusing to grant a continuance until the witnesses can be brought in. Harris v. State, 118 Ga. App. 769, 165 S.E.2d 462 (1968).

Delay in subpoena of witnesses. — When the defendant's motion for continuance is based upon the absence of a material witness for whom a subpoena was not issued by the defendant until the morning the trial was to begin and who has not been served therewith at the time the motion was made, there is no error in overruling the motion. Eady v. State, 129 Ga. App. 656, 200 S.E.2d 767 (1973).

Failure to subpoena witnesses. — When error is assigned on grounds of the refusal of the court to grant a continuance because of the absence of defense witnesses, and upon the hearing of the motion it appears that neither witness was under subpoena, the movant has failed to meet an essential requirement of this section, and the Court of Appeals cannot hold that the trial court abused the court's discretion in denying the motion. McNabb v. State, 69 Ga. App. 885, 27 S.E.2d 246 (1943).

If the trial court granted the accused at least one previous continuance to secure the same witness, and the accused offered no evidence that the witness was properly subpoenaed, the court did not abuse the court's discretion in denying a motion for continuance. Brandon v. State, 236 Ga. App. 203, 511 S.E.2d 573 (1999).

General Consideration (Cont'd)

Requirements of O.C.G.A. § 17-8-25 were not satisfied when the defendant failed, during a hearing on a motion for a new trial, to call the absent witness who had been claimed as the basis for an application for a continuance. Jackson Gore Inn v. Town of Ludlow, 228 A.3d 643, 2020 Vt. LEXIS 15 (2020).

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance due to the absence of a witness as the defendant failed to subpoena the witness. Stevens v. State, 261 Ga. App. 73, 581 S.E.2d 685 (2003).

Trial court erred in denying the defendant's motion for a continuance of the hearing on the defendant's motion for new trial so that the defendant could produce an alibi witness to testify at that hearing because counsel did not properly serve a subpoena on the alibi witness as email was not a proper means of serving a subpoena, and the defendant made no assertion that the defendant attempted to subpoena the alibi witness as statutorily required. Smith v. State, 308 Ga. 81, 839 S.E.2d 630 (2020).

Witness that had not been subpoenaed. — Trial counsel was deficient on the ground that the defendant's counsel's motion for continuance did not comply with O.C.G.A. § 17-8-25 because the witness in question had not been subpoenaed and, thus, counsel could not comply with the statute; the defendant did not show that the trial court's denial of the motion for continuance was reversible error and did not demonstrate ineffective assistance of counsel. Presley v. State, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Failure to show witness was subpoenaed in the denial of the defendant's motion for continuance, when the defendant failed to show that the witness was subpoenaed, that the witness's testimony would be material, or that appellant knew any facts expected to be proved by the witness. Dorsey v. State, 203 Ga. App. 397, 416 S.E.2d 879 (1992).

Continuance may be refused if witness is inaccessible for next term. Howard v. State, 7 Ga. App. 61, 65 S.E. 1076 (1909); Boyd v. State, 17 Ga. App. 162, 86 S.E. 411 (1915); Luttrell v. State, 176 Ga. App. 508, 336 S.E.2d 369 (1985).

When moving party fails to show that an absent witness' testimony could be expected to be procured at the next term of court, there is no abuse of discretion in refusing to grant a continuance at trial nor any error in denying the movant's motion for a new trial on this ground. Ledford v. State, 173 Ga. App. 474, 326 S.E.2d 834 (1985).

Exceptions to rule that witness not be absent by movant's permission. — An exception to the rule that witness must not be absent by permission of movant exists if the prosecuting solicitor (now district attorney) told the movant that presence of witnesses was not required. Polite v. State, 78 Ga. 347 (1886).

Failure of officer to serve subpoena on witness. — An exception to the requirement that a witness be served is found in former Penal Code 1895, § 961 (see O.C.G.A. § 17-8-33), which does not require service of a subpoena when a proper officer fails to serve witness within the jurisdiction of the court. Paulk v. State, 5 Ga. App. 567, 63 S.E. 659 (1909), later appeal, 8 Ga. App. 704, 70 S.E. 50 (1911); Hobbs v. State, 8 Ga. App. 53, 68 S.E. 515 (1910).

Failure to serve subpoena on deputy. — Trial court did not err in granting the state's motion for continuance under O.C.G.A. § 17-8-33(a) because, while a subpoena was issued for an absent witness, a former deputy, the sheriff's office failed to serve the subpoena because the former deputy was subpoenaed to appear on the date in a separate case, however, the other case had settled and the former deputy was absent from court. Dowd v. State, 280 Ga. App. 563, 634 S.E.2d 509 (2006).

Continuance denied despite inability to contact state medical examiner. — Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance on the ground that the defendant had not been able to contact the state medical examiner who conducted the autopsy on the victim. At the time the motion was argued, the defendant knew that the state would not be calling the examiner; moreover, as there

was no dispute as to the victim's cause of death, stabbing, the examiner's testimony would not have been material to the defense. Hudson v. State, 284 Ga. 595, 669 S.E.2d 94 (2008).

Cited in Turner v. State, 70 Ga. 765 (1883); Moseley v. State, 74 Ga. 404 (1884); Parker v. State, 74 Ga. 836 (1885); Pyburn v. State, 84 Ga. 193, 10 S.E. 733 (1890); Kennedy v. State, 101 Ga. 559, 28 S.E. 979 (1897); Paulk v. State, 5 Ga. App. 567, 63 S.E. 659 (1909); Hobbs v. State, 8 Ga. App. 53, 68 S.E. 515 (1910); Solomon v. State, 10 Ga. App. 469, 73 S.E. 623 (1912); Dickens v. State, 137 Ga. 523, 73 S.E. 826 (1912); Tolbert v. State, 12 Ga. App. 685, 78 S.E. 131 (1913); Williams v. State, 13 Ga. App. 179, 78 S.E. 1012 (1913); Burnsed v. State, 14 Ga. App. 832, 82 S.E. 595 (1914); Terry v. State, 15 Ga. App. 108, 82 S.E. 635 (1914); Johnson v. State, 16 Ga. App. 287, 85 S.E. 204 (1915); Amerson v. State, 18 Ga. App. 176, 88 S.E. 998 (1916); Fudge v. State, 18 Ga. App. 312, 89 S.E. 374 (1916); Watts v. State, 20 Ga. App. 182, 92 S.E. 966 (1917); James v. State, 23 Ga. App. 534, 98 S.E. 737 (1919); Danzley v. State, 25 Ga. App. 170, 102 S.E. 915 (1920); Williams v. State, 25 Ga. App. 380, 103 S.E. 685 (1920); Teems v. State, 34 Ga. App. 594, 130 S.E. 216 (1925); Evans v. State, 167 Ga. 261, 145 S.E. 512 (1928); Smith v. State, 170 Ga. 234, 152 S.E. 482 (1930); Clarke v. State, 41 Ga. App. 556, 153 S.E. 616 (1930); Wells v. State, 43 Ga. App. 347, 158 S.E. 641 (1931); Whitehead v. State, 43 Ga. App. 401, 158 S.E. 917 (1931); Reese v. State, 44 Ga. App. 251, 161 S.E. 156 (1931); Walker v. State, 52 Ga. App. 108, 182 S.E. 524 (1935); Anderson v. State, 190 Ga. 455, 9 S.E.2d 642 (1940); Orr v. State, 63 Ga. App. 352, 11 S.E.2d 102 (1940); Holley v. State, 191 Ga. 804, 14 S.E.2d 103 (1941); Battey v. State, 65 Ga. App. 748, 16 S.E.2d 441 (1941); Morris v. State, 66 Ga. App. 37, 16 S.E.2d 908 (1941); Woodward v. State, 197 Ga. 60, 28 S.E.2d 480 (1943); Brown v. State, 71 Ga. App. 522, 31 S.E.2d 85 (1944); Nobles v. State, 71 Ga. App. 802, 32 S.E.2d 545 (1944); Hall v. State, 202 Ga. App. 42, 42 S.E.2d 134 (1947); Nelson v. State, 84 Ga. App. 596, 66 S.E.2d 751 (1951); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665 (1952); Lyons v. State, 94 Ga. App. 570, 95 S.E.2d 478 (1956); Whitehead v. State, 96 Ga. App. 382, 100 S.E.2d 139 (1957); Scoggins v. State, 98 Ga. App. 360, 106 S.E.2d 39 (1958); Johnson v. State, 215 Ga. 839, 114 S.E.2d 35 (1960); Beasley v. State, 115 Ga. App. 827, 156 S.E.2d 128 (1967); Gravely v. State, 127 Ga. App. 206, 192 S.E.2d 912 (1972); Jones v. State, 232 Ga. 771, 208 S.E.2d 825 (1974); Davis v. State, 135 Ga. App. 111, 217 S.E.2d 417 (1975); Davis v. State, 135 Ga. App. 584, 218 S.E.2d 297 (1975); Wilkerson v. State, 139 Ga. App. 725, 229 S.E.2d 529 (1976); Harrison v. State, 140 Ga. App. 296, 231 S.E.2d 809 (1976); Wilcox v. State, 238 Ga. 431, 233 S.E.2d 154 (1977); Holland v. State, 141 Ga. App. 422, 233 S.E.2d 497 (1977); Heard v. State, 141 Ga. App. 666, 234 S.E.2d 83 (1977); Gamarra v. State, 142 Ga. App. 196, 235 S.E.2d 652 (1977); Shaw v. State, 239 Ga. 690, 238 S.E.2d 434 (1977); Chandler v. State, 143 Ga. App. 608, 239 S.E.2d 158 (1977); Fouts v. State, 240 Ga. 39, 239 S.E.2d 366 (1977); Reaves v. State, 146 Ga. App. 409, 246 S.E.2d 427 (1978); Weathers v. State, 147 Ga. App. 64, 248 S.E.2d 21 (1978); Davis v. State, 153 Ga. App. 433, 265 S.E.2d 351 (1980); Gilmore v. State, 154 Ga. App. 429, 268 S.E.2d 693 (1980); Smith v. State, 154 Ga. App. 541, 268 S.E.2d 768 (1980); Gibson v. State, 158 Ga. App. 501, 280 S.E.2d 900 (1981); Wingfield v. State, 159 Ga. App. 69, 282 S.E.2d 713 (1981); Hornsby v. State, 159 Ga. App. 672, 284 S.E.2d 630 (1981); Baxter v. State, 159 Ga. App. 632, 284 S.E.2d 649 (1981); Hester v. State, 159 Ga. App. 642, 284 S.E.2d 659 (1981); Farrell v. State, 160 Ga. App. 321, 287 S.E.2d 318 (1981); Whatley v. State, 162 Ga. App. 106, 290 S.E.2d 316 (1982); Bryant v. State, 164 Ga. App. 543, 298 S.E.2d 272 (1982); Wilkerson v. Turner, 693 F.2d 121 (11th Cir. 1982); Wilson v. State, 250 Ga. 630, 300 S.E.2d 640 (1983); Brunetti v. State, 176 Ga. App. 184, 335 S.E.2d 414 (1985); Brock v. State, 177 Ga. App. 430, 339 S.E.2d 403 (1986); Hullender v. State, 256 Ga. 86, 344 S.E.2d 207 (1986); Neff v. State, 178 Ga. App. 777, 344 S.E.2d 740 (1986); Moore v. State, 179 Ga. App. 488, 347 S.E.2d 318 (1986); Rhinehart v. State, 181 Ga. App. 507, 352 S.E.2d 823 (1987); Thompkins v. State, 257 Ga. 113, 356

General Consideration (Cont'd)

S.E.2d 207 (1987); McGuire v. State, 185 Ga. App. 233, 363 S.E.2d 850 (1987); Johnson v. State, 185 Ga. App. 475, 364 S.E.2d 609 (1988); Cook v. State, 185 Ga. App. 585, 364 S.E.2d 912 (1988); White v. State, 187 Ga. App. 301, 370 S.E.2d 50 (1988); Medley v. State, 194 Ga. App. 154, 390 S.E.2d 75 (1990); Mills v. State, 198 Ga. App. 527, 402 S.E.2d 123 (1991); Swint v. State, 199 Ga. App. 515, 405 S.E.2d 333 (1991); Pitts v. State, 202 Ga. App. 634, 415 S.E.2d 58 (1992); Riggins v. State, 206 Ga. App. 239, 424 S.E.2d 879 (1992); Bell v. State, 208 Ga. App. 337, 430 S.E.2d 777 (1993); Griggs v. State, 208 Ga. App. 768, 432 S.E.2d 591 (1993); Gay v. State, 220 Ga. App. 78, 467 S.E.2d 383 (1996); Adefenwa v. State, 221 Ga. App. 429, 471 S.E.2d 900 (1996); Pickens v. State, 225 Ga. App. 792, 484 S.E.2d 731 (1997); Hunter v. State, 237 Ga. App. 803, 517 S.E.2d 534 (1999); Bacon v. State, 239 Ga. App. 874, 521 S.E.2d 695 (1999); Couch v. State, 256 Ga. App. 822, 570 S.E.2d 57 (2002); Theophile v. State, 295 Ga. App. 517, 672 S.E.2d 479 (2009); Miller v. State, 351 Ga. App. 757, 833 S.E.2d 142 (2019).

Evidence

Demonstrating reasonable expectation that witness appear. — Defendant who complied with all of the requirements of O.C.G.A. § 17-8-25 except one and demonstrated that the defendant expected the witness to be in court the next day, because officers were to get the witness, should have received a continuance. Miller v. State, 208 Ga. App. 20, 430 S.E.2d 159 (1993).

It was not incumbent upon defense counsel to state with certitude just when the witness would be available to testify. It was enough that defense counsel demonstrated that defense counsel reasonably expected that the witness's presence could be obtained without undue delay. Miller v. State, 208 Ga. App. 20, 430 S.E.2d 159 (1993).

Facts to which the absent witness would testify must appear in the showing for a continuance. The judge is entitled to this information in order that the judge can decide whether the evidence of the absent witness is material and admissible and not blindly accept the statement of defendant's counsel that the evidence of the witness was material and admissible. Mell v. State, 69 Ga. App. 302, 25 S.E.2d 142 (1943).

Fugitive witness. — Witness who failed to appear for the witness's own trial was a fugitive. Accordingly, the codefendant could not have shown that the codefendant expected to be able to procure the witness's testimony at the next term. Roberts v. State, 208 Ga. App. 64, 430 S.E.2d 175 (1993).

Defendant's failure to establish whereabouts of a witness. — When the defendant is unable to establish by any evidence that the defendant would ever be able to obtain the whereabouts of a witness, a trial judge does not abuse the judge's discretion in denying a motion for continuance. Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65 (1980).

Requirement that movant allege how movant expects to procure witness' attendance. — On the hearing of a motion for a continuance, based upon the absence of a material witness for the defense, when the court is authorized to find that the witness is beyond the jurisdiction of the court, that the witness's absence is not temporary, and that the court is powerless to force the witness to attend, although the movant states that the movant expects to have the witness present at the next term of the court, if possible, in these circumstances the motion should go further and state the means whereby the movant expects to procure the witness's attendance, as that the witness has promised to attend, or that the movant has some other ground for the movant's expectation that the witness will attend. Wright v. State, 71 Ga. App. 346, 30 S.E.2d 839 (1944).

Evidence must be material, and not indefinite, or irrelevant. Griffin v. State, 26 Ga. 493 (1858); Wiggins v. State, 84 Ga. 488, 10 S.E. 1089 (1890).

Witness's testimony must not relate to evidence not specifically denied. Teal v. State, 17 Ga. App. 324, 86 S.E. 739 (1915).

Witness's testimony must not be cumulative of testimony of other witnesses who are present. Long v. State, 38 Ga. 491 (1868); Anderson v. State, 72 Ga. 98 (1883); Jones v. State, 125 Ga. 307, 54 S.E. 122 (1906); Blount v. State, 18 Ga. App. 204, 89 S.E. 78 (1916).

Failure to grant a continuance for testimony which is merely cumulative is not reversible error. Gallimore v. State, 166 Ga. App. 601, 305 S.E.2d 164 (1983).

If the missing testimony is cumulative and would not contradict the testimony of the state's witness as to any controlling point, it is not error to refuse a continuance. Grimes v. State, 168 Ga. App. 372, 308 S.E.2d 863 (1983).

Since the defendants presented no fewer than four witnesses who testified that the witnesses had heard the victim state that the victim did not know who had robbed the victim, the defendants' motion for continuance to obtain the presence of an absent witness who would have testified to the same effect or could have been impeached if the witness denied hearing such a statement was properly denied. Daniel v. State, 180 Ga. App. 179, 348 S.E.2d 720 (1986).

Defendant is not entitled to a continuance to obtain the presence of an absent witness when the expected testimony is merely impeaching and cumulative of other testimony in the case. Stafford v. State, 187 Ga. App. 401, 370 S.E.2d 646 (1988).

Practice and Procedure

Absence of sole witness for defense. — Trial court abused the court's discretion by denying the defendant's request for a continuance pursuant to O.C.G.A. § 17-8-25 based on the absence of a subpoenaed witness who was the sole witness for the defense since defendant's counsel stated that after a mistrial had been declared in the first trial, "the witness was excused," since it could not be inferred from the brief statement made by counsel that when the witness was excused, the subpoena's effectiveness was necessarily terminated completely. Teat v. State, 181 Ga. App. 735, 353 S.E.2d 535 (1987).

Absence of witness for state. — It was not an abuse of discretion for the trial court to grant a continuance to the state based on the absence of a police officer witness, who was not under subpoena but had been served with a notice, because the officer was prevented from testifying because the officer was placed on administrative leave. Hicks v. State, 221 Ga. App. 735, 472 S.E.2d 474 (1996).

Trial court did not err by excusing the jury after an ex parte conference with the state about a problem with the state's witnesses, because the jury had not been sworn, so no jeopardy attached, the state had shown that absent witnesses were material, the trial resumed one month later, and the defendant was not surprised by the witnesses at trial. Hoke v. State, 326 Ga. App. 71, 755 S.E.2d 876 (2014).

If the missing witness' testimony is solely impeaching and the judgment complained of is authorized by evidence other than the testimony sought to be impeached, it is not an abuse of discretion to refuse the continuance. Grimes v. State, 168 Ga. App. 372, 308 S.E.2d 863 (1983).

When the defendant failed to show that the desired witnesses' testimony could be procured by the next term of court, or what the substance of the witnesses' testimony would be, and because the missing witnesses' testimony was solely impeaching of a similar transaction rather than the offense charged, the trial court did not abuse the court's discretion in denying defendant's motion for a continuance; furthermore, the trial court fashioned an alternative procedure that made a report of any contested and offending statements available to defendant while limiting the state's ability to challenge it. Joiner v. State, 265 Ga. App. 395, 593 S.E.2d 936 (2004).

Materiality of testimony. — In order to obtain a continuance for the execution of a writ of habeas corpus ad testificandum, the defendant does not have to state facts expected to be proved by an absent witness at trial when the witness' testimony would be material and the witness' whereabouts had only been discovered immediately prior to trial. Jackson v. State, 184 Ga. App. 133, 360 S.E.2d 907 (1987).

Motion properly denied when witness' availability unknown. — When in

Practice and Procedure (Cont'd)

response to a question from the court as to when a witness injured in an accident would be ready to testify, the defendant's counsel replied, "I don't know", the court did not err by denying the defendant's motion for a continuance. Nation v. State, 180 Ga. App. 460, 349 S.E.2d 479 (1986).

Errors in issuing subpoenas. — When a witness was under a subpoena that did not specify a date for trial, but obligated the witness to be ready to testify at any time in the indefinite future, the trial court did not abuse the court's discretion in excusing the witness from the requirements of the subpoena and denying the defendant's motion for a continuance to secure the witness's attendance. Clark v. State, 225 Ga. App. 851, 485 S.E.2d 543 (1997).

Continuance should have been granted to secure witness's presence. — In a prosecution for driving under the influence, the trial court erred in refusing the defendant's request for a continuance because of the absence of a subpoenaed witness since the witness was the only person who could testify as to the truth of an officer's testimony that the witness told the officer the defendant drove the truck. Arnold v. State, 228 Ga. App. 137, 491 S.E.2d 205 (1997).

Grounds for continuance not met. — When the eight showings listed in O.C.G.A. § 17-8-25 for applications for continuance on the ground that a witness is absent were not met, the appellate court was unable to review the trial court's exercise of discretion on a motion for continuance. Garland v. State, 242 Ga. App. 19, 528 S.E.2d 550 (2000).

Trial court did not err in denying the defendant's motion for a continuance pursuant to O.C.G.A. § 17-8-25 of a pre-trial hearing on the defendant's motion in limine, seeking to exclude showup identification evidence of the victim and the victim's girlfriend, as their testimony was not material for the purposes of the pre-trial hearing; the eyewitnesses' trial testimony did not require a conclusion that the showup occurred during conditions causing a substantial likelihood of misidentification. Miller v. State, 266 Ga. App. 378, 597 S.E.2d 475 (2004).

At the time of the defendant's trial, the defendant's potential witnesses' appeals were pending and their counsel informed the defendant that, if called as witnesses, the witnesses would assert the witnesses' privilege against self-incrimination. Therefore, the defendant could not satisfy the requirement of showing that the witnesses would be available at the next term of court and, thus, the trial court did not abuse the court's discretion by denying the defendant's motion for a continuance under O.C.G.A. § 17-8-25. Pope v. State, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Trial court did not err in denying a motion for a continuance to allow the defendant to further investigate the possibility of an alibi defense because the defendant had made no attempt to show that there was an alibi or how additional time might be of benefit. Holloway v. State, 278 Ga. App. 709, 629 S.E.2d 447 (2006).

There was no abuse of discretion in a trial court's denial of a defendant's continuance motion under O.C.G.A. § 17-8-25 due to the defendant's inability to locate a homeless man who was a witness to a vehicle accident that formed the basis for the criminal charges against the defendant as the trial court provided the defendant with additional time to attempt to locate the witness, upon the defendant's failure to find the witness the trial court allowed the witness's prior testimony to be read into the record, and upon the location of the witness during the jury's deliberation, the same testimony was proffered from the live witness; further, the defendant had never subpoenaed the witness to appear at trial. Potts v. State, 296 Ga. App. 242, 674 S.E.2d 109 (2009).

Defendant did not meet the requirements for a continuance under O.C.G.A. § 17-8-25 due to the absence of the defendant's mother because the defendant did not subpoena the defendant's mother. Daniels v. State, 321 Ga. App. 748, 743 S.E.2d 440 (2013).

Trial court did not err in denying the defendant's request for a continuance based on a witness's absence as there was no evidence a subpoena for the witness existed, counsel conceded that counsel released the witness from the subpoena af-

ter the first day of trial, the defendant failed to establish the witness's place of residence or availability by the next term, and the defendant failed to provide the trial court with the facts the defendant expected the witness to prove. Janasik v. State, 323 Ga. App. 545, 746 S.E.2d 208 (2013).

Admission by state of facts expected to be proved by absent witnesses. — When several of the requirements for the motion are absent and when the facts expected to be proved by the witnesses were admitted by the state, the trial judge was clearly right to overrule the motion for a continuance as to this ground. Golden v. State, 76 Ga. App. 851, 47 S.E.2d 513 (1948).

Admissions of defendant, in judicio, of facts inconsistent with those to which the absent witness would testify remove the ground for continuance because the witness's testimony would no longer be material. Fryer v. State, 138 Ga. App. 124, 225 S.E.2d 437 (1976).

It must appear that there are no other witnesses present by whom the same fact could be proved. Hill v. State, 91 Ga. 153, 16 S.E. 976 (1893).

Indefinite, inadmissible, and useless evidence. — When it appears that the evidence would be indefinite, inadmissible, and useless, the court will not grant the continuance. Richter v. State, 4 Ga. App. 274, 61 S.E. 147 (1908).

Motion based on right to benefit of counsel. — If a motion for continuance is based on the defendant's right to benefit of counsel, and cannot be construed as an application for continuance based on the absence of a material witness, the showing required by this section does not apply. Edwards v. State, 204 Ga. 384, 50 S.E.2d 10 (1948).

Testimony at former trial may be shown in counter-showing. Johnson v. State, 65 Ga. 94 (1880).

It may not be shown that the facts to which the witness would testify are not true. Brown v. State, 65 Ga. 332 (1880); Williams v. State, 69 Ga. 11 (1882).

Continuance to secure attendance of medical examiner. — No abuse of discretion resulted from the grant of a continuance to the state based on the absence of the medical examiner, who was a material witness, because the defendant failed to show a show a violation of O.C.G.A. § 17-8-33. Moreover, in granting the prosecutor's motion for a continuance, the trial court noted that the court would do the same for a defendant in similar circumstances. Parker v. State, 282 Ga. 897, 655 S.E.2d 582 (2008).

Appellate Review

No interference with court's discretion unless abused. — Determination of the trial judge in the exercise of the judge's discretion will not be controlled unless manifestly abused. Tyree v. State, 74 Ga. App. 229, 39 S.E.2d 441 (1946).

Motion to continue is addressed to the sound discretion of the trial judge, and the appellate court will not interfere unless it is clearly shown that the judge has abused the judge's discretion. Fryer v. State, 138 Ga. App. 124, 225 S.E.2d 437 (1976); Harris v. State, 142 Ga. App. 37, 234 S.E.2d 798 (1977); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978).

Discretion abused when motion denied despite showing of all prerequisites. — When a criminal defendant moves for a continuance based on a witness' absence, the trial court's discretion is not abused unless the defendant showed the court all of the prerequisites of this section. Watts v. State, 142 Ga. App. 857, 237 S.E.2d 231 (1977).

Motion denial is error. — If the motion complies with all of the requirements of this section, and there is no counter-showing by the state, it is error to refuse to grant the continuance. Frost v. State, 91 Ga. App. 618, 86 S.E.2d 646 (1955).

No appellate review of denial of motion when requirements of section not met. — If defendant's showing for continuance did not meet the requirements of this section, court's overruling of the defendant's motion for continuance was not error. Johnson v. State, 67 Ga. App. 294, 19 S.E.2d 922 (1942).

When it is clearly apparent that some of the requirements of this section have not been met, an appellate court will not review the trial judge's discretion in denying

Appellate Review (Cont'd)

a motion for continuation based on this ground. Smith v. State, 120 Ga. App. 448, 170 S.E.2d 832 (1969).

Statutory requirements which must be met before appellate courts may review the trial judge's discretion in denying a motion for continuance due to the absence of a witness are enumerated in this section. Grant v. State, 147 Ga. App. 517, 249 S.E.2d 328 (1978).

Each of the requirements set forth in O.C.G.A. § 17-8-25 must be met before an appellate court may review the exercise of the trial court's discretion in denying a motion for continuance based upon the absence of a witness. Garrett v. State, 202 Ga. App. 463, 414 S.E.2d 693 (1992).

Each of the requirements of O.C.G.A. § 17-8-25 must be met before an appellate court may review a trial judge's discretion in denying a motion for continuance based upon an absent witness; these statutory requirements exist regardless of whether the state's conduct contributed to the release of witnesses. Vaughan v. State, 210 Ga. App. 381, 436 S.E.2d 19 (1993).

In a murder trial, because the defendant failed to produce evidence regarding what the state's witness would have testified to if the witness had been called back during the defense case, no error was shown. Morris v. State, 303 Ga. 192, 811 S.E.2d 321 (2018).

Denial of motion not abuse of discretion. — When a motion for continuance does not comply with the requirements of O.C.G.A. § 17-8-25, no abuse of the court's discretion in refusing to continue the case because of the absence of witnesses is shown. Corbin v. State, 212 Ga. 231, 91 S.E.2d 764, cert. denied, 351 U.S. 987, 76 S. Ct. 1057, 100 L. Ed. 1501 (1956); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975); Atwater v. State, 233 Ga. App. 339, 503 S.E.2d 919 (1998).

If the moving party fails to make a proper showing of the requirements set forth in this section, the denial of a continuance motion cannot be said to be an abuse of discretion. Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767 (1973); Harris v. State, 142 Ga. App. 37, 234 S.E.2d 798 (1977); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978); Apgar v. State, 159 Ga. App. 752, 285 S.E.2d 89 (1981).

Denial of a motion for continuance is not an abuse of discretion when the state has stipulated as to the testimony of absent witnesses even though the truthfulness thereof is not conceded. Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767 (1973).

Defendant was not entitled to a continuance after the state gave notice of the state's intent to present evidence that the crimes occurred in 1996, instead of 1995, because the dates in the indictment were not a material element of the crimes with which the defendant was charged and the defendant was not alleging an alibi defense; thus, the appeals court found that the trial court did not abuse the court's discretion in denying the defendant's motion seeking a continuance. Heath v. State, 269 Ga. App. 872, 605 S.E.2d 427 (2004).

Trial court did not abuse the court's discretion in denying the defendant's request for a continuance to secure the transporting officer's testimony because the defendant failed to meet several of the requirements delineated in O.C.G.A. § 17-8-25, including showing that the transporting officer resided within 100 miles of the place of trial and that the defendant could procure the officer's testimony at the next term of court. Lafavor v. State, 334 Ga. App. 125, 778 S.E.2d 377 (2015).

Grant of continuance proper. — Trial court did not abuse the court's discretion as a matter of law in granting a continuance in the absence of a witness subpoena; further, a trial court had the authority to grant a continuance under the court's general power to serve the principles of justice. Carraway v. State, 263 Ga. App. 151, 587 S.E.2d 152 (2003).

Trial court did not abuse the court's discretion by allowing a continuance in order to allow the state to procure the attendance of a material witness with regard to a defendant's trial for trafficking marijuana and the fact that the continuance was granted ex parte did not change that result nor give the state an advantage over the defendant. Mora v. State, 292 Ga. App. 860, 666 S.E.2d 412 (2008).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 59.

ALR. — Right to continuance to procure witness to alibi, 41 A.L.R. 1530.

Right of accused to continuance because of absence of witness who is fugitive from justice, 42 A.L.R.2d 1229.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

17-8-26. Party or party's attorney in attendance at General Assembly as grounds for granting continuance.

(a) A member of the General Assembly who is a party to or the attorney for a party to a case; any member of the Office of Legislative Counsel, including the legislative counsel and persons provided for under subsection (d) of Code Section 28-4-3, appearing on behalf of the General Assembly in a case; or any member of the staff of the Lieutenant Governor, the Speaker of the House of Representatives, or the chairperson of the Judiciary Committee or Special Judiciary Committee of the Senate or of the Judiciary Committee or Judiciary, Non-civil Committee of the House of Representatives who is the lead counsel for a party to a case pending in any trial or appellate court or before any administrative agency of this state shall be granted a continuance and stay of the case. The continuance and stay shall apply to all aspects of the case, including, but not limited to, the filing and serving of an answer to a complaint, the making of any discovery or motion, or of any response to any subpoena, discovery, or motion, and appearance at any hearing, trial, or argument. Unless a shorter length of time is requested by the member, the continuance and stay shall last for the seven days prior to the regular or extraordinary session of the General Assembly; the length of any regular or extraordinary session of the General Assembly; during the first three weeks following any recess or adjournment, including an adjournment sine die of any regular or extraordinary session; and the entirety of any day during the calendar year on which a legislative committee for which the member serves or is staff holds a scheduled meeting. Notwithstanding any other provision of law, rule of court, or administrative rule or regulation, and to the extent permitted by the Constitutions of the United States and of the State of Georgia, the time for doing any act in the case which is delayed by the continuance or stay provided by this Code section shall be automatically extended by the same length of time as the continuance or stay covered.

(b)(1) For such other times not provided for in subsection (a) of this Code section, a member of the General Assembly who is a party to a case or the lead counsel for a party to a case may request a continuance and stay for such other times as the member of the General Assembly certifies to the court that his or her presence

elsewhere is required by his or her duties with the General Assembly. The certification by the member of the General Assembly shall be in writing and shall state with particularity the nature of the General Assembly duties that require the continuance or stay. Opposing counsel, any person who is alleged in the case by the state to be a victim, or the court on its own motion shall have ten days from receipt of the request for a continuance or stay to object to the request by stating with particularity the grounds upon which it is determined that such stay or continuance will cause significant harm to the rights of a party or would otherwise be detrimental to the interest of justice. The court upon receipt of the objection, or on its own motion, shall consider the following in determining whether to grant or deny the continuance or stay:

(A) The length of time that the case has been pending;

(B) The length of delay that such stay or continuance will cause in the resolution of the case;

(C) The nature of the General Assembly duties that require the continuance or stay; and

(D) Such other factors that the court determines to be relevant in determining the harm to the rights of the parties or the interest of justice in the granting or denial of the request for a continuance or stay.

(2) Absent a ruling by the court denying the continuance or stay certified by the member under paragraph (1) of this subsection, such continuance or stay shall be considered granted as a matter of law.

History. — Ga. L. 1905, p. 93, § 1; Civil Code 1910, § 5711; Code 1933, § 81-1402; Ga. L. 1977, p. 760, § 1; Ga. L. 1983, p. 675, § 1; Ga. L. 1996, p. 112, § 2; Ga. L. 2002, p. 403, § 2; Ga. L. 2006, p. 752, § 3/SB 503; Ga. L. 2019, p. 777, § 3/HB 502.

The 2019 amendment, effective May 7, 2019, substituted the present provisions of this Code section for the former provisions, which read: "(a) A member of the General Assembly who is a party to or the attorney for a party to a case which is pending in any trial or appellate court or before any administrative agency of this state shall be granted a continuance and stay of the case. The continuance and stay shall apply to all aspects of the case, including, but not limited to, the filing and serving of an answer to a complaint, the making of any discovery or motion, or of any response to any subpoena, discovery, or motion, and appearance at any hearing, pretrial appearance, arraignment, plea or motion calendar, trial, or argument. When a case, motion, hearing, or argument is called and is subject to a continuance or stay under this Code section due to the party's attorney's membership in the General Assembly, the party shall not be required to be present at the call of the case, motion, hearing, or argument. Unless a shorter length of time is requested by the member, the continuance and stay shall last the length of any regular or extraordinary session of the General Assembly and during the first three weeks following any recess or adjournment, including an adjournment sine die of any regular or extraordinary session. Notwithstanding any other provision of law, rule of court, or administrative rule or regulation, and to the extent permitted by the Constitutions of the United States and of the State of

Georgia, the time for doing any act in the case which is delayed by the continuance or stay provided by this Code section shall be automatically extended by the same length of time as the continuance or stay covered.

"(b) A continuance and stay shall also be granted for such other times as the member of the General Assembly or staff member certifies to the court that his or her presence elsewhere is required by his or her duties with the General Assembly." See Editor's note for applicability.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-150.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2019, a period was substituted for a comma at the end of the third sentence of subsection (a).

Editor's notes. — Ga. L. 2019, p. 777, § 5/HB 502, not codified by the General Assembly, provides that: "This Act shall apply to all civil and criminal cases, including, but not limited to, any case currently initiated within any court in this state."

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 43, 52.

ALR. — Counsel's absence because of attendance on Legislature, as ground for continuance, 49 A.L.R.2d 1073.

17-8-27. Attorney General in attendance at General Assembly as grounds for granting continuance.

When any case pending in the courts of this state in which the Attorney General is of counsel is scheduled to be called for any reason during sessions of the General Assembly or during a period of 15 days preceding or following sessions of the General Assembly, on motion of the Attorney General or an assistant attorney general, it shall be a good ground for continuance that the Attorney General and his staff are occupied in aid of the business of the General Assembly.

History. — Ga. L. 1956, p. 700, § 1; Ga. L. 2019, p. 777, § 4/HB 502.

The 2019 amendment, effective May 7, 2019, substituted "reason" for "purpose" near the middle of this Code section. See Editor's note for applicability.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-156.

Editor's notes. — Ga. L. 2019, p. 777, § 5/HB 502, not codified by the General Assembly, provides that: "This Act shall apply to all civil and criminal cases, including, but not limited to, any case currently initiated within any court in this state."

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 52.

17-8-28. Witness in attendance at General Assembly as grounds for granting continuance.

(a) Any person summoned to serve as a witness in a criminal case shall be excused by the judge from attendance at the court by reason of his attendance as a legislator at the General Assembly.

(b) In all criminal cases, it shall be the duty of the presiding judge, on motion of either the state or the defendant, to continue the case when it appears that a material witness is absent from the court by reason of his attendance at the General Assembly.

History. — Ga. L. 1905, p. 93, § 3; Civil Code 1910, § 5712; Penal Code 1910, § 988; Code 1933, §§ 27-2003, 81-1407.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-159.

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 59.
ALR. — Right to continuance to procure witness to alibi, 41 A.L.R. 1530.

17-8-29. Party or party's counsel in attendance at meeting of Board of Regents of the University System of Georgia as grounds for granting continuance.

Should any member of the Board of Regents of the University System of Georgia or any member of the State Board of Education be engaged at the time of any meeting of the board as counsel or party in any case pending in the courts of this state and should the case be called for trial during the regular session of the board, the member's absence from attending the session shall be good ground for a postponement or continuance of the case until the session of the board has ended.

History. — Ga. L. 1931, p. 7, § 56; Code 1933, § 81-1404; Ga. L. 1985, p. 1406, § 2; Ga. L. 1997, p. 143, § 17.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-151.

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 43, 52.

17-8-30. Party or party's counsel in attendance at meeting of Board of Human Services or Board of Behavioral Health and Developmental Disabilities as grounds for granting continuance.

Should any member of the Board of Human Services or the Board of Behavioral Health and Developmental Disabilities be engaged at the time of any meeting of the board as counsel or party in any case pending in the courts of this state and should the case be called for trial during the regular session of the board, the absence of the member to attend the session shall be good ground for a postponement or a continuance of the case until the session of the board has ended.

History. — Ga. L. 1933, p. 7, § 1; Code 1933, § 81-1405; Ga. L. 2009, p. 453, § 2-3/HB 228; Ga. L. 2010, p. 286, § 13/SB 244.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-152.

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 43, 52.

17-8-31. Party, leading attorney, or material witness in attendance on active duty as member of National Guard or component of armed forces of the United States as grounds for granting continuance; setting bail in certain cases.

(a) It shall be the duty of any judge of the courts of this state to continue any case in the court on or without motion when any party thereto or his or her leading attorney is absent from court when the case is reached by reason of his or her attendance on active duty as a member of the National Guard or a reserve or active component of the armed forces of the United States. The case may proceed if the party, in the absence of his or her leading attorney, or the leading attorney, in the absence of the party, announces ready for trial on the call of the case. If counsel is absent, it shall be necessary for his or her client to make oath that he or she cannot safely go to trial without the absent attorney and, if a party is absent, his or her counsel shall state in his or her place that he or she cannot safely go to trial without the client.

(b) It shall be the duty of any judge of the courts of this state to continue any case in the court upon a showing by the state or the defendant that a material and necessary witness is unavailable by reason of being on active duty as a member of the National Guard or as a member of a reserve or active component of the armed forces of the United States.

(c) In cases in which a demand for speedy trial has been filed in accordance with Code Section 17-7-170 or 17-7-171, the court shall grant the continuance if the party moving for a continuance pursuant to subsection (b) of this Code section establishes by testimony, affidavits, or other evidence that:

(1) The witness is material and necessary;

(2) The witness is located outside the territorial limits of the state;

(3) The party has submitted a request to the proper military authorities for the testimony of the witness in accordance with Section 301 of Title 5 of the United States Code and federal regulations or directives issued by the armed forces pursuant thereto; and

(4) The witness will not be available within the time limits prescribed by Code Section 17-7-170 or 17-7-171.

This continuance shall toll the running of the demand for speedy trial and shall continue the trial until the witness is released from active duty or the military makes the witness available to testify. If the witness only becomes available to testify within the last two weeks of the term of court in which the case must be tried, the case may be tried at the next succeeding term of court.

(d) In any case in which the court grants the state a continuance pursuant to subsection (c) of this Code section, the defendant shall have bail set upon application to the court, except in those cases punishable by death or imprisonment for life without parole. In any case in which the defendant is accused of committing a serious violent felony, as defined by subsection (a) of Code Section 17-10-6.1, the court shall consider but shall not be required to set bail.

History. — Ga. L. 1925, p. 149, § 1; Code 1933, § 81-1406; Ga. L. 2003, p. 154, § 4; Ga. L. 2004, p. 631, § 17; Ga. L. 2006, p. 893, § 5/HB 1421.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-153.

JUDICIAL DECISIONS

Construction with O.C.G.A. § 17-7-170. — While the trial court was authorized to conclude that the "lead officer" in the prosecution against the defendant was a material and necessary witness who was unavailable for 14 months while the defendant's case was pending, and thus a continuance during that period was proper under O.C.G.A. § 17-8-31, despite the fact that no explanation was given for the remainder of the delay, given that the defendant failed to prove any of the other Barker v. Wingo factors in determining whether a speedy trial violation occurred, the defendant's motion to dismiss the indictment on speedy trial grounds was properly denied. Bell v. State, 287 Ga. App. 300, 651 S.E.2d 218 (2007), cert. denied, No. S08C0031, 2007 Ga. LEXIS 811 (Ga. 2007).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 43, 52.

ALR. — Appealability of order granting or refusing stay or continuance under Federal Civil Relief Act because of litigant's military service, 34 A.L.R.2d 1149.

Effect of war on litigation pending at the time of its outbreak, 137 A.L.R. 1335; 147 A.L.R. 1298; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

Validity and construction of war legislation in nature of moratory statute, 147 A.L.R. 1311; 148 A.L.R. 1388; 149 A.L.R. 1457; 150 A.L.R. 1400; 150 A.L.R. 1420; 151 A.L.R. 1456; 152 A.L.R. 1452; 153 A.L.R. 1422; 154 A.L.R. 1448; 155 A.L.R. 1452; 156 A.L.R. 1450; 157 A.L.R. 1450; 158 A.L.R. 1450.

Soldiers' and Sailors' Civil Relief Acts, 147 A.L.R. 1366; 148 A.L.R. 1395; 149 A.L.R. 1463; 150 A.L.R. 1428; 151 A.L.R. 1460; 152 A.L.R. 1457; 153 A.L.R. 1429; 154 A.L.R. 1455; 155 A.L.R. 1456; 156 A.L.R. 1455; 157 A.L.R. 1454; 158 A.L.R. 1456; 35 A.L.R. Fed. 649.

17-8-32. Effect of admission by opposing party of facts to be proved upon allowance of continuance.

No continuance shall be allowed in any court on account of the absence of a witness or for the purpose of procuring testimony when the opposite party is willing to admit, and does not contest the truth of, the facts expected to be proved; and the court shall order such admission to be reduced to writing.

History. — Ga. L. 1853-54, p. 52, § 1; Code 1863, § 3452; Code 1868, § 3472; Code 1873, § 3523; Code 1882, § 3523; Civil Code 1895, § 5130; Penal Code 1895, § 963; Civil Code 1910, § 5716; Penal Code 1910, § 989; Code 1933, § 81-1411.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-161.

JUDICIAL DECISIONS

Denying continuance when prosecuting officer admits facts to which witness would testify. — If the prosecuting officer admits the truth of facts to which it is claimed absent witnesses would testify, it is not error to overrule a motion for a continuance based on the absence of such witnesses. May v. State, 185 Ga. 335, 195 S.E. 196 (1938).

Notes of trial judge may show admission. Morgan v. State, 120 Ga. 499, 48 S.E. 238 (1904).

Cited in Pannell v. State, 29 Ga. 681 (1859); Delk v. State, 99 Ga. 667, 26 S.E. 752 (1896); Watson v. State, 118 Ga. 66, 44 S.E. 803 (1903); Reese v. State, 44 Ga. App. 251, 161 S.E. 156 (1931).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 67, 69.

ALR. — Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

17-8-33. Granting of continuances where indictment found or accusation made; continuance where material witness unavailable; continuances required by principles of justice; granting of continuance where postponement possible to later date in term.

(a) Every person against whom a true bill of indictment is found or an accusation is made shall be tried at the term of the court at which the indictment is found or the accusation is made unless the absence of a material witness or the principles of justice should require a continuance of the case, in which case the court shall allow a continuance until the next term of the court. The court shall have power to allow the continuance of criminal cases from term to term, as often as the principles of justice may require, upon sufficient cause shown under oath.

(b) No continuance shall be granted over the objection of the adverse party in any court which has a continuous session for 30 days or more where the cause for the continuance can be obviated by a postponement to a later day during the term. Whenever a motion and a proper showing for a continuance is made by either party, the presiding judge, at any time, shall set the case down for a later day during the same term if it shall be practicable thereby to avoid a continuance of the case until the next term.

History. — Laws 1833, Cobb's 1851 Digest, p. 835; Code 1863, § 4533; Code 1868, § 4553; Code 1873, § 4647; Code 1882, § 4647; Ga. L. 1893, p. 56, § 1; Penal Code 1895, § 961; Penal Code 1910, § 986; Code 1933, § 27-2002.

Law reviews. — For comment on Cannady v. State, 190 Ga. 227, 9 S.E.2d 241 (1940), see 3 Ga. B.J. 55 (1940).

JUDICIAL DECISIONS

Analysis

General Consideration
Witnesses
Preparation for Trial
Practice and Procedure
Appellate Review

General Consideration

Continuances in criminal cases are not governed by the same rule as in civil cases. Hobbs v. State, 8 Ga. App. 53, 68 S.E. 515 (1910).

For continuance as waiver of demand for trial, see Campbell v. State, 6 Ga. App. 539, 65 S.E. 307 (1909).

Formal and proper motion in the record must be shown. — Continuance not granted in absence of proper motion. Boggus v. State, 34 Ga. 275 (1866); Ray v. State, 91 Ga. 87, 16 S.E. 311 (1892); Pressley v. State, 132 Ga. 64, 63 S.E. 784 (1909).

In order for a party successfully to complain of a ruling which the party contends to have been a denial of a continuance, the party must be able to show a formal and proper motion in the record as the basis of the asserted error, and this rule is technically construed. Horton v. State, 132 Ga. App. 407, 208 S.E.2d 186 (1974).

Motion is addressed to court's sound discretion. — Motion for continuance is addressed to the sound discretion of the trial court. Pulliam v. State, 236 Ga. 460, 224 S.E.2d 8, cert. denied, 428 U.S. 911, 96 S. Ct. 3225, 49 L. Ed. 2d 1219 (1976); Bunge v. State, 149 Ga. App. 712, 256 S.E.2d 23 (1979).

Motions for a continuance predicated on the basis that counsel had insufficient time to prepare for trial address themselves to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. Nave v. State, 171 Ga. App. 165, 318 S.E.2d 753 (1984).

It was not error to grant a continuance ex parte, particularly when the court held a full hearing on the motion the following morning. The grant or denial of a motion for continuance is within the sole discretion of the trial judge, and absent a showing that such discretion was abused, it will not be controlled. Campbell v. State, 181 Ga. App. 790, 354 S.E.2d 10 (1987).

Grant or denial of a continuance is within the court's discretion. Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980), overruled on other grounds, Barnes v. State, 157 Ga. App. 582, 277 S.E.2d 916 (1981).

Grant or denial of a continuance to a criminal defendant is in the sound discre-

tion of the court, especially when the defendant is in jail. Gann v. State, 166 Ga. App. 172, 303 S.E.2d 510 (1983).

Circumstances are to be considered. — Every application for a continuance should be heard and determined according to the application's circumstances. Roberts v. Moore, 27 Ga. 411 (1859); Frain v. State, 40 Ga. 529 (1869).

Sufficiency of time for preparation depends on facts and circumstances. — Whether or not a reversal is to be adjudged because counsel was not allowed sufficient time to prepare the case for trial is to be determined by the particular facts and circumstances of each case. Carnes v. State, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

Question of whether speedy trial denied depends on facts and circumstances. — Whether a defendant has been denied a speedy trial is not merely a matter of time, but depends upon the facts and circumstances of each case. Newman v. State, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

Distinction in treatment of motions made at term in which indictment found and at subsequent terms. — Motions for continuance, made at the term at which the indictment is found, while addressed to the discretion of the court, stand upon a different footing from such motions made at a subsequent term. In such cases, the discretion of the court should be liberally exercised in favor of a fair trial, no less than that the trial should be speedy, and every facility should be afforded a defendant for presenting a defense as fully as the defendant might be able to do, were the case tried at a subsequent term. Reasonable opportunity for the defendant to prepare a defense should not be sacrificed in the interest of speed. Waters v. State, 62 Ga. App. 720, 9 S.E.2d 716 (1940).

Motion not made nor testimony offered as to motion's necessity. — When no motion for continuance is made, nor is testimony offered under oath as to the motion's necessity, a new trial will not be granted for the failure to grant a continuance. Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

Oath of sufficient cause needed for continuance. — Request for continuance must be supported by a showing on oath of sufficient cause that the principles of justice require a continuance of the case. Taylor v. City of Griffin, 113 Ga. App. 589, 149 S.E.2d 177 (1966), cert. denied, 385 U.S. 1016, 87 S. Ct. 733, 17 L. Ed. 2d 552 (1967).

Good reason given for continuance. — If a good reason is shown as to why the party is not prepared to go to trial, a continuance should be granted. Parker v. State, 81 Ga. 332, 6 S.E. 600 (1888).

If no reason given for granting continuance, denial will not be reversed. — When it does not appear that any reason was stated to the trial court why the court should not then proceed with the trial of the case, the judgment of the trial court in denying a requested continuance will not be reversed. Taylor v. City of Griffin, 113 Ga. App. 589, 149 S.E.2d 177 (1966), cert. denied, 385 U.S. 1016, 87 S. Ct. 733, 17 L. Ed. 2d 552 (1967).

Amendments alone do not entitle opposite party to a continuance. Myrick v. State, 13 Ga. 190 (1853).

No continuance for something easily anticipated. — Continuance should not be granted for something that might reasonably have been anticipated. King v. State, 21 Ga. 220 (1857).

Prejudicial acts or statements of presiding judge. — That an act or statement of the presiding judge may be prejudicial to a defendant about to be placed on trial is not a legal ground of a motion for a continuance. Smith v. State, 7 Ga. App. 252, 66 S.E. 556 (1909).

Cited in Whitley v. State, 38 Ga. 50 (1868); Harvey v. State, 67 Ga. 639 (1881); Blackman v. State, 76 Ga. 288 (1886); Barrow v. State, 121 Ga. 187, 48 S.E. 950 (1904); Brooks v. State, 3 Ga. App. 458, 60 S.E. 211 (1908); Howell v. State, 5 Ga. App. 186, 62 S.E. 1000 (1908); Haines v. State, 8 Ga. App. 627, 70 S.E. 84 (1911); Trammell v. State, 183 Ga. 711, 189 S.E. 529 (1937); Holley v. State, 191 Ga. 804, 14 S.E.2d 103 (1941); Williams v. State, 192 Ga. 247, 15 S.E.2d 219 (1941); Woodward v. State, 197 Ga. 60, 28 S.E.2d 480 (1943); Akridge v. State, 85 Ga. App. 117, 68 S.E.2d 168 (1951); Waters v. State,

General Consideration (Cont'd)

85 Ga. App. 79, 68 S.E.2d 233 (1951); Cartee v. State, 85 Ga. App. 532, 69 S.E.2d 827 (1952); Johnson v. State, 215 Ga. 839, 114 S.E.2d 35 (1960); Blevins v. State, 113 Ga. App. 413, 148 S.E.2d 192 (1966); Butler v. State, 126 Ga. App. 22, 189 S.E.2d 870 (1972); State v. King, 137 Ga. App. 26, 222 S.E.2d 859 (1975); Gaines v. State, 142 Ga. App. 181, 235 S.E.2d 640 (1977); Lewis v. State, 239 Ga. 732, 238 S.E.2d 892 (1977); Garner v. State, 159 Ga. App. 244, 282 S.E.2d 909 (1981); Wiley v. State, 250 Ga. 343, 296 S.E.2d 714 (1982); Hampton v. State, 250 Ga. 805, 301 S.E.2d 274 (1983); Blair v. State, 166 Ga. App. 434, 304 S.E.2d 535 (1983); Mora v. State, 292 Ga. App. 860, 666 S.E.2d 412 (2008).

Witnesses

Facts to which the absent witness would have testified must appear. — Judge is entitled to this information in order that the judge can decide whether the evidence of the absent witness is material and admissible and not blindly accept the statement of the defendant's counsel that the evidence of the witness was material and admissible. Mell v. State, 69 Ga. App. 302, 25 S.E.2d 142 (1943).

Defendant should state how defendant expects to procure attendance of absent witness. — On the hearing of a motion for a continuance based upon the absence of a material witness for the defense, if the court is authorized to find that the witness was beyond the jurisdiction of the court, that the witness's absence was not temporary, and that the court was powerless to force the witness to attend, although the movant did state that the movant expected to have the witness present at the next term of the court, if possible, in these circumstances the motion should have gone further and stated the means whereby the movant expected to procure the witness's attendance, as that the witness had promised to attend, or that the movant had some other ground for the movant's expectation that the witness would attend. Wright v. State, 71 Ga. App. 346, 30 S.E.2d 839 (1944).

Testimony by another as to matters to which absent witness was to testify. — There is no abuse of discretion in overruling a motion for continuance because of the absence of witnesses to prove the good character of the accused since it was shown that there was at least one other witness who was present at the trial by whom the defendant could establish character. Stevens v. State, 49 Ga. App. 248, 174 S.E. 718 (1934).

Denial of a continuance on account of absence of a witness is not reversible error if another witness testifies to the facts to which the absent witness was expected to testify. Johnson v. State, 72 Ga. App. 534, 34 S.E.2d 555 (1945).

If witness makes an unexpected statement which defendant knows is false, the party surprised should move for a continuance. Sanders v. State, 7 Ga. App. 603, 67 S.E. 696 (1910).

Defendant testifying that the defendant does not need absent witness' testimony. — Court does not abuse the court's discretion in refusing a continuance to the defendant on the ground of the absence of a witness if the defendant testifies that the defendant does not need such testimony, and it does not appear where and when the witness can be located. Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939).

Illness of a relative, not a necessary party to the case, is not ground for continuance. Williams v. State, 180 Ga. 595, 180 S.E. 101 (1935).

Failure of district attorney's office to produce witness. — When the district attorney's office assumes the onus of producing a witness and fails to do so, it in effect testifies to the court that the witness' appearance would hurt rather than help the defendant's case. Cox v. State, 147 Ga. App. 743, 250 S.E.2d 193 (1978).

Absence of witness for state. — It was not an abuse of discretion for the trial court to grant a continuance to the state based on the absence of a police officer witness, who was not under subpoena but had been served with a notice since the officer was prevented from testifying because the officer was placed on administrative leave. Hicks v. State, 221 Ga. App. 735, 472 S.E.2d 474 (1996).

Trial court did not err in granting the state's motion for continuance under O.C.G.A. § 17-8-33(a) because, while a subpoena was issued for an absent witness, a former deputy, the sheriff's office failed to serve the subpoena, because the former deputy was subpoenaed to appear on the date in a separate case, however, the other case had settled and the former deputy was absent from court. Dowd v. State, 280 Ga. App. 563, 634 S.E.2d 509 (2006).

Continuance to secure attendance of medical examiner. — No abuse of discretion resulted from the grant of a continuance to the state based on the absence of the medical examiner, who was a material witness, because the defendant failed to show a show a violation of O.C.G.A. § 17-8-33. Moreover, in granting the prosecutor's motion for a continuance, the trial court noted that the court would do the same for a defendant in similar circumstances. Parker v. State, 282 Ga. 897, 655 S.E.2d 582 (2008).

Burden is on the state to show the absence of a witness was harmless. The mere statement of opposing counsel to this effect is insufficient. Cox v. State, 147 Ga. App. 743, 250 S.E.2d 193 (1978).

Delay in subpoenaing witness as grounds for denial of motion. — If the defendant's motion for continuance is based upon the absence of a material witness for whom a subpoena was not issued by the defendant until the morning the trial was to begin and who had not been served therewith at the time the motion was made, there is no error in overruling the motion. Eady v. State, 129 Ga. App. 656, 200 S.E.2d 767 (1973).

Preparation for Trial

Reasonable time should be allowed for the accused to prepare for trial. Battles v. State, 9 Ga. App. 192, 70 S.E. 973 (1911).

Need for time to prepare case as grounds for continuance. — It is not ground for reversal of a judgment denying a new trial in a criminal case that the judge refused to grant a continuance, when sole counsel for the defendant accused of murder had been engaged in the trial of the same case during the two preceding days, which trial had resulted in a mistrial, and had done a great amount of work, and did not feel that counsel could safely go to trial in a case of such gravity and importance. The motion for continuance not having met the requirements of any rule permitting continuances, it is necessarily a question presented to the discretion of the judge, and the trial court's discretion in granting or refusing continuances will not be disturbed, unless manifestly, flagrantly, and clearly abused. Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943).

Time to be allowed counsel to prepare for trial is in the sound discretion of the trial judge, and the judge's discretion will not be interfered with by the court unless abused. Kell v. State, 188 Ga. 670, 4 S.E.2d 596 (1939); Bunge v. State, 149 Ga. App. 712, 256 S.E.2d 23 (1979).

Lack of opportunity for defendant to confer with lawyers. — When no unusual or intricate matters of fact or law appear, it is no abuse of discretion on the part of the trial judge to overrule a motion to continue based on lack of opportunity of the defendant to confer with the defendant's lawyers. Williams v. State, 180 Ga. 595, 180 S.E. 101 (1935).

Fault in nonrepresentation of defendant as affecting right to continuance. — If the fault in nonrepresentation lies with the defendant, the defendant is not entitled to a continuance, but if there is uncertainty as to whether the fault of nonrepresentation lies with the defendant a continuance should be granted. In re Brookins, 153 Ga. App. 82, 264 S.E.2d 560 (1980).

Withdrawal of counsel or lack of preparation of new counsel. — Neither sudden withdrawal of retained counsel nor lack of preparation of new counsel is ipso facto a ground for continuance. Horton v. State, 132 Ga. App. 407, 208 S.E.2d 186 (1974).

Delay in obtaining counsel as grounds for denying motion. — Court does not abuse the court's discretion in overruling a motion for continuance when the accused is under bond, and the case is specially set at a time satisfactory with counsel who represented the accused at the commitment hearing, the accused be-

Preparation for Trial (Cont'd)

ing advised of the date, having made no request of the court to appoint counsel for the accused, and having waited until the night preceding the date fixed for the trial to procure counsel, as it is the accused's own fault if the accused's counsel did not have sufficient time to prepare a defense. Townsend v. State, 78 Ga. App. 385, 50 S.E.2d 801 (1948).

Appointment of counsel shortly before trial as grounds for continuance. — If an accused is forced to trial immediately after counsel appointed for defense, a continuance should be allowed. Jones v. State, 65 Ga. 506 (1880); McArver v. State, 114 Ga. 514, 40 S.E. 779 (1902).

When counsel is appointed to defend the accused on the charge of murder, slightly less than 24 hours before the case is called for trial, the court does not abuse the court's discretion in overruling a motion then made for a continuance on the ground that the defendant's counsel had not had sufficient time within which to prepare for trial. Cannady v. State, 190 Ga. 227, 9 S.E.2d 241 (1940), commented on in 3 Ga. B.J. 55 (1940).

Appointment of defense counsel eight days prior to trial. — Defendant was not prejudiced by the appointment of counsel eight days prior to trial and denial of continuances, when on the day set for trial defense counsel requested a continuance, stating that counsel had not had an opportunity to talk with all the witnesses, but the trial court denied this motion, stating that counsel would be given an opportunity to interview witnesses prior to their testimony, since no showing was made that any prospective witness not interviewed by the defense would have been beneficial to the defendant. Newberry v. State, 250 Ga. 819, 301 S.E.2d 282 (1983).

Misunderstanding by counsel. — When there is a misunderstanding on the part of counsel, a continuance will not be allowed unless it is entirely honest and justifiable. Long v. State, 38 Ga. 491 (1868).

Short continuance upheld. — Although public defender was unable to prepare for the case due to the public defender office's extremely heavy workload, because counsel had been assigned the case approximately eight months earlier and appellant had been arraigned more than three months earlier, the trial court did not abuse the court's discretion in granting counsel just under a week to complete the preparations. Roberts v. State, 208 Ga. App. 64, 430 S.E.2d 175 (1993).

Practice and Procedure

Physical inability of accused to stand trial as grounds for continuance. — When a motion for a continuance is made on the ground that the accused is physically unable to stand the strain of a trial, and the accused is present in court, the presiding judge may consider the condition of the accused as it appears to the judge, as well as the testimony adduced on the motion. In such a case the good sense, sound judgment, and humanity of the trial judge must be relied on as safeguards against injustice. Warren v. State, 53 Ga. App. 221, 185 S.E. 385 (1936).

Defendant as juror. — That defendant is a juror for the week during which the defendant's case is called for trial is not ground for a continuance. Johnson v. State, 83 Ga. 553, 10 S.E. 207 (1889).

Same jurors appearing at both trials for jointly indicted defendants. — When accused is jointly indicted with another, the fact that some of the jurors constituting the panel upon the former had at the same term served on the trial of the latter is no ground for a continuance. Humphries v. State, 100 Ga. 260, 28 S.E. 25 (1897).

Use of same witnesses and evidence. — It is not grounds for a continuance that one of those accused is tried for the same offense as the other and the case involved the same evidence and the same witnesses. Sutton v. State, 18 Ga. App. 28, 88 S.E. 744 (1916); Sutton v. State, 18 Ga. App. 162, 88 S.E. 1005 (1916).

Length of postponement. — Postponement to a later day in term is subject to the sound discretion of the judge. Lyles v. State, 130 Ga. 294, 60 S.E. 578 (1908).

Circumstances which would be sufficient to cause postponement of trial for 60 days must be extraordinary and unusual.

Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418 (1939).

Popular excitement alone is not sufficient to postpone the trial of a case, except under extraordinary circumstances. Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418 (1939).

Public prejudice insufficient. — In view of provisions for obtaining impartial jurors, public prejudice alone is not sufficient for a continuance. Fogarty v. State, 80 Ga. 450, 5 S.E. 782 (1888); Charlon v. State, 106 Ga. 400, 32 S.E. 347 (1899).

Continuance will not be granted simply on the assertion of the accused that the accused is unable to have a fair trial because of public excitement. Taylor v. State, 135 Ga. 622, 70 S.E. 237 (1911).

Newspaper publicity not in itself grounds for postponement. — Fact that the newspapers of a community have dwelt upon a crime situation that was being investigated by the grand jury will not of itself cause a postponement of a case reached in its regular course. Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418 (1939).

Right to demand trial is in keeping with policy. — In keeping with the policy of former Code 1933, § 27-2002 (see O.C.G.A. § 17-8-33), it is provided by former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170) that an accused person may demand such trial. Harris v. State, 84 Ga. App. 1, 65 S.E.2d 267 (1951).

Mere statements of defendant to counsel and repeated to the court in a motion for continuance are, at most, in the nature of hearsay and have no probative value. The court is not required to consider on the motion for a continuance any conclusion drawn by counsel from such statements made by the defendant to counsel and argued to the court. Townsend v. State, 78 Ga. App. 385, 50 S.E.2d 801 (1948).

Appellate Review

Abuse of discretion generally. — Discretion of the trial court in refusing to grant a continuance will not be interfered with unless such discretion is abused. Dorsey v. State, 236 Ga. 591, 225 S.E.2d 418 (1976); Marshall v. State, 143 Ga. App. 731, 240 S.E.2d 176 (1977).

Motion for continuance is addressed to the sound discretion of the trial court and the refusal to grant a continuance will not be disturbed unless there is a clear abuse of discretion. Young v. State, 237 Ga. 852, 230 S.E.2d 287 (1976), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Broad discretion given to the presiding judge in granting or refusing to continue trials is not to be disturbed unless manifestly abused. Cannady v. State, 190 Ga. 227, 9 S.E.2d 241 (1940), commented on in 3 Ga. B.J. 55 (1940); Carnes v. State, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

Grant of motions for continuance is within the sound discretion of the trial judge, and an appellate court will not interfere unless it is clearly shown that the trial judge abused the judge's discretion. Terry v. State, 160 Ga. App. 433, 287 S.E.2d 360 (1981).

Counsel's opinion that defendant incapable of continuing. — If the defendant's counsel offered only counsel's opinion that the defendant was incapable of continuing with the trial, there was an insufficient showing of a necessity for a continuance. Nash v. State, 179 Ga. App. 702, 347 S.E.2d 651 (1986).

Jury bias. — After a defendant contended that the defendant failed to conduct a proper voir dire because the defendant was afraid of irritating prospective jurors because of aggressive questioning the panel received during voir dire prior to the defendant's brother's trial for the same offense, there was no error to deny a motion for continuance without showing actual evidence of jury bias or prejudice. Kelley v. State, 168 Ga. App. 911, 311 S.E.2d 180 (1983).

No material injury to accused. — Discretion not abused if no material injury results to accused. Hardy v. State, 117 Ga. 40, 43 S.E. 434 (1903); Teal v. State, 119 Ga. 102, 45 S.E. 964 (1903).

Failure to prepare demurrer and plea. — Discretion is not abused by refusal to continue to later hour in day in order to allow counsel to prepare demurrer and plea when there is no reason why such plea was not prepared. Oglesby v.

Appellate Review (Cont'd)

State, 121 Ga. 602, 49 S.E. 706 (1905).

If harm not demonstrated, enumerations of error are meritless. — Refusal of continuance is not cause for a new trial if the defendant is not injured by the ruling. Cox v. State, 147 Ga. App. 743, 250 S.E.2d 193 (1978).

If the defendant has failed to demonstrate any such harm by either the court's failure to grant a continuance or the court's issuance of the order and the court's rescinding thereof, the defendant's enumerations of error are without merit. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Supreme Court will prevent the precipitation of a case if a continuance was necessary. Maddox v. State, 32 Ga. 581, 79 Am. Dec. 307 (1861).

Only when record shows identifiable prejudice is reversal authorized on appeal. — It is only when the record reveals to the appellate courts facts or circumstances showing as a matter of law identifiable prejudice to the accused, such as when the events have moved so swiftly that constitutional guaranties are overridden, that the reviewing courts are authorized to reverse the trial court's refusal to grant an extension. Carnes v. State, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

Review of denial of motion based on inadequate preparation time or inability to use witness. — Court of Appeals will not interfere with the discretion of the trial judge in refusing to grant a continuance on a motion based generally on two grounds: inadequate time for counsel to prepare for trial; and the inability to use a witness present at the scene of the crime who was accused of participating. Mack v. State, 125 Ga. App. 639, 188 S.E.2d 828 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 280, 281, 286, 287.

C.J.S. — 17 C.J.S., Continuances, § 1 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, §§ 346 et seq., 567 et seq.

ALR. — Hostile sentiment or prejudice as ground for continuance of criminal trial, 39 A.L.R.2d 1314.

Right of accused to continuance because of absence of witness who is fugitive from justice, 42 A.L.R.2d 1229.

Amendment of indictment or information with respect to name or capacity of person alleged to have been victim of crime as ground for continuance, 85 A.L.R.2d 1204.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 A.L.R.3d 725.

Illness or incapacity of judge, prosecuting officer, or prosecution witness as justifying delay in bringing accused speedily to trial — state cases, 78 A.L.R.3d 297.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 A.L.R.4th 899.

17-8-34. Granting of continuances in cases returned by appellate court for trial.

When a case is sent back for trial to a superior, state, or city court by the Supreme Court or Court of Appeals, the case shall be in order for trial; and, if the continuances of either party are exhausted, the trial court may grant one continuance to the party, as the ends of justice may require.

History. — Ga. L. 1851-52, p. 214, § 6; Code 1863, § 3456; Code 1868, § 3476; Code 1873, § 3527; Code 1882, § 3527; Civil Code 1895, § 5134; Civil Code 1910, § 5720; Code 1933, § 81-1415.

Cross references. — Trial of cases returned for new trial by appellate courts generally, § 5-5-49. Corresponding provision relating to civil procedure, § 9-10-162.

17-8-35. Effect of continuance by defendant upon trial of codefendants.

The continuance of a case by one of several defendants indicted jointly shall not operate as a continuance as to the other defendants objecting thereto.

History. — Ga. L. 1858, p. 99, § 2; Code 1863, § 4575; Code 1868, § 4596; Code 1873, § 4693; Code 1882, § 4693; Penal Code 1895, § 967; Penal Code 1910, § 993; Code 1933, § 27-2004.

JUDICIAL DECISIONS

Cited in Adams v. State, 129 Ga. App. 839, 201 S.E.2d 649 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 280, 281.
C.J.S. — 17 C.J.S., Continuances, § 1 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 567 et seq.

17-8-36. Entry of date of continuance upon docket of court; announcement of continuance in open court.

The judges of the superior, state, and city courts shall, upon the continuance of any case, enter the date of the continuance upon their dockets opposite the case and in open court make public announcement of the continuance.

History. — Ga. L. 1895, p. 41, § 1; Civil Code 1895, § 5140; Penal Code 1895, § 968; Civil Code 1910, § 5726; Penal Code 1910, § 994; Code 1933, § 81-1421; Ga. L. 1983, p. 884, § 3-20.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-169.

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 116 et seq.

17-8-37. Duration of continuance.

When a court grants a continuance of a pending case for whatever cause, the continuance shall extend until the next term of court only.

History. — Laws 1799, Cobb's 1851 Digest, p. 486; Code 1863, § 3448; Code 1868, § 3468; Code 1873, § 3519; Code 1882, § 3519; Civil Code 1895, § 5126; Civil Code 1910, § 5710; Code 1933, § 81-1401.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-164.

JUDICIAL DECISIONS

Cited in Whitehead v. State, 43 Ga. App. 401, 158 S.E. 917 (1931).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, § 115.

ALR. — Effect of war on litigation pending at the time of its outbreak, 154 A.L.R. 1447.

Amendment of pleading with respect to parties or their capacity as ground for continuance, 67 A.L.R.2d 477.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

17-8-38. Case not reached at trial term continued.

A case not reached at the trial term stands over as continued.

History. — Orig. Code 1863, § 3455; Code 1868, § 3475; Code 1873, § 3526; Code 1882, § 3526; Civil Code 1895, § 5133; Civil Code 1910, § 5719; Code 1933, § 81-1414.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-165.

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Continuances, §§ 11, 12, 17.

ARTICLE 3

CONDUCT OF PROCEEDINGS

Cross references. — Testimony by defendant in criminal case generally, § 24-5-506. Husband and wife as witnesses for and against each other, § 24-5-503.

RESEARCH REFERENCES

ALR. — Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 A.L.R.4th 1072.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 A.L.R.4th 500.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

17-8-50. Courts in which trials of inmates escaping from correctional institutions to take place; admissibility of records pertaining to former trials of such inmates; testimony of other inmates.

The trial of inmates escaping from a state or county correctional institution shall take place in the superior court of the county in which the escape occurs, and inmates so escaping shall remain in the correctional institution after their apprehension and shall be treated as are other inmates until the trial takes place. At the trial, the copies of the records transmitted to the superintendent or warden of the state or county correctional institution, relative to the former trials of such inmates, shall be produced and filed of record in the superior court; and any other inmate not included in the same indictment shall be a competent witness.

History. — Laws 1833, Cobb's 1851 Digest, p. 837; Code 1863, § 4545; Code 1868, § 4565; Code 1873, § 4659; Code 1882, § 4659; Penal Code 1895, § 318; Penal Code 1910, § 323; Code 1933, § 26-4511; Code 1933, § 26-9902, enacted by Ga. L. 1968, p. 1249, § 1.

Cross references. — Escape generally, § 16-10-52.

JUDICIAL DECISIONS

Procuring state's compliance with section when noncompliance alleged. — If the defendant contends the defendant was entitled to a directed verdict of acquittal based on the state's alleged violation of the provisions of O.C.G.A. § 17-8-50 because, prior to the trial on an escape charge, the defendant was sentenced to serve 14 days in confinement by the prison disciplinary committee and then transferred from the facility from which the defendant escaped to another correctional institution, and the state failed to produce the records of the defendant's former conviction at trial, the defendant should have filed a petition for a writ of habeas corpus or a petition for a writ of mandamus in order to procure the state's compliance with § 17-8-50. Lofton v. State, 190 Ga. App. 408, 379 S.E.2d 13 (1989).

Administrative punishment. — This section did not limit the imposition of administrative punishment for escape. Horne v. Hopper, 238 Ga. 140, 231 S.E.2d 735 (1977).

Right to return to same institution upon capture. — Prior to November 1, 1982, a county correctional institute was not a "penitentiary" because it was not "exclusively" for the confinement of felony prisoners, as required by former Code 1933, § 102-103. As a result, former Code 1933, § 26-9902 (see O.C.G.A. § 17-8-50), which dealt with the trial of prisoners escaping from the "penitentiary," was inapplicable to a prisoner escaping from a county correctional institute. Accordingly, such a prisoner had no right, if one in fact existed under the inapplicable statute, to be returned to and to remain in the county correctional institute after the prisoner's apprehension. Mullins v. State, 167 Ga. App. 670, 307 S.E.2d 61 (1983).

Cited in McKenzey v. State, 140 Ga. App. 402, 231 S.E.2d 149 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Escape, § 1 et seq.

C.J.S. — 30A C.J.S., Escape and Related Offenses; Rescue, § 1 et seq.

ALR. — What justifies escape or attempt to escape, or assistance in that regard, 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted, 3 A.L.R.4th 1085.

Propriety of jury instruction regarding credibility of witness who has been convicted of a crime, 9 A.L.R.4th 897.

Propriety and prejudicial effect of witness testifying while in prison attire, 16 A.L.R.4th 1356.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

17-8-51. Admissibility of testimony of inmates in trials for crime of mutiny.

At the trial of an inmate of a penal institution for the crime of mutiny, any other inmate not included in the same indictment shall be a competent witness, and the infamy of his character and of the crime of which he has been convicted shall be exceptions to his credit only.

History. — Laws 1833, Cobb's 1851 Digest, p. 840; Code 1863, § 4563; Code 1868, § 4583; Code 1873, § 4677; Code 1882, § 4677; Penal Code 1895, § 331; Penal Code 1910, § 336; Code 1933, § 26-4803; Code 1933, § 26-9903, enacted by Ga. L. 1968, p. 1249, § 1.

Cross references. — Mutiny generally, § 16-10-54.

JUDICIAL DECISIONS

Cited in Bussey v. State, 202 Ga. App. 483, 414 S.E.2d 710 (1992).

RESEARCH REFERENCES

ALR. — Propriety of jury instruction regarding credibility of witness who has been convicted of a crime, 9 A.L.R.4th 897.

17-8-52. Oath to be administered to witnesses.

(a) The following oath shall be administered to witnesses in criminal cases:

> "Do you solemnly swear or affirm that the evidence you shall give to the court and jury in the matter now pending before the court shall be the truth, the whole truth, and nothing but the truth? So help you God."

(b) Any oath given that substantially complies with the language in this Code section shall subject the witness to the provisions of Code Section 16-10-70.

History. — Laws 1833, Cobb's 1851 Digest, p. 836; Code 1863, § 4537; Code 1868, § 4557; Code 1873, § 4651; Code 1882, § 4651; Penal Code 1895, § 980; Penal Code 1910, § 1006; Code 1933, § 38-1702; Ga. L. 1997, p. 1499, § 2.

Cross references. — Perjury and related offenses, § 16-10-70 et seq.

JUDICIAL DECISIONS

District attorney may administer the oath under court direction. Thomas v. State, 67 Ga. 460 (1881).

Materially different oath cannot be basis for perjury prosecution. — When it is affirmatively shown that the oath administered to a witness was materially different in both form and substance than the prescribed statutory oath, the administered oath was not a lawful one and cannot properly be the basis for a perjury prosecution. Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976).

Oath not materially different. — Oath given to arresting officer indicating the defendant's name, the crimes charged, and the fact that the testimony was being given in a trial and not a grand jury proceeding was not materially different in both form and substance from the prescribed statutory oath and was proper. Elam v. State, 211 Ga. App. 739, 440 S.E.2d 511 (1994).

Oath materially different but not harmful. — Trial court erred in permitting an undercover agent to testify after being administered an oath that did not substantially comply with O.C.G.A. § 17-8-52; but the error was not sufficiently harmful to warrant reversal. Lee v. State, 223 Ga. App. 438, 477 S.E.2d 872 (1996).

Oath administered is presumed to be lawful. — When there is evidence that an oath was administered to a witness, it will be presumed in the absence of proof to the contrary that the lawful or statutory oath was administered. Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976).

Failure to make timely objection to oath. — When the defendant fails to make a timely objection to the state's failure to administer the oath to witnesses in the precise terms set forth in this section, waiting instead until the state rests the state's case, the defendant waives the objection and cannot complain on appeal. Joseph v. State, 149 Ga. App. 296, 254 S.E.2d 383 (1979); Montes v. State, 262 Ga. 473, 421 S.E.2d 710 (1992).

Omission of oath not ground for new trial. — See Smith v. State, 81 Ga. 479, 8 S.E. 187 (1888); Rhodes v. State, 122 Ga. 568, 50 S.E. 361 (1905).

Cited in Hilson v. State, 204 Ga. App. 200, 418 S.E.2d 784 (1992).

17-8-53. Exclusion of public from courtroom when evidence vulgar or obscene.

During a trial in a court of any case in which the evidence is vulgar and obscene or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right in his discretion and on his own motion, or on motion of a party or his attorney, to hear and try the case after clearing the courtroom of all or any portion of the audience.

History. — Ga. L. 1890-91, p. 111, § 1; Ga. L. 1895, p. 49, § 1; Civil Code 1895, § 5296; Civil Code 1910, § 5885; Code 1933, § 81-1006.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-3. Exclusion of public from hearings involving determination of delinquency, deprivation, or unruliness of minors, § 15-11-700.

Law reviews. — For review of 1996 legislation relating to filming or videotaping in the courtroom, see 13 Ga. St. U.L. Rev. 83 (1996).

JUDICIAL DECISIONS

Discretion of judge in allowing public in courtroom. — Every person accused of a crime is entitled to a public trial. The presiding judge, in the exercise of sound discretion, may, without violating this right, exclude from the courtroom during the trial, for any sufficient special reason, such portion of the spectators as fall within the class to which this section applied. Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908).

Under neither the Constitution nor the laws of Georgia is it ever reversible error for a trial judge, in the judge's discretion, to allow the public to occupy seats in the courtroom as long as the public's conduct is orderly, peaceful, and does not tend to obstruct justice. Lancaster v. State, 168 Ga. 470, 148 S.E. 139 (1929), overruled on other grounds, Curtis v. State, 236 Ga. 362, 223 S.E.2d 721 (1976).

That matters are "ordinarily indecent to be mentioned" was not sufficient. — When the judge, without further reason than that the testimony will relate to matters ordinarily indecent to be mentioned, orders, over the objection of the defendant, that the courtroom be cleared of everyone not connected with the case, the judge abused the judge's discretion and violated the defendant's right to a public trial as guaranteed by this section. Prejudice to the defendant is conclusively to be presumed from such an order, and a new trial necessarily results. Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908).

Partial closure of courtroom proper. — Trial court did not abuse the court's discretion by partially closing the courtroom during the victims' testimonies because the trial court limited the closure by allowing the defendant, the attorneys for the defense and the state, immediate families or guardians of the victims, immediate families or guardians of the defendant, the attorneys' employees, officers of the court, sheriff's deputies, and any members of the press to remain in the courtroom, which was acceptable pursuant to the Sixth Amendment. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. 2012), appeal dismissed, 2020 U.S. App. LEXIS 3372 (11th Cir. Ga. 2020).

Aggravated sodomy and incest. — In prosecution for aggravated sodomy and incest, there was no abuse of discretion on the part of the trial court in excluding juvenile spectators from the courtroom and no violation of appellant's right to a public trial. Parker v. State, 162 Ga. App. 271, 290 S.E.2d 518 (1982).

Trial "public" when news media present. — Georgia courts have given little credence to contentions that a hearing was not "public" when, in the interest of fair administration of justice, the trial court has cleared a part of the spectators from the courtroom but has allowed representatives of the news media to remain. R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982).

Right of access of news media representatives is no greater and no less than any other member of the general public. R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982).

Closure of courtroom must be supported by specific findings. — Although the trial court cursorily mentioned protecting the minor victim's privacy, the trial court's findings must be specific enough that a reviewing court can determine whether the closure order was properly entered and the trial court's conclusory statement that the court had considered the alternatives to closure and found the alternatives to be insufficient under the circumstances of the case was not specific enough to enable the court to determine that the closure order was en-

tered properly. Spikes v. State, 353 Ga. App. 454, 838 S.E.2d 121 (2020).

Cited in Moore v. State, 151 Ga. 648, 108 S.E. 47 (1921); Henderson v. State, 207 Ga. 206, 60 S.E.2d 345 (1950); Babb v. State, 157 Ga. App. 757, 278 S.E.2d 495 (1981); Sears v. State, 182 Ga. App. 480, 356 S.E.2d 72 (1987).

RESEARCH REFERENCES

C.J.S. — 88 C.J.S. (Rev), Trial, §§ 110, 113 et seq.

ALR. — Exclusion of public during criminal trial, 156 A.L.R. 265; 48 A.L.R. 1436.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases, 39 A.L.R.3d 852.

Restricting public access to judicial records of state courts, 84 A.L.R.3d 598.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time, 70 A.L.R.4th 632.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 A.L.R.4th 476.

17-8-54. Persons in courtroom when person under age of 16 testifies concerning sexual offense.

In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel as provided for by Code Section 15-18-14.2, jurors, newspaper reporters or broadcasters, and court reporters.

History. — Code 1981, § 17-8-54, enacted by Ga. L. 1985, p. 1190, § 1; Ga. L. 2013, p. 891, § 1/HB 480.

Editor's notes. — Former Code Section 17-8-54, which related to writing out and reading of the charge to the jury, was redesignated as Code Section 17-8-56 by Ga. L. 1985, p. 1190, § 1.

JUDICIAL DECISIONS

Purpose of section. — Court properly refused to clear courtroom of unnecessary persons when the defendant accused a courtroom observer of coaching the witness; the purpose of O.C.G.A. §§ 17-8-54 and 17-8-55 is to protect the interest of the child witness and the record showed the witness' testimony was not influenced by any spectator. Martin v. State, 205 Ga. App. 591, 422 S.E.2d 876, cert. denied, 205 Ga. App. 900, 422 S.E.2d 876 (1992).

Closure of courtroom must be supported by specific findings. — Although the trial court cursorily mentioned protecting the minor victim's privacy, the trial court's findings must be specific enough that a reviewing court can determine whether the closure order was properly entered and the trial court's conclusory statement that the court had considered the alternatives to closure and found the alternatives to be insufficient under the circumstances of the case was not specific enough to enable the court to determine that the closure order was entered properly. Spikes v. State, 353 Ga. App. 454, 838 S.E.2d 121 (2020).

Allowing child victim's psychologist to remain in court not error. — With regard to a defendant's trial and conviction on various child sexual abuse charges, the trial court did not violate

O.C.G.A. § 17-8-54 as a result of clearing the courtroom of all spectators, with the exception of the victim's psychologist, who remained in the courtroom during the testimony, when the child testified, as there was no evidence in the record that the psychologist improperly influenced the testimony of the victim and, consequently, the defendant failed to assert a valid basis for reversal. Further, the purpose of § 17-8-54 is to protect the interest of the child witness, not the defendant; thus, a failure to follow the statute did not violate the defendant's rights. Driggers v. State, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

Allowing child advocate to sit with child. — Trial court did not err in allowing a victim's advocate to accompany the victim to the witness stand and sit by the victim in front of the jury while the victim testified because the trial court carefully observed the advocate's presence and demeanor during the victim's testimony and saw no inappropriate or prejudicial conduct or behavior. Ford v. State, 322 Ga. App. 31, 743 S.E.2d 442 (2013).

Prejudice not shown. — Defendant failed to demonstrate how the clearing of two of defendant's relatives from the courtroom when "everybody was made to leave the courtroom who was not an officer" prejudiced the defendant's cause or resulted in a different outcome at trial. Turner v. State, 245 Ga. App. 294, 536 S.E.2d 814 (2000), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009).

Defendant failed to show that the trial court violated the defendant's right to a public trial after the court cleared the courtroom of nonessential personnel when the youngest victim, who was four years old, testified because the defendant did not identify any specific people or category of people that were wrongly evicted. Clark v. State, 309 Ga. App. 749, 711 S.E.2d 339 (2011).

Failure to object. — When the defendant was charged with, inter alia, child molestation, and the trial court, pursuant to O.C.G.A. § 17-8-54, excluded certain individuals from the courtroom when the victims testified, including members of the defendant's immediate family, the defendant waived the defendant's appellate argument that this was, in effect, a total closure of the courtroom because the defendant did not object when the defendant's family members were excluded. Hunt v. State, 268 Ga. App. 568, 602 S.E.2d 312 (2004).

Because the defendant failed to object to the exclusion of the defendant's parents from the courtroom, and the failure did not amount to plain error, the appeals court rejected the defendant's contentions on appeal that O.C.G.A. § 17-8-54 was violated as was the defendant's right to public trial; moreover, the appeals court declined to extend the plain error doctrine to the instant facts. Delgado v. State, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

Defendant waived any challenge to the trial court's exclusion of the defendant's family during the victim's testimony by failing to object. Waiver aside, the challenge lacked merit, as the defendant could not show the alleged error harmed the defendant. Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013).

Closed proceedings proper. — Trial court did not violate the defendant's Sixth Amendment right to a public trial by closing the child molestation proceedings for the child victim's testimony; O.C.G.A. § 17-8-54 permitted partial closure of the court room when a person under the age of 16 testified about a sex offense; the victim, age seven, was testifying about a sex offense, and § 17-8-54 did not violate the Sixth Amendment. Goldstein v. State, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, No. S07C0623, 2007 Ga. LEXIS 338 (Ga. 2007).

Trial court did not abuse the court's discretion by partially closing the courtroom during the victims' testimonies because the trial court limited the closure by allowing the defendant, the attorneys for the defense and the state, immediate families or guardians of the victims, immediate families or guardians of the defendant, the attorneys' employees, officers of the court, sheriff's deputies, and any members of the press to remain in the courtroom, which was acceptable pursuant to the Sixth Amendment. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS

1027 (Ga. 2012), appeal dismissed, 2020 U.S. App. LEXIS 3372 (11th Cir. Ga. 2020).

Trial court properly cleared the courtroom while the two minor victims testified at the defendant's trial for child molestation as O.C.G.A. § 17-8-54 authorized the trial court to clear the courtroom and, to the extent the trial court improperly required persons excepted from § 17-8-54 to leave as well, the defendant waived appellate review by not objecting. Tolbert v. State, 321 Ga. App. 637, 742 S.E.2d 152 (2013).

Waiver of constitutionality argument. — By failing to challenge the constitutionality of O.C.G.A. § 17-8-54 until after the child victim testified, the defendant waived the right to argue on appeal that the statute violated the defendant's constitutional right to a public trial. Craven v. State, 292 Ga. App. 592, 664 S.E.2d 921 (2008), cert. denied, No. S08C1939, 2008 Ga. LEXIS 935 (Ga. 2008).

Harmless error. — Although the trial court violated O.C.G.A. § 17-8-54 in removing the defendant's immediate family from the courtroom while the victim testified, the error was harmless. Other evidence, including testimony by the victim's family members, a pediatrician, a child protective services worker, a nurse, and a psychotherapist, supported the conviction. Craven v. State, 292 Ga. App. 592, 664 S.E.2d 921 (2008), cert. denied, No. S08C1939, 2008 Ga. LEXIS 935 (Ga. 2008).

Cited in Donaldson v. State, 255 Ga. App. 451, 565 S.E.2d 486 (2002).

RESEARCH REFERENCES

ALR. — Determination of request for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer — issues of proof, consideration of alternatives, and scope of closure, 32 A.L.R.6th 171.

Basis for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer, 33 A.L.R.6th 1.

17-8-55. Testimony of child less than 17 years old outside physical presence of accused.

(a) As used in this Code section, the term "child" means an individual who is under 17 years of age.

(b) This Code section shall apply to all proceedings when a child is a witness to or an alleged victim of a violation of Code Section 16-5-1, 16-5-20, 16-5-23, 16-5-23.1, 16-5-40, 16-5-70, 16-5-90, 16-5-95, 16-6-1, 16-6-2, 16-6-3, 16-6-4, 16-6-5, 16-6-5.1, 16-6-11, 16-6-22, 16-6-22.1, 16-6-22.2, 16-8-41, or 16-15-4.

(c) The court, upon the motion of the prosecuting attorney or the parent, legal guardian, or custodian of a child, or on its own motion, shall hold an evidentiary hearing to determine whether a child shall testify outside the physical presence of the accused. Such motion shall be filed, or requested by the court, at least ten days prior to trial unless the court shortens such time period for good cause, as it deems just under the circumstances.

(d) The court may order a child to testify outside the physical presence of the accused, provided that the court finds by a preponder-

ance of the evidence that such child is likely to suffer serious psychological or emotional distress or trauma which impairs such child's ability to communicate as a result of testifying in the presence of the accused. In determining whether a preponderance of the evidence has been shown, the court may consider any one or more of the following circumstances:

(1) The manner of the commission of the offense being particularly heinous or characterized by aggravating circumstances;

(2) The child's age or susceptibility to psychological or emotional distress or trauma on account of a physical or mental condition which existed before the alleged commission of the offense;

(3) At the time of the alleged offense, the accused was:

(A) The parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time; or

(B) A person who maintains or maintained an ongoing personal relationship with such child's parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time and the relationship involved the person living in or frequent and repeated presence in the same household or premises as the child;

(4) The alleged offense was part of an ongoing course of conduct committed by the accused against the child over an extended period of time;

(5) A deadly weapon or dangerous instrument was used during the commission of the alleged offense;

(6) The accused has inflicted serious physical injury upon the child;

(7) A threat, express or implied, of physical violence to the child or a third person if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;

(8) A threat, express or implied, of the incarceration of a parent, relative, or guardian of the child, the removal of the child from the family, or the dissolution of the family of the child if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;

(9) A witness other than the child has received a threat of physical violence directed at such witness or to a third person by or on behalf of the accused, and the child is aware of such threat;

(10) The accused, at the time of the inquiry:

(A) Is living in the same household with the child;

(B) Has ready access to the child; or

(C) Is providing substantial financial support for the child; or

(11) According to expert testimony, the child would be particularly susceptible to psychological or emotional distress or trauma if required to testify in open court in the physical presence of the accused.

(e) A court order allowing or not allowing a child to testify outside the physical presence of the accused shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of such testimony shall:

(1) State the method by which such child shall testify;

(2) List any individual or category of individuals allowed to be in the presence of such child during such testimony, including the individuals the court finds contribute to the welfare and well-being of the child during his or her testimony;

(3) State any special conditions necessary to facilitate the cross-examination of such child;

(4) State any condition or limitation upon the participation of individuals in the child's presence during such child's testimony;

(5) Provide that the accused shall not be permitted to be in the physical presence of a child during his or her testimony if the accused is pro se;

(6) Provide that if counsel for the accused or the accused is precluded from being physically present during the child's testimony, then the prosecuting attorney shall likewise be precluded from being physically present; and

(7) State any other condition necessary for taking or presenting such testimony.

(f) The method used for allowing a child to testify outside the physical presence of the accused shall allow the judge, jury, and accused to observe the demeanor of the child as if he or she were testifying in the courtroom. When such testimony occurs it shall be transmitted to the courtroom by any device or combination of devices capable of projecting a live visual and oral transmission, including, but not limited to, a

two-way closed circuit television broadcast, an Internet broadcast, or other simultaneous electronic means. The court shall ensure that:

(1) The transmitting equipment is capable of making an accurate transmission and is operated by a competent operator;

(2) The transmission is in color and the child is visible at all times;

(3) Every voice on the transmission is audible and identified;

(4) The courtroom is equipped with monitors which permit the jury, the accused, and others present in the courtroom to see and hear the transmission; and

(5) The image and voice of the child, as well as the image of all other persons other than the operator present in the testimonial room, are transmitted live.

History. — Code 1981, § 17-8-55, enacted by Ga. L. 2014, p. 205, § 1/HB 804; Ga. L. 2019, p. 74, § 2-6/SB 158.

The 2019 amendment, effective July 1, 2019, deleted "16-6-14," following "16-6-11," in subsection (b). See Editor's note for applicability.

Editor's notes. — Former Code Section 17-8-55, relating to judge's expression of opinion as to matters proved or guilt of accused, was redesignated as Code Section 17-8-57 by Ga. L. 1985, p. 1190, § 1.

Ga. L. 2014, p. 205, § 1/HB 804, effective July 1, 2014, repealed former Code Section 17-8-55, pertaining to testimony of child ten years old or younger by closed circuit television, and enacted the present Code section. The former Code section was based on Ga. L. 1985, p. 1190, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 1377, § 1.

Ga. L. 2019, p. 74, § 1-1/SB 158, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Anti-Human Trafficking Protective Response Act.'"

Ga. L. 2019, p. 74, § 3-1/SB 158, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2019, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2019, shall be governed by the statute in effect at the time of such offense, and any resulting conviction shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction."

Law reviews. — For article on the 2014 enactment of this Code section, see 31 Ga. St. U.L. Rev. 75 (2014). For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 63 (2019).

For comment, "Child Sexual Abuse: A New Decade for the Protection of Our Children?," see 39 Emory L.J. 581 (1990).

JUDICIAL DECISIONS

Waiver of confrontation clause claim. — Trial counsel did not provide ineffective assistance under Ga. Const. 1983, Art. I, Sec. I, Para. XIV by failing to object when the trial court allowed a partition to be placed between the defendant and the children, allegedly in violation of U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV, when the children testified in the molestation case; the defendant waived the confrontation claim since the defendant arranged for the partition in order to head off the state's request for testimony via closed-circuit television pursuant to O.C.G.A. § 17-8-55, and defense counsel's failure to object, therefore, could not be challenged because this fell into the realm of strategy. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007), overruled on other

grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Cited in Kuptz v. State, 179 Ga. App. 150, 345 S.E.2d 670 (1986); Martin v. State, 205 Ga. App. 591, 422 S.E.2d 876 (1992).

RESEARCH REFERENCES

ALR. — Closed-circuit television witness examination, 61 A.L.R.4th 1155.

Determination of request for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer — issues of proof, consideration of alternatives, and scope of closure, 32 A.L.R.6th 171.

Basis for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer, 33 A.L.R.6th 1.

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 198 et seq.

17-8-56. Writing out and reading of charge to jury; filing of charge; furnishing of copies of charge.

(a) The judges of the superior, state, and city courts shall, when the counsel for either party requests it before argument begins, write out their charges and read them to the jury; and it shall be error to give any other or additional charge than that so written and read.

(b) The charge so written out and read shall be filed with the clerk of the court in which it was given and shall be accessible to all persons interested in it. The clerk shall give certified copies of the charge to any person applying therefor, upon payment of the usual fee.

(c) This Code section shall not apply when there is an official stenographer or reporter of the court in attendance thereon who takes down in shorthand and writes out the full charge of the trial judge in the case upon the direction of court.

History. — Ga. L. 1860, p. 42, §§ 1, 2; Code 1863, §§ 240, 241; Code 1868, §§ 234, 235; Code 1873, §§ 244, 245; Ga. L. 1877, p. 13, § 1; Ga. L. 1878-79, p. 150, § 1; Code 1882, §§ 244, 245; Civil Code 1895, §§ 4318, 4319; Penal Code 1895, §§ 1030, 1031; Ga. L. 1897, p. 41, § 1; Civil Code 1910, §§ 4847, 4848; Penal Code 1910, §§ 1056, 1057; Code 1933, §§ 81-1102, 81-1103; Ga. L. 1943, p. 262, § 1; Ga. L. 1983, p. 884, § 3-21; Code 1981, § 17-8-56, as redesignated by Ga. L. 1985, p. 1190, § 1.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-5.

Editor's notes. — Former Code Section 17-8-54 was redesignated as this Code section by Ga. L. 1985, p. 1190, § 1.

JUDICIAL DECISIONS

Analysis

General Consideration
Practice and Procedure
Appellate Review

General Consideration

Purpose of reducing charge to writing and reading charge to jury. — Principal object in requiring the charge to be reduced to writing and read as written to the jury, and then filed with the clerk of the court, is to prevent disputes between the judge and counsel as to what was the charge. Moyers v. State, 61 Ga. App. 324, 6 S.E.2d 438 (1939).

Provisions of this section are mandatory. Strickland v. State, 6 Ga. App. 536, 65 S.E. 300 (1909); Walker v. State, 10 Ga. App. 85, 72 S.E. 531 (1911); Brindle v. State, 17 Ga. App. 741, 88 S.E. 460 (1916); Roberts v. State, 59 Ga. App. 115, 200 S.E. 474 (1938).

Refusal to comply with statute is ground for reversal. Strickland v. State, 6 Ga. App. 536, 65 S.E. 300 (1909); Walker v. State, 10 Ga. App. 85, 72 S.E. 531 (1911); Brindle v. State, 17 Ga. App. 741, 88 S.E. 460 (1916).

Effect of § 15-14-3. — Former Code 1882, §§ 244, 245 (see O.C.G.A. § 17-8-56) was not repealed by former Code 1933, § 24-3102 (see O.C.G.A. § 15-14-3) providing for the appointment of an official court reporter. Bowden v. Achor, 95 Ga. 243, 22 S.E. 254 (1895); Brindle v. State, 17 Ga. App. 741, 88 S.E. 460 (1916).

Judge must charge all law on the subject that is material and applicable. — When a judge undertakes to charge the law on any subject the judge must charge all of the law which is material and applicable to the case. Clinton v. State, 41 Ga. App. 661, 154 S.E. 377 (1930).

Reading of Code section as charge. — It is sufficient compliance if the judge reads the section verbatim from the Code itself, noting accurately in the judge's charge the section so read. Walton v. State, 17 Ga. App. 375, 86 S.E. 1072 (1915).

Sufficiency of notation when Code section read as charge. — Notation as to the Code section read must be accurate. Walker v. State, 8 Ga. App. 214, 68 S.E. 873 (1910); Hays v. State, 10 Ga. App. 823, 74 S.E. 314 (1912), later appeal, 14 Ga. App. 604, 81 S.E. 914 (1914); Whitaker v. State, 11 Ga. App. 208, 75 S.E. 258 (1912).

When the notations made in a written charge leave in doubt what statute was read to the jury, a new trial will be granted if the evidence does not demand the verdict. Walker v. State, 8 Ga. App. 214, 68 S.E. 873 (1910); Hays v. State, 10 Ga. App. 823, 74 S.E. 314 (1912), later appeal, 14 Ga. App. 604, 81 S.E. 914 (1914).

Charge as to lesser included crimes. — Written application must be made to the trial judge at or before the close of the evidence, requesting a charge on lesser crimes that are included in those set forth in the indictment or accusation, and the trial judge's failure to do so, without a written request, is not error. Cross v. State, 150 Ga. App. 206, 257 S.E.2d 330 (1979).

Cited in Homer v. State, 6 Ga. App. 667, 65 S.E. 701 (1909); Walton v. State, 33 Ga. App. 48, 125 S.E. 511 (1924); Smith v. State, 65 Ga. App. 66, 15 S.E.2d 272 (1941); White v. State, 151 Ga. App. 559, 260 S.E.2d 554 (1979).

Practice and Procedure

Use of recess to write out charges. — Judge should take a recess, if necessary, to secure time to write out the judge's charges. Homer v. State, 6 Ga. App. 667, 65 S.E. 701 (1909).

Additional instruction when instructions have not been reduced to writing on request of counsel. — When the trial court, without the request of counsel for the defendant or for the state, wrote out the court's instructions to the jury, and, without reading such instructions to the jury, announced to the jury that such was the court's written charge, and had the bailiff hand the charge to a juror, who took the charge with the juror to the jury room and, just as the jury was in the act of retiring to consider the jury's verdict, the trial court gave an additional charge, such an action was not error as contravening that portion of this section which prohibits the giving of additional charges to the jury when the trial court has, on request of counsel, reduced the court's charge to writing. Woodard v. State, 91 Ga. App. 374, 85 S.E.2d 723 (1955).

Additional charge given upon request of the jury. — If the prisoner's counsel requests the court to give the court's charge to the jury in writing, and after complying with the request, the court gives orally additional charges, it is cause for a new trial, although the additional charges are given upon a request of the jury for further instruction. Jones v. State, 63 Ga. 456 (1879); Willis v. State, 89 Ga. 188, 15 S.E. 32 (1892).

When the jury returns and asks for additional instruction which the court gives, in part from the original written charge and in part outside thereof, and refiles the original charge and reduces the part of the recharge given outside of the original charge to writing and then reads the charge to the jury, and files the charge with the clerk, the court has not committed reversible error. Moyers v. State, 61 Ga. App. 324, 6 S.E.2d 438 (1939).

As to what is not an additional charge, see Dowling v. State, 7 Ga. App. 613, 67 S.E. 697 (1910).

Delay in filing charges is not necessarily reversible error. — Under this section failure to immediately file the written charge is not error. The only requirement of this section is that when requested, the charge be written out and read by the judge as written, and filed with the clerk so as to be accessible to all persons interested in the charge. Sherwood v. State, 33 Ga. App. 49, 125 S.E. 512 (1924).

When it appears that the charge has been duly filed in the clerk's office, the fact that the charge was retained by the trial court for some time prior thereto is not necessarily error requiring reversal. Fitzgerald v. State, 82 Ga. App. 521, 61 S.E.2d 666 (1950).

Failure to file instructions not given on request of a party. — When the trial judge, without the request of counsel for either the defendant or the state, writes out an instruction to the jury, and does not have the charge filed with the clerk of the court, such inaction constitutes no violation of the provisions of this section as this section requires the trial court to file only those charges to the jury which have been reduced to writing upon the timely request of counsel for one of the parties. Woodard v. State, 91 Ga. App. 374, 85 S.E.2d 723 (1955).

Failure to show on appeal that requested charge not substantially covered by charge given. — If error is assigned upon a refusal of the trial judge to give certain requested instructions to the jury, and it is not shown that the request was not substantially covered by the charge given by the court, and the entire charge is not brought up, the court on appeal is unable to determine whether such refusal was erroneous or not. Perdue v. State, 17 Ga. App. 299, 86 S.E. 661 (1915).

Part of charge may be inapplicable. — It is not usually cause for new trial that entire Code section is given even though part of the charge may be inapplicable under the facts in evidence. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Charge need not be given in exact language of request. — Charge is to be considered as a whole, and when the charge covers the subject matter of the request, it is not error although not in the exact language of the request. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Consideration of entire charge. — Charge of the court must always be considered as a whole in determining whether a particular portion thereof amounts to harmful or reversible error; and, when the charge as a whole substantially presents issues in such a way as is not likely to confuse the jury even though a portion of the charge may not be as clear and precise as could be desired, an appellate court will not reverse a verdict authorized by the evidence. Ideal Pool Corp. v. Champion, 157 Ga. App. 380, 277 S.E.2d 753 (1981).

Language used in charge. — In absence of request, court's failure to define meaning of terms used in charge is not ordinarily ground for reversal. Parker v. State, 157 Ga. App. 521, 278 S.E.2d 99 (1981).

Language which is appropriate when contained in opinion by reviewing court may be improper when embodied in jury

Practice and Procedure (Cont'd)

charge. Lofton v. State, 157 Ga. App. 447, 278 S.E.2d 94 (1981).

Charge in a justification defense. — Jury instruction that "where the defense of justification is offered, it is the duty of the jury to consider it along with all the testimony in this case, and if the evidence, taken as a whole, raises reasonable doubt in the mind of the jury of the defendant's guilt, then you should acquit him" did not shift the burden of proof in the defendant's case; however, this charge should not be given in the future. Though not burden-shifting, the charge could have the possibility of being confusing in a close case. Preston v. State, 282 Ga. 210, 647 S.E.2d 260 (2007).

Essential elements of crime must be charged. — When certain legal offenses (i.e., felony, murder) constitute elements of the crime charged (i.e., criminal solicitation), even in the absence of a request to so charge, the trial court errs in failing to provide the jury with the legal definitions of the elemental crimes. The court will not presume, in the absence of a proper instruction from the court, that a jury is cognizant of the legal definition of an underlying offense and will apply the appropriate legal standard in deciding the case. Essuon v. State, 286 Ga. App. 869, 650 S.E.2d 409 (2007).

Slip of the tongue in giving charge not reversible error. — Mere verbal inaccuracy in a charge, which results from a palpable slip of the tongue, and clearly could not have misled or confused the jury, is not reversible error. Gober v. State, 247 Ga. 652, 278 S.E.2d 386 (1981).

Transcribing of charge by court reporter obviates section's requirements. — When trial court failed to file with court clerk the court's written charge as read to the jury, but had an official court reporter take down the full charge, transcribe the charge, and include the charge as part of the trial transcript, the requirement of O.C.G.A. § 17-8-56 that the charge be filed with the clerk of the court was obviated. Simmons v. State, 172 Ga. App. 695, 324 S.E.2d 546 (1984).

Appellate Review

In order to preserve the issue of proper jury instruction for appeal, the defendant must object to a charge or state that the defendant reserves the objections. Robinson v. State, 176 Ga. App. 18, 335 S.E.2d 303 (1985).

Charge in terms of "the law presumes" not automatically reversible error. — While the Supreme Court has expressly disapproved of criminal jury instruction cast in terms of "the law presumes" the use of such terminology does not automatically lead to reversal; rather, the entire charge must be examined to determine whether a reasonable juror could interpret the charge as (1) creating a conclusive presumption or (2) burden shifting. Wells v. State, 247 Ga. 792, 279 S.E.2d 213 (1981).

Refusal to charge on issue not raised by evidence. — If evidence at trial does not raise the issue, the trial court does not err in refusing to charge on voluntary manslaughter. Larkin v. State, 247 Ga. 586, 278 S.E.2d 365 (1981).

Charge permissible as to inference to be drawn from acts of defendant. — Trial court's charge that the jury could infer that the acts of a person of sound mind and discretion are the products of a person's will and that the jury could infer that a person of sound mind and discretion intends the natural and probable consequences of a person's acts, but that whether or not the jury made any such inference was a matter solely within the jury's discretion, was not impermissibly burden shifting since such instruction not only told the jury what the law presumed but also informed the jury that the jury had a choice. Duke v. State, 158 Ga. App. 71, 279 S.E.2d 476 (1981).

RESEARCH REFERENCES

C.J.S. — 89 C.J.S. (Rev), Trial, §§ 573, 574, 727 et seq.

ALR. — Duty of court in criminal case, in absence of request, to charge with respect to circumstantial evidence, 15 A.L.R. 1049.

Failure of instruction on reasonable doubt to include phrase "lack of evidence"

or equivalent as reversible error, 67 A.L.R. 1372.

Propriety of instruction in criminal case as to the importance of enforcement of law, or duty of jury in that regard, 124 A.L.R. 1133.

Propriety and effect, in criminal case, of use of alias of accused in instructions to jury, 87 A.L.R.2d 1217.

Propriety of specific jury instructions as to credibility of accomplices, 4 A.L.R.3d 351.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon, 12 A.L.R.3d 832.

Propriety of reference, in instruction in criminal case, to jurors' duty to God, 39 A.L.R.3d 1445.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense, 15 A.L.R.4th 118.

17-8-57. Expression or intimation of opinion by judge as to matters proved or guilt of accused.

(a)(1) It is error for any judge, during any phase of any criminal case, to express or intimate to the jury the judge's opinion as to whether a fact at issue has or has not been proved or as to the guilt of the accused.

(2) Any party who alleges a violation of paragraph (1) of this subsection shall make a timely objection and inform the court of the specific objection and the grounds for such objection, outside of the jury's hearing and presence. After such objection has been made, and if it is sustained, it shall be the duty of the court to give a curative instruction to the jury or declare a mistrial, if appropriate.

(b) Except as provided in subsection (c) of this Code section, failure to make a timely objection to an alleged violation of paragraph (1) of subsection (a) of this Code section shall preclude appellate review, unless such violation constitutes plain error which affects substantive rights of the parties. Plain error may be considered on appeal even when a timely objection informing the court of the specific objection was not made, so long as such error affects substantive rights of the parties.

(c) Should any judge express an opinion as to the guilt of the accused, the Supreme Court or Court of Appeals or the trial court in a motion for a new trial shall grant a new trial.

History. — Laws 1850, Cobb's 1851 Digest, p. 462; Code 1863, § 3172; Code 1868, § 3183; Code 1873, § 3248; Code 1882, § 3248; Civil Code 1895, § 4334; Penal Code 1895, § 1032; Civil Code 1910, § 4863; Penal Code 1910, § 1058; Code 1933, § 81-1104; Code 1981, § 17-8-55; Code 1981, § 17-8-57, as redesignated by Ga. L. 1985, p. 1190, § 1; Ga. L. 2015, p. 1050, § 1/SB 99.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-7.

Editor's notes. — Former Code Section 17-8-55 was redesignated as this Code section by Ga. L. 1985, p. 1190, § 1.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001). For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For annual survey of criminal law,

see 57 Mercer L. Rev. 113 (2005). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For annual survey of law on criminal law, see 62 Mercer L. Rev. 87 (2010). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 91 (2015). For annual survey of criminal law, see 67 Mercer L. Rev. 31 (2015).

For comment on Sanders v. State, 66 Ga. App. 128, 17 S.E.2d 251 (1941), see 4 Ga. B.J. 51 (1942). For comment on Brock v. State, 91 Ga. App. 141, 85 S.E.2d 177 (1954), holding that a statement by the trial judge designating a witness as an accomplice is a violation by the trial court of the inhibition against an expression by the trial judge as to what has been proved, see 17 Ga. B.J. 501 (1955).

JUDICIAL DECISIONS

Analysis

General Consideration
Inquiries by the Judge
Rulings by the Judge
Jury Charges and Curative Instructions
Necessity for Objection or Motion

General Consideration

Purpose. — Reason for this section prohibiting the judge from intimating the judge's opinion as to what has been proved is to keep the jury from being influenced, not to keep the judge from making up the judge's own mind. Morton v. State, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

Purpose of the legal inhibition against the expression or intimation of opinion by the judge is to protect a defendant in the defendant's weakness, as well as in the defendant's strength, and to preserve inviolate the priceless right of trial by jury. Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976).

O.C.G.A. § 17-8-57 is limited to remarks made before the jury. See Dukes v. State, 186 Ga. App. 773, 369 S.E.2d 257 (1988); In re S.U., 232 Ga. App. 798, 503 S.E.2d 66 (1998); Miller v. State, 243 Ga. App. 764, 533 S.E.2d 787 (2000).

When the specific comments of the judge complained of by the defendant were made outside the presence of the jury, there was no violation of O.C.G.A. § 17-8-57. Smith v. State, 236 Ga. App. 122, 511 S.E.2d 223 (1999).

Trial court did not err in allowing the state a recess to review a point of law and by offering to allow a recess for the state to subpoena a missing file as the scope of O.C.G.A. § 17-8-57 is confined to matters occurring before the jury; here, outside of the presence of the jury, the trial court impartially offered both sides opportunities to present their evidence in a manner that would best give legally admissible, efficient, and comprehensible testimony to the jury. Ingram v. State, 286 Ga. App. 662, 650 S.E.2d 743 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Trial judge's comments about venue and an open-container charge did not violate O.C.G.A. § 17-8-57 because the comments were made outside the jury's presence, the case was reopened without any reference to the judge's opinion, and the questions were then presented to the jury. Thus, there was no indication that the judge's comments in any way influenced, or even could have influenced, the jury. Davenport v. State, 308 Ga. App. 140, 706 S.E.2d 757 (2011).

Appellant's plea counsel's failure to object to comments made by the trial judge during the plea hearing, comments which the appellant argued violated O.C.G.A. § 17-8-57, was not ineffective assistance; such an objection would have been meritless because § 17-8-57 only applied if a jury was present. Rhodes v. State, 296 Ga. 418, 768 S.E.2d 445 (2015), overruled on other grounds by Collier v. State, 834 S.E.2d 769, 2019 Ga. LEXIS 708 (Ga. 2019).

Trial court's comments on the evidence did not violate O.C.G.A. § 17-8-57 be-

cause it was made outside the presence of the jury. Powell v. State, 352 Ga. App. 14, 833 S.E.2d 602 (2019).

Comments four years after verdict. — Judge's comment on the latent fingerprint cards, four years after the verdict, was not an opinion on guilt in violation of O.C.G.A. § 17-8-57. Moore v. State, 293 Ga. 676, 748 S.E.2d 419 (2013).

When § 17-8-57 violated. — O.C.G.A. § 17-8-57 is only violated when the court's charge assumes certain things as facts and intimates to the jury what the judge believes the evidence to be. Mullinax v. State, 255 Ga. 442, 339 S.E.2d 704 (1986); Williams v. State, 257 Ga. 788, 364 S.E.2d 569 (1988); Stephens v. State, 185 Ga. App. 825, 366 S.E.2d 211 (1988), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020); Turner v. State, 259 Ga. 873, 388 S.E.2d 857 (1990); Fletcher v. State, 197 Ga. App. 112, 397 S.E.2d 605 (1990); Blackmon v. State, 197 Ga. App. 133, 397 S.E.2d 728 (1990).

When a habeas court found the trial court violated O.C.G.A. § 17-8-57 and that appellate counsel was ineffective for failing to raise the issue on appeal, it was error for the habeas court to order that the defendant was entitled to a new appeal as: (1) this violated the rule that a criminal defendant was not entitled to a second appeal; (2) wasted judicial resources as an appeal required the appellate court to engage in the same analysis the habeas court had just performed; and (3) created the possibility, realized in this case, that an appellate court would be presented with a matter outside of the court's jurisdiction, as appeals of decisions of a habeas court were the sole province of the Georgia Supreme Court. Milliken v. Stewart, 276 Ga. 712, 583 S.E.2d 30 (2003).

On appeal from an aggravated assault conviction, because the trial judge improperly commented on the evidence in violation of O.C.G.A. § 17-8-57 by telling the jury that the parties agreed that there was no gun involved in the incident, the comment amounted to reversible error entitling the defendant to a new trial. Brimidge v. State, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

O.C.G.A. § 17-8-57 is violated only when a court's charge assumes certain things as facts and intimates to the jury what the judge believes the evidence to be. Hargett v. State, 285 Ga. 82, 674 S.E.2d 261 (2009), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Violation of either the letter or spirit of O.C.G.A. § 17-8-57 constitutes reversible error. Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

It is error to violate even the spirit of this section. A violation thereof is a mandatory cause for a new trial. Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976).

No violation of the statute. — Defendant's conviction was affirmed because the trial court's questioning the conviction did not cross the line and violate O.C.G.A. § 17-8-57, but rather was interposed for the purposes of developing the truth in the case and of clarifying the witnesses' testimony. Littlejohn v. State, 320 Ga. App. 197, 739 S.E.2d 682 (2013).

Trial court did not violate O.C.G.A. § 17-8-57 when the court announced to a panel of the jury venire during preliminary instructions that the indicted offense of malice murder occurred in the subject county as the court was merely explaining what was alleged in the indictment against the defendant, not what had been proven. Lindsey v. State, 295 Ga. 343, 760 S.E.2d 170 (2014).

Trial counsel was not ineffective in failing to object to the court's ruling that the court's finding of criminal contempt could not be used to impeach the second victim's testimony because allowing the jury to be informed that the court had found the second victim to have testified falsely would have directly violated the principle that it was error for a judge in any criminal case to express or intimate the judge's opinion as to what had or had not been proved or as to the guilt of the accused. Green v. State, 299 Ga. 337, 788 S.E.2d 380 (2016).

Trial court's comment to potential jurors that the defendant was charged with the murder of the defendant's wife did not violate O.C.G.A. § 17-8-57 as the judge was explaining the nature of the case to help jurors determine if the jurors had been exposed to extensive media coverage.

General Consideration (Cont'd)

Smart v. State, 299 Ga. 414, 788 S.E.2d 442 (2016).

Trial court did not commit plain error or violate O.C.G.A. § 17-8-57 when the court reminded a victim during direct examination that the victim was "in the room" when a co-defendant uttered a threat as the trial court's restatement of what the victim had testified to and its immediately following question were designed not to express an improper opinion as to what had or had not been proved, but to elucidate the issues before the jury. Carter v. State, 343 Ga. App. 853, 805 S.E.2d 924 (2017), cert. denied, No. S18C0568, 2018 Ga. LEXIS 519 (Ga. 2018).

Defendant failed to show that any of the trial court's comments violated O.C.G.A. § 17-8-57 because the defendant's statement that it was taking a recess to provide the state an opportunity to talk with the witness was an exercise of the court's discretion to control the trial proceedings and not an expression of the court's opinion of the witness's credibility, the overall import of the trial court's statements about an officer's testimony was to explain to counsel why counsel had exhausted a particular line of question and why the court was directing counsel to move on to a different topic, and the judge's comments were meant to clarify the prior testimony of the sergeant. Thompson v. State, 349 Ga. App. 1, 825 S.E.2d 413 (2019).

Defendant was not entitled to a new trial because the trial court did not violate O.C.G.A. § 17-8-57 as the trial court's statement was a permissible clarification of a procedure that did not address the credibility of witnesses or any fact at issue in the trial and the defendant could not establish plain error. Elrod v. State, 354 Ga. App. 177, 840 S.E.2d 658 (2020).

Instruction on alternative defenses. — When the defendant also pursued the alternative defense that the defendant did not cause the gun to fire, the jury charge as given did not violate O.C.G.A. § 17-8-57 because it would not have been error for the trial court to directly tell the jury that the defendant admitted the shooting for purposes of the defenses of justification and accident. McLean v. State, 297 Ga. 81, 772 S.E.2d 685 (2015).

Rule inapplicable. — Trial court's admission of testimony from a victim of a prior aggravated assault and armed robbery was not subject to plain error review as the instant prosecution was not a death penalty case or action in which the trial judge expressed or intimated the judge's opinion as to the guilt of the accused or as to what had or had not been proved in violation of O.C.G.A. § 17-8-57. Brooks v. State, 281 Ga. 514, 640 S.E.2d 280 (2007).

Prejudicial character of remarks. — It is the prejudicial character of the remarks which constitutes the error. Morton v. State, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

Fact must be material for this section to apply. Jones v. State, 65 Ga. 621 (1880).

Failure to identify comment with particularity. — Defendants failed to show a violation of O.C.G.A. § 17-8-57, when the defendants failed to identify the challenged comment with any particularity. Gorman v. State, 318 Ga. App. 535, 734 S.E.2d 263 (2012).

When expression of opinion as to what has been proved is error. — It is error for the trial court to give an opinion as to what has been proved if the opinion goes to the essential question of guilt or innocence or if, although undisputed, it may be the subject of contrary inferences, and it is error to instruct the jury that there is no contention to the contrary even as to uncontradicted evidence when the defendant, by the defendant's plea of not guilty, has placed every material fact in issue. McFarland v. State, 109 Ga. App. 688, 137 S.E.2d 308 (1964).

Court of appeals did not err by finding that the trial court violated O.C.G.A. § 17-8-57 by expressing an opinion as to whether venue had been proven because following the prosecutor's attempt to elicit testimony from a salesperson as to the salesperson's store's location, the trial court asked the state if venue was established and commented that there had been some confusion since a salesperson had worked at one store and was working in another one, and that the court just

wanted to make sure; the comment "I just wanted to make sure," following the trial court's questioning of the salesperson, constituted an expression of opinion that venue had in fact been proven, and the plain language of § 17-8-57 provided for reversal of the entire case, not a portion thereof. State v. Anderson, 287 Ga. 159, 695 S.E.2d 26 (2010).

Comment on where crime occurred not improper. — It was not an impermissible statement by the trial court that the crime actually happened in a specific county or that the state properly indicted the defendant therein. Mitchell v. State, 337 Ga. App. 841, 789 S.E.2d 797 (2016), cert. denied, No. S17C0012, 2017 Ga. LEXIS 211 (Ga. 2017).

Although it was unusual and unnecessary for the trial court to explain an accomplice's plea deal to the potential jurors, the explanations were not a comment on the defendant's guilt, nor were the explanations comments on whether a fact had or had not been proved. The court summarized the terms of the accomplice's plea deal, the court did not tell the jury that the accomplice's testimony would be truthful, but rather stated accurately that the state's sentencing recommendation would depend on whether the accomplice's testimony was truthful in the state's opinion. Barboza v. State, No. S20A0404, 2020 Ga. LEXIS 470 (June 29, 2020).

Presumption of injury from erroneous opinion of proof or guilt. — Law conclusively presumes injury from the error of expressing an opinion as to proof or guilt, and the mandatory provisions of this section require reversal of the judgment of the trial court on proper assignment of error. Allen v. State, 194 Ga. 178, 21 S.E.2d 73, answer conformed to, 67 Ga. App. 607, 21 S.E.2d 280 (1942), overruled on other grounds, Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943).

Expression of opinion as to an uncontested and undisputed fact is not cause for reversal. Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577 (1990).

Trial court judge did not violate O.C.G.A. § 17-8-57 by questioning the defendant about a prior guilty plea that the defendant entered as the questioning involved matters that were not disputed; there was similarly no violation by the judge's questioning of the defendant's roommate as to why the defendant signed an affidavit indicating that cocaine found in their apartment belonged to the roommate, as the questioning only served to assist the defendant, and counsel's failure to object thereto indicated a lack of prejudice to the defendant. Branscomb v. State, 272 Ga. App. 700, 613 S.E.2d 222 (2005).

Trial court's statement to the jury in the defendant's felony murder and cruelty to children trial regarding the child victim's teething did not violate O.C.G.A. § 17-8-57 since the fact of the child's teething was undisputed; defendant testified that the defendant was told that the child was teething, and another witness testified that they were using medication to alleviate the child's teething discomfort. Sauerwein v. State, 280 Ga. 438, 629 S.E.2d 235 (2006).

Fact that an item seized from the defendant's person was cocaine was not contradicted at trial, and the defendant personally referred to the substance as cocaine. Therefore, the trial court's comment that Exhibit 1 "is the cocaine" as the court collected the evidence was not an improper comment on the evidence contrary to O.C.G.A. § 17-8-57, and any error was cured by an instruction to the jury that whether or not the substance was cocaine was for the jury to determine. Nelson v. State, 305 Ga. App. 65, 699 S.E.2d 66 (2010).

Expression of opinion on issue of fact is not harmless. — Provisions of this section are mandatory, and a charge which discloses the court's opinion on an issue of fact cannot be treated as harmless. Mitchell v. State, 89 Ga. App. 80, 78 S.E.2d 563 (1953).

Trial court violated O.C.G.A. § 17-8-57, requiring a reversal of the defendant's convictions, even though defense counsel did not object to the trial court's comments because a violation of § 17-8-57 was always "plain error." Murphy v. State, 290 Ga. 459, 722 S.E.2d 51 (2012).

Defendant was entitled to a new trial because by stating to the jury venire that the crime happened in Taylor County, Georgia, the trial court judge expressed or

General Consideration (Cont'd)

intimated the court's opinion as to a disputed issue of fact and thus violated O.C.G.A. § 17-8-57. Sales v. State, 296 Ga. 538, 769 S.E.2d 374 (2015).

An expression of opinion by the court with regard to what had or had not been proved cannot be deemed harmless. Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976).

Terms of O.C.G.A. § 17-8-57 are mandatory. — This section forbids a trial judge to express or intimate the judge's opinion as to what has or has not been proved, and declares that should the judge violate this section, the reversal of the case is mandatory. Demonia v. State, 69 Ga. App. 862, 27 S.E.2d 101 (1943).

There can be no finding of harmless error if a trial court violates O.C.G.A. § 17-8-57; thus, the law is well-established that instructions given to a jury by a trial court cannot cure a violation of § 17-8-57 and the Georgia Supreme Court disapproves any case law language intimating the contrary. Patel v. State, 282 Ga. 412, 651 S.E.2d 55 (2007).

Absolute guarantee of new trial. — Section gives to one accused of crime the absolute guarantee of a new trial in the event the accused is deprived of a fair and impartial trial because of error under that section committed by the judge before whom the accused is convicted. Allen v. State, 194 Ga. 178, 21 S.E.2d 73, answer conformed to, 67 Ga. App. 607, 21 S.E.2d 280 (1942), overruled on other grounds, Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943).

If O.C.G.A. § 17-8-57 is violated, even in clear case of guilt, new trial must be granted. — Even in a clear case of guilt, an appellate court has no other alternative, and the court desires no other, than to grant a new trial when the court comes to the conclusion that the right of the defendant to have the fact of the defendant's guilt or innocence determined exclusively by the jury has been in the slightest degree infringed by judicial intimation or expression. Cook v. State, 40 Ga. App. 125, 149 S.E. 79 (1929).

Regardless of correctness of verdict. — When a defendant has been deprived of a fair and impartial trial, the grant of a new trial is imperative, without reference to the correctness of the verdict. Cook v. State, 40 Ga. App. 125, 149 S.E. 79 (1929).

Expression of opinion on facts renders the grant of a new trial imperative, without reference to the correctness of the verdict. Golden v. State, 45 Ga. App. 501, 165 S.E. 299 (1932).

Disregard of this section on the part of a trial judge renders the grant of a new trial imperative, without reference to the correctness of the verdict. Allen v. State, 194 Ga. 178, 21 S.E.2d 73, answer conformed to, 67 Ga. App. 607, 21 S.E.2d 280 (1942), overruled on other grounds, Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943).

Remedy when jurors are prejudiced by remarks by officers of the court. — If the defendant is of the opinion that any remarks made by officers of the court might prejudice the jurors, the defendant's remedy is to purge the jury on the trial of the case. Robinson v. State, 86 Ga. App. 375, 71 S.E.2d 677 (1952).

Comments on scheduling and procedure. — Judge's comments at the outset of the trial that the judge would keep breaks as brief as possible and that, if the jury had not begun deliberations by Friday, it was possible the jury would have to return the following week were not intended to hurry the trial to a conclusion and did not indicate an opinion that the defendant was guilty. Johnson v. State, 222 Ga. App. 722, 475 S.E.2d 918 (1996).

Comments on venue. — Trial court's statement to the venire that the crime took place in Muscogee County expressed or intimated the court's opinion as to a disputed issue of fact at trial in violation of O.C.G.A. § 17-8-57, and entitled the defendant to a new trial. Rouse v. State, 296 Ga. 213, 765 S.E.2d 879 (2014).

Comments regarding pretrial procedure. — Although the trial court's comments to the jury venire three weeks prior to their service may have come close to commenting on the defendant's guilt or innocence, the comments were made to explain the procedure leading up to the jurors' service and, thus, did not necessitate a new trial. Hicks v. State, 326 Ga. App. 46, 755 S.E.2d 855 (2014).

Colloquy regarding expanding the indictment due to additional evidence. — Trial judge's explanation to a defendant's counsel that based on the counsel's questioning of an investigator regarding the defendant's statement to the investigator that the defendant lived in Florida, the judge was going to expand the indictment to include falsifying or concealing a material fact, which was one possible violation of O.C.G.A. § 16-10-20, when the defendant had only been charged with making a false statement, did not constitute an improper remark under O.C.G.A. § 17-8-57 because it was a colloquy with counsel regarding possible jury charges and did not express an opinion on what had or had not been proved. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, No. S12C0500, 2012 Ga. LEXIS 263 (Ga. 2012).

Comments about control and preventing a disturbance. — Court found no violation of O.C.G.A. § 17-8-57 because: (1) the trial court's comment, made in an effort to keep the proceedings under control and to prevent a disturbance, warning the defendant outside the presence of the jury that the defendant would be removed from the courtroom if the defendant could not stay under control, was not improper; and (2) the remaining comments were limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue in the trial, and thus, did not constitute a basis for reversal. Linson v. State, 287 Ga. 881, 700 S.E.2d 394 (2010).

Trial judge's comment, after excusing for cause a jury panel member who was a sworn police officer, that the judge had no discretion in the matter because of a prior appellate ruling, and that the judge disagreed with that ruling, did not constitute a statement of opinion either as to proof or as to guilt, and thus did not impermissibly bolster any witness's credibility. Najmaister v. State, 196 Ga. App. 345, 396 S.E.2d 71 (1990).

Judge's comments about defendant's desire to question all jurors. — When the record shows that the defendant's election to question all the jurors on the panel before starting to strike a jury prompted the trial court to comment to the jury, "Do not let it prejudice your minds against the defendant in any way whatsoever," nothing in the record showed that the defendant was in any way prejudiced by this remark. Davis v. State, 204 Ga. App. 657, 420 S.E.2d 349 (1992).

Court's statements regarding defendant's choice to proceed pro se were not improper. — None of the trial court's statements to the jury was an improper comment on the evidence because the record showed that the trial court explained to the jury that the defendant chose not to be present during jury selection, that the trial would proceed in the defendant's absence, that the defendant would have an opportunity to participate if the defendant changed the defendant's mind, that the defendant had been offered an attorney, and that the trial court had advised the defendant to accept the offer but the defendant had chosen self representation. Caldwell v. State, 273 Ga. App. 135, 614 S.E.2d 246 (2005).

Indirect reference to appellate process did not violate rule. — Trial judge's statement that the judge would "get reversed probably" if the judge failed to read the jury charge did not violate O.C.G.A. § 17-8-57(a)(1) because the statement did not suggest the judge believed the defendant would be found guilty and appeal but merely stressed the importance of the jury charge. DeLoach v. State, 308 Ga. 283, 840 S.E.2d 396 (2020).

Trial court's inadvertent statements that the allegations in the indictment were facts, that the indictment was evidence, that the jurors had to base the jurors' decision on what the attorneys said, and that the jurors were to report any evidence the jurors heard outside the courtroom did not constitute comments on the evidence. Atkins v. State, 253 Ga. App. 169, 558 S.E.2d 755 (2002).

Trial court's joking comment. — As the record showed that the trial court's joking comment was directed at a juror, and not the defendant, and defense counsel did not object to the statement, there was no violation of O.C.G.A. § 17-8-57. Abernathy v. State, 278 Ga. App. 574, 630 S.E.2d 421 (2006).

Trial court's rebuke of counsel. — No abuse of discretion resulted from the

General Consideration (Cont'd)

trial court's refusal to declare a mistrial after the court advised defense counsel to refrain from inappropriately interrupting the testimony of the medical examiner; moreover, the defendant failed to show by the record that the court's purportedly damaging rebuke constituted an expression of opinion on the case, especially when the court reminded the jury of the court's previous instruction not to consider any actions, comments, or opinions of the court in reaching a verdict. Buttram v. State, 280 Ga. 595, 631 S.E.2d 642 (2006).

Trial court's use of word "honey". — Trial court judge's use of the word "honey" to refer to an eight-year-old child victim while the victim was testifying was not an opinion of the victim's credibility and did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings. Moore v. State, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

Distinction between evidence and proof. — There is a difference between evidence and proof: evidence tends to establish or disprove an alleged matter of fact in issue; proof is the effect of evidence, while evidence is merely the means of making proof. A fact is not proved unless it is established. Jackson v. State, 177 Ga. 264, 170 S.E. 26 (1933).

Statement that there is no dispute about a fact in evidence does not express an opinion. McCloud v. State, 166 Ga. 436, 143 S.E. 558 (1928).

If there is no conflict in the evidence on a certain point the trial court may take the fact to have been admitted or proved as the case may be. McFarland v. State, 109 Ga. App. 688, 137 S.E.2d 308 (1964).

Trial court did not err under O.C.G.A. § 17-8-57 by referring to the composition of exhibits which contained cocaine and ecstasy because there was never any dispute at trial as to the composition of the exhibits. Foster v. State, 314 Ga. App. 642, 725 S.E.2d 777 (2012).

Court intimating opinion upon uncontested fact. — That the trial court intimates an opinion upon an uncontested and undisputed fact is not cause for a new trial as being in violation of this section. Abbott v. State, 91 Ga. App. 380, 85 S.E.2d 615 (1955).

O.C.G.A. § 17-8-57 inapplicable to facts conceded by both parties. — This section refers to the expression or intimation of an opinion touching some fact at issue involved in the case, and not to something that is conceded by both parties. Thomas v. State, 27 Ga. App. 38, 107 S.E. 418 (1921).

Assumption that fact is true when only one possible inference from evidence. — While the trial court may not under this section express an opinion as to what has been proved in the case, when only one inference is possible from the evidence it is not improper for the court to assume the fact to be true. Green v. State, 129 Ga. App. 27, 198 S.E.2d 343 (1973); Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974).

Stating an admitted fact does not constitute an expression or intimation of opinion. Swain v. State, 162 Ga. 777, 135 S.E. 187 (1926).

Comments by the court not plain error. — Since the fact that the victim's home was burglarized was not an issue in the case because the defendant put forth an alibi defense readily agreeing that the home had been burglarized, the court's comment about the home being "burglarized" did not constitute plain error. Archie v. State, 248 Ga. App. 56, 545 S.E.2d 179 (2001).

Defendant's claim that the trial court's comments on the credibility of the co-defendant failed as any error did not amount to plain error because the defendant failed to establish that the error affected the defendant's substantial rights given the strong evidence of guilt against the defendant, including the defendant's admission to being present for the shooting and admission to a fellow gang member that the defendant shot the victim. Harris v. State, 302 Ga. 832, 809 S.E.2d 723 (2018).

Instruction to counsel to keep closing argument relevant not improper. — In a defendant's trial for aggravated assault and other charges arising out of a road rage incident, the trial court did not violate O.C.G.A. § 17-8-57 by interrupt-

ing defense counsel's closing argument to request that counsel not stray into matters that were not relevant; the instruction that the arguments raised by defense counsel were not relevant was neither an expression of opinion nor a comment on the evidence. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

To assume state's evidence is the truth violates law. — To assume in a criminal case that the testimony for the state is the truth, though such testimony is not contradicted by evidence for the defendant, and to charge the jury that such testimony is the truth and that there is no contention to the contrary, is violative of this section and demands a new trial. Golden v. State, 45 Ga. App. 501, 165 S.E. 299 (1932).

Assumption by court that a crime has been committed. — If there is nothing in the evidence or in the defendant's statement to dispute the fact that the alleged crime was committed, and the defendant's defense rests solely upon the contention that the defendant did not participate in the offense, the court does not violate this section in assuming that a crime has been committed. Pruitt v. State, 36 Ga. App. 736, 138 S.E. 251 (1927).

Assumption that facts have been admitted, when plea of not guilty entered. — Plea of not guilty, by one accused of crime, is an express contention on the accused's part antagonistic to every fact necessary to be proved by the state in order to establish the accused's guilt. Unless the accused admits one or more of the facts which it devolves upon the state to prove, such facts must be established by evidence. To assume that an important fact in the case on trial has been admitted, and to so instruct the jury when no such admission has been made, is error requiring a new trial. Duke v. State, 43 Ga. App. 428, 158 S.E. 919 (1931).

Stressing the contentions of one party at the expense of an adversary may amount to such an intimation of opinion as to demand the grant of a new trial. Screven v. State, 169 Ga. 384, 150 S.E. 558 (1929).

Discussion of case between judge and counsel. — Question put by the judge in a colloquy between the judge and counsel on a question of the admissibility of certain evidence is not error. Davis v. State, 72 Ga. App. 631, 34 S.E.2d 672 (1945).

It is not reversible error for the judge, in discussing with counsel the admissibility of testimony, the propriety of a nonsuit, the direction of a verdict, or similar matters in the progress of the trial, or in explaining the judge's rulings upon questions of this nature, to refer to the evidence or to the statements of witnesses, provided the judge does not go out of the line of legitimate discussion upon the point presented, or use such language as to indicate apparent or actual judicial approval or disparagement of any witness or of any part of the testimony. Miller v. State, 122 Ga. App. 553, 177 S.E.2d 838 (1970); Jones v. State, 159 Ga. App. 634, 284 S.E.2d 651 (1981).

Inhibition against an expression or intimation of opinion by the trial judge as to the facts of the case does not extend to colloquies between the judge and counsel as to the admissibility of certain evidence, especially if the judge is ruling upon a point made by counsel for the accused. Bradley v. State, 137 Ga. App. 670, 224 S.E.2d 778, cert. denied, 429 U.S. 918, 97 S. Ct. 310, 50 L. Ed. 2d 284 (1976); Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444 (1981); Troutman v. State, 178 Ga. App. 314, 342 S.E.2d 785 (1986).

Trial court's reference to a witness's testimony during colloquy with counsel respecting an evidentiary ruling was not an impermissible expression of opinion. Mooney v. State, 221 Ga. App. 420, 471 S.E.2d 904 (1996).

Trial court simply admonishing defense counsel for questioning a witness about what the witness was asked in the witness's plea did not rise to the level of an expression or intimation of opinion by the judge as to matters proved or as to the guilt of the accused. Wooten v. State, 240 Ga. App. 725, 524 S.E.2d 776 (1999).

Discussion of evidence with counsel. — Statutory inhibition against an expression or intimation of opinion by the trial court as to the facts of the case does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Havard v. State,

General Consideration (Cont'd)

175 Ga. App. 798, 334 S.E.2d 381 (1985); Smith v. State, 189 Ga. App. 27, 375 S.E.2d 69 (1988); Whitt v. State, 215 Ga. App. 704, 452 S.E.2d 125 (1994); Aman v. State, 223 Ga. App. 309, 477 S.E.2d 431 (1996); Williams v. State, 244 Ga. App. 692, 536 S.E.2d 572 (2000).

Mere colloquies between counsel and the trial court regarding evidentiary issues do not violate O.C.G.A. § 17-8-57. Bryant v. State, 268 Ga. 664, 492 S.E.2d 868 (1997); Loveless v. State, 245 Ga. App. 555, 538 S.E.2d 464 (2000).

Trial court did not violate O.C.G.A. § 17-8-57 in explaining the basis for an evidentiary ruling outside the presence of the jury. Singleton v. State, 240 Ga. App. 240, 522 S.E.2d 734 (1999).

Trial court did not violate O.C.G.A. § 17-8-57 by qualifying an expert witness in the presence of the jury since the court later charged the jurors that it was the jury's function to determine the credibility or believability of the witnesses and that the court had not intended, by any ruling or comment made during the progress of the trial, to express any opinion upon the credibility of the witnesses. Davitt v. State, 257 Ga. App. 384, 571 S.E.2d 427 (2002).

Explanation of evidence. — Trial court's explanation of certain evidence given at trial as being an example of direct testimony or evidence did not amount to an improper comment by the trial court or an intimation of the court's opinion as to the defendant's guilt. Ridgeway v. State, 174 Ga. App. 663, 330 S.E.2d 916 (1985).

If the jury asked a question regarding specific evidence, it was proper for the trial court to instruct the jury that the jury must remember the evidence. Nealy v. State, 230 Ga. App. 747, 498 S.E.2d 119 (1998).

Comment on defendant's testimony. — Trial court's statement to the jury that the defendant "is about to testify as to I believe some bases for his change in testimony which you may have observed yesterday," followed with an instruction that the testimony should be considered solely for the purpose of explaining the change did not violate O.C.G.A. § 17-8-57. Nealy v. State, 239 Ga. App. 651, 522 S.E.2d 34 (1999).

Comment intimating court's opinion on credibility of witness. — Defendant was entitled to a new trial because the trial court erred in asking a witness whether the witness was lying or being truthful, intimating the court's opinion regarding the credibility of the witness's testimony. Williams v. State, 329 Ga. App. 706, 766 S.E.2d 474 (2014).

Comment's on witness's expertise. — Trial court's statement that a witness was an expert and was a frequent witness did not amount to plain error because the defendant failed to show a violation of O.C.G.A. § 17-8-57, much less an obvious error, as the comment indicated nothing about the defendant's guilt and did not likely affect the outcome of the trial. Hightower v. State, 304 Ga. 755, 822 S.E.2d 273 (2018).

Expression of opinion about witness's credibility. — Trial court violated O.C.G.A. § 17-8-57 by expressing the court's opinion about the credibility of a neighbor, who testified for the state at the defendant's trial, because the trial court's question and comment about the neighbor's testimony intimated the court's opinion that the testimony was believable since the neighbor was an independent witness, unrelated to any of the parties involved in the case; any reasonable juror, having heard the trial court's comments, could construe the comments as an expression of opinion on the neighbor's credibility, and the trial court's purported curative instruction did not eradicate the court's inappropriate comments. Callaham v. State, 305 Ga. App. 626, 700 S.E.2d 624 (2010).

Trial court violated O.C.G.A. § 17-8-57, requiring a reversal of the defendant's convictions because: (1) the jury could have interpreted the court calling a witness a "good detective" as expressing a favorable opinion of the witness's abilities and thus bolstering the witness's credibility; and (2) it was impossible to say the jurors were not influenced to some extent. Murphy v. State, 290 Ga. 459, 722 S.E.2d 51 (2012).

Trial court violated O.C.G.A. § 17-8-57, requiring a reversal of the defendant's

convictions because: (1) the jury could have construed the court's comments on an officer's use of a written document and the officer's "best efforts" as expressing an opinion that the officer's recollection of the defendant's statement was reliable or credible; and (2) it was impossible to say the jurors were not influenced to some extent. Murphy v. State, 290 Ga. 459, 722 S.E.2d 51 (2012).

Trial court's admonition to defense counsel and instructions to the jury to disregard defense counsel's challenge to an officer's credibility clearly intimated the court's opinion that the officer's testimony was believable and violated O.C.G.A. § 17-8-57, and the purported curative instruction did not eradicate the trial court's inappropriate comments. Wilson v. State, 325 Ga. App. 859, 755 S.E.2d 253 (2014).

Remarks not opinion. — Comment was clearly a preliminary reference to what the jury could expect to hear once the evidence began, and was not an unauthorized expression of an opinion by the trial court as to what actually had been proven in the case. Cammon v. State, 269 Ga. 470, 500 S.E.2d 329 (1998).

In defendant's shoplifting case, when the judge explained that the judge had directed a verdict on certain items because no evidence was presented that the items were stolen, the judge's explanation was not an expression of opinion on the remainder of the evidence in the case. Smith v. State, 275 Ga. App. 60, 619 S.E.2d 694 (2005).

Court of appeals erred by reversing the defendant's convictions for armed robbery because the trial court did not violate O.C.G.A. § 17-8-57 when the court did not express or intimate the court's opinion as to what had or had not been proved since the court's directive to prove venue was followed by a question as to whether venue had been proven; in order to violate § 17-8-57, the trial court's comments must pertain to a disputed issue of fact. State v. Gardner, 286 Ga. 633, 690 S.E.2d 164 (2010).

Trial court did not improperly express the court's opinion of the case in front of the jury in violation of O.C.G.A. § 17-8-57 because, although the trial judge told the prosecution that the prosecution needed another witness after venue was put into question, the only possible inference was that venue had not been proven. Furthermore, the trial court was within the court's discretion to limit the scope of the testimony of the following witness to the issue of venue as the prosecution had already rested the prosecutor's case; the trial court had discretion to propound the court's own questions to the witness; and the trial court never stated that the alleged crime took place in the county where the trial occurred and never expressed the court's opinion or commented on what had been proven. Smith v. State, 306 Ga. App. 693, 703 S.E.2d 329 (2010).

Trial court did not err when the court charged the jury by intimating the court's opinion as to the defendant's credibility, in violation of O.C.G.A. § 17-8-57, because, when the charge on impeachment was considered in context, no reasonable juror could have construed the charge as an expression of the trial court's own opinion that the defendant had been impeached or committed the alleged crimes. Moreover, the jury was instructed that the jury alone would decide whether the defendant was guilty of a crime. Pullen v. State, 315 Ga. App. 125, 726 S.E.2d 621 (2012).

Trial court did not intimate an opinion on any facts or any of the evidence in violation of O.C.G.A. § 17-8-57 because the court's comments to the jury were limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue. Ingram v. State, 290 Ga. 500, 722 S.E.2d 714 (2012).

Judge's friendly exchange with the assistant district attorney and a witness did not amount to an impermissible comment on the witness's credibility. Griffin v. State, 331 Ga. App. 550, 769 S.E.2d 514 (2015).

Court's comment on the obvious confusion between the prosecutor and a witness regarding the insurer's decision to cover the loss as opposed to its consent to the fire was not an opinion about what had or had not been proven. Frey v. State, 338 Ga. App. 583, 790 S.E.2d 835 (2016).

Judge's commenting on the materiality of certain evidence, questioning defense counsel about the purpose of a

General Consideration (Cont'd)

cross-examination, and observing that the case was "sloppily run" did not harm the defendant's right to a fair trial. Boyd v. State, 267 Ga. 453, 479 S.E.2d 724 (1997).

Judge's comments regarding appellate process violated statute. — Trial court violated O.C.G.A. § 17-8-57 by responding to the jury's request for "all of the evidence" that if the court gave the jury other items "it would be reversible error" and "we would have to try the case all over again"; these statements improperly referred to the availability of appellate review, intimating that the defendant was guilty and would need to appeal. Gibson v. State, 288 Ga. 617, 706 S.E.2d 412 (2011).

Remark assuming truth of controverted fact. — There was reversible error when the court's remark assuming the truth of a fact stated therein controverted a central theme of the defense. Sweat v. State, 173 Ga. App. 441, 326 S.E.2d 809 (1985).

Explanation as to delay of witness not expression of opinion. — Trial court's explanation to the jury that the delay of the witness was not willful and that the witness had been sent for but not arrested, thereby causing an early noon recess, did not constitute an expression of an opinion as to what had been proved or as to the guilt of the accused. Hendricks v. State, 157 Ga. App. 715, 278 S.E.2d 453 (1981).

When the trial court instructed the jury immediately after sending a witness out to listen to a tape recording of the witness's interview with the police, instructed the jury in the court's general charge that nothing the court said was to be construed as a comment on the evidence or the guilt or innocence of the defendant, and also instructed the jury that the purpose in postponing the examination of the witness was to control the progress of the trial and "make the orderly presentation of the case go a little bit faster," the instructions were proper and demonstrated that no comment made in the jury's presence was directed toward a material issue or relevant evidence in the case. Smith v. State, 236 Ga. App. 122, 511 S.E.2d 223 (1999).

Judge explaining ruling. — Remarks by judge assigning a reason for a ruling are neither an improper expression of opinion nor a comment on the evidence. McClain v. State, 267 Ga. 378, 477 S.E.2d 814 (1996), cert. denied, 521 U.S. 1106, 118 S. Ct. 2485, 138 L. Ed. 2d 993 (1997).

There was no violation of O.C.G.A. § 17-8-57 because the comment was explanatory of the trial court's ruling on the objection to the admission of testimony. Cammon v. State, 269 Ga. 470, 500 S.E.2d 329 (1998).

Trial court did not improperly comment upon the evidence at trial because the court's statements were clearly intended to explain the court's ruling on the state's objection to defense counsel's closing argument. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not state an opinion on an expert's testimony in violation of O.C.G.A. § 17-8-57 because the trial court exercised the court's judgment and discretion by stopping the testimony and explaining the court's evidentiary ruling to trial counsel. Ridley v. State, 290 Ga. 798, 725 S.E.2d 223 (2012).

Court limiting defendant's movement in courtroom. — Court could not conclude that a judge's brief explanation that the judge restricted the defendant's movement around the courtroom during trial amounted to a "continuing" or "constant" reminder that the defendant was detained at the time of trial; evidence that an accused was confined in jail for the offense at issue in a criminal trial did not place the defendant's character in evidence. Walker v. State, 259 Ga. App. 83, 576 S.E.2d 62 (2003).

Court's explanation to jury of purpose of Jackson-Denno hearing. — Trial court's explanation to the jury out of the presence of defense counsel regarding the purpose of a Jackson-Denno hearing did not constitute an expression of the court's opinion as to the the voluntariness of the defendant's statement. Harper v. State, 171 Ga. App. 57, 318 S.E.2d 787 (1984).

Ministerial comment. — Judge's comment to the jury that the case "should be very straightforward ... once we get the trial underway" was not an expression of

opinion regarding facts. Bradford v. State, 221 Ga. App. 232, 471 S.E.2d 248 (1996).

Judge's comments regarding pro se defendant's behavior in the courtroom were not comments directed toward a material issue or relevant evidence in the case. Flantroy v. State, 231 Ga. App. 744, 501 S.E.2d 10 (1998).

Judge's explanation that defendant absent due to disruptive behavior. — Trial court's statement explaining the defendant's absence from the courtroom because of disruptive behavior did not constitute an expression or intimation of the court's opinion as to the guilt of the accused. Williams v. State, 183 Ga. App. 373, 358 S.E.2d 914 (1987).

Court directing defendant to testify from counsel's table. — Trial court does not err in directing the defendant to testify from defense counsel's table, if the trial court does not express an opinion as to what has or has not been proved or as to the guilt of the defendant, as the conduct of the trial, especially matters of courtroom security, are matters within the discretion of the trial court. Lee v. State, 166 Ga. App. 644, 305 S.E.2d 175 (1983).

Judge's comments about defendant's cross-examination techniques proper. — Judge's informing a defendant in the defendant's capacity as cocounsel in defendant's own defense that the defendant could not make speeches while ostensibly cross-examining a state's witness and that the defendant should limit the defendant's remarks to asking questions was not violative of O.C.G.A. § 17-8-57. Powers v. State, 168 Ga. App. 642, 310 S.E.2d 260 (1983).

Although, in a criminal trial, a trial judge agreed with the prosecution that defense counsel's question mischaracterized a witness's plea bargain, the judge did not violate O.C.G.A. § 17-8-57 because: (1) the remark did not state or imply an opinion as to what had or had not been proved or as to a defendant's guilt; and (2) the remark merely exercised the judge's duty to manage the trial proceedings. White v. State, 315 Ga. App. 54, 726 S.E.2d 548 (2012).

Comment on demonstration by defense counsel. — Statements and questions by the court merely clarifying the nature of a demonstration by defense counsel and enunciating a correct statement of the law were not improper comments on the evidence. Rowe v. State, 266 Ga. 136, 464 S.E.2d 811 (1996).

Remark to jury about continuing deliberations. — Judge's statement to the jury "[a] lot of times when you sleep on it, things have a way of coming together" did not constitute an impermissible comment as to what had been proved or as to how the jury should find. Schwerdtfeger v. State, 167 Ga. App. 19, 305 S.E.2d 834 (1983).

Remarks as to introduction of evidence. — There was no error in a charge to the jury that "the state will introduce evidence in support of the charges contained in the indictment," since such statement did not predict that the state's evidence would establish the charges. Cook v. State, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Statement by the court as to what a witness has testified has been construed to be an intimation or expression of opinion as to what has been proven. Golden v. State, 45 Ga. App. 501, 165 S.E. 299 (1932).

Judge may state recollection as to what has been testified. — It is permissible for the trial judge to state the judge's recollection of what has been testified when in doing this the judge does not intimate any opinion. Saffold v. State, 11 Ga. App. 329, 75 S.E. 338 (1912).

Stating what witness testified to, when testimony material and prejudicial to accused. — Statement by the court to the jury as to what a witness has testified, when such testimony is material and prejudicial to the accused, is reversible error. Edwards v. State, 4 Ga. App. 167, 60 S.E. 1033 (1908).

Remarks tending to compliment or disparage witness. — Trial judge should not, in the hearing of the jury, make any remark tending to compliment or disparage a witness. Cole v. State, 6 Ga. App. 798, 65 S.E. 839 (1909).

Comment thanking officer not improper. — While the trial court's casual colloquy with witnesses should have been minimized in front of the jury, the trial

General Consideration (Cont'd)

court's merely thanking a law enforcement witness, as a courtesy, for the officer's service as a witness did not rise to the level of improperly intimating an opinion about the testimony of the witness. Foster v. State, 314 Ga. App. 642, 725 S.E.2d 777 (2012).

Statements of judge's own knowledge tending to exculpate witness. — It is reversible error for the judge to state facts of the judge's own knowledge, or as of the judge's own knowledge, tending to exculpate the witness from an offense charged against the witness, or tending to show that there were mitigating circumstances connected with the offense. Cole v. State, 6 Ga. App. 798, 65 S.E. 839 (1909).

Remark as to manner of cross-examination. — Statement of judge that certain evidence might be admissible on the idea of impeachment cannot be construed as expressing the opinion of the judge that the witness in question had been impeached by the evidence, particularly if the charge of the court did not contain any instructions upon the subject of the impeachment of witnesses. Cole v. State, 63 Ga. App. 418, 11 S.E.2d 239 (1940).

Judge's remark in regard to the cross-examination by counsel for the defendant of an alleged accomplice of the defendant that, "you put him under a severe cross-examination," is not an expression of opinion by the trial judge as to the severity of the cross-examination of the witness for the state. Gravitt v. State, 220 Ga. 781, 141 S.E.2d 893 (1965).

Judge stating hypothesis. — It is not error for the trial judge to merely state an hypothesis if the judge does not intimate any opinion as to guilt or innocence of the accused, especially if the jury is properly instructed that nothing said or done by the judge should influence the verdict. Mays v. State, 237 Ga. 907, 230 S.E.2d 282 (1976).

Comment on irrelevant evidence. — Statement that certain evidence, which is entirely irrelevant, has no probative value is not a violation of this section. Tanner v. State, 163 Ga. 121, 135 S.E. 917 (1926).

Comments drawing attention to evidence. — Judge did not improperly comment on evidence by referring to evidence that was introduced. The reference was not telling the jury what the evidence proved, but instead was merely drawing the jury's attention to evidence which was relevant to the next charge to be given. Slaton v. State, 224 Ga. App. 422, 480 S.E.2d 872 (1997).

Repetitive instructions by the trial court on four occasions, after defining charged offenses and lesser included offenses, as to the form of the verdict should the jury find the defendant guilty of an offense did not constitute an improper expression or intimation of guilt. Reid v. State, 232 Ga. App. 313, 501 S.E.2d 842 (1998).

For comment by court on qualifications of expert witness, see Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978), cert. denied, 439 U.S. 1102, 99 S. Ct. 881, 59 L. Ed. 2d 63 (1979).

If a trial judge refers to a witness as the "victim," and the defendant makes no objection to such comments at trial, the defendant is estopped from raising this issue on appeal. Brown v. State, 150 Ga. App. 289, 257 S.E.2d 359 (1979).

Since the trial court did not impermissibly give an expression of an opinion concerning the evidence when the court used the word "victim," the defendant could not show deficient performance on the part of counsel for failing to object. Morris v. State, 280 Ga. 184, 625 S.E.2d 391 (2006).

References to witnesses as "young lady" or "little girls." — Trial court's references to the state's witnesses in open court as "young lady" or as "little girls" in bench conferences with the attorneys did not express or intimate the court's opinion as to the evidence or the guilt of the accused. Jennette v. State, 197 Ga. App. 580, 398 S.E.2d 734 (1990).

Allowing a child-victim to sit on the mother's lap during questioning did not amount to an intimation of the trial court's opinion as to what had been proven or the accused's guilt. Murchison v. State, 231 Ga. App. 769, 500 S.E.2d 651 (1998).

Reference by the court to "the confession testified about" by a witness does not express or intimate an opinion that any confession has been proved.

Jackson v. State, 177 Ga. 264, 170 S.E. 26 (1933).

If court remarks "he has answered that" in response to question posed to witness the court is not intimating or expressing an opinion as to what had been proved. Hamilton v. State, 91 Ga. App. 295, 85 S.E.2d 496 (1954).

Remarks as to whether counsel will connect up certain evidence later. — Rulings on admissibility of evidence, consisting of remarks by the court as to whether counsel would connect up certain evidence later, and statement that the court would rule on the admissibility later, do not express an opinion on the facts of the case. Pierce v. State, 212 Ga. 88, 90 S.E.2d 417 (1955).

Mere challenging by the court of question asked by the defendant of a witness for the state without challenging a like question asked by the state of the defendant cannot be taken as impliedly expressing an opinion as to the guilt or innocence of the accused. Williams v. State, 186 Ga. 251, 197 S.E. 838 (1938).

Judge looking for quick verdict. — For inference from judge's remarks that the judge is looking for a quick verdict, see Dyson v. State, 155 Ga. App. 297, 270 S.E.2d 711 (1980).

References to witnesses or codefendants as accomplices. — If a witness is jointly indicted with the defendant on trial, and the witness and the accused are the only two alleged to be involved in the criminal transaction, and the court charges the jury that the witness, having been convicted, is an accomplice as a matter of law, this is an expression of an opinion by the trial judge upon a matter of fact as to what had been proved upon trial. Such an error renders the grant of a new trial imperative, without reference to the correctness of the verdict. Sellers v. State, 41 Ga. App. 572, 153 S.E. 782 (1930).

Statement that the codefendants "appear in this case as accomplices" is error, and a reversal for such error is mandatory. Mitchell v. State, 89 Ga. App. 80, 78 S.E.2d 563 (1953).

Judge allowing testimony, to hear "the truth about it." — If, in response to an objection of the defendant's counsel to a question propounded by the solicitor to a witness, the court allows the question stating "we want the truth about it," and it is contended that this statement is error because the court complimented the witness, and intimated and expressed an opinion in the presence of the jury that the witness would tell the truth, the remark deals with future testimony and not with facts which have been proved. Accordingly, it does not come within the inhibition of this section making it mandatory to reverse any case in which the court has expressed or intimated an opinion. Whether or not reversal would follow from the remark made would depend not only on whether it was error, but on whether the error was harmful to the movant. Hamilton v. State, 91 Ga. App. 299, 85 S.E.2d 557 (1954).

Judge's prejudicial remarks in hearing of the jurors. — When remark of the judge in answer to counsel is made in the hearing of the jurors and is prejudicial to the defendant, the defendant should either have moved to declare a mistrial or for postponement of the case that other jurors might be impaneled to try the defendant. Armstrong v. State, 181 Ga. 538, 183 S.E. 67 (1935).

Failure to remove jury before ruling on motion for directed verdict. — Although merely ruling on a point of law raised by the parties in a case does not constitute an expression of opinion of the trial court under this section, even though the judge must refer to testimony in order to make the judge's ruling intelligible, nevertheless, it is very possible that the jury, being laymen, might consider the fact that the court refused to direct a verdict for one of the parties as an implication that the judge was of the opinion that one party should not prevail. In such a case, it is not necessary for the movant to show that the court's error in refusing to grant the motion to remove the jury actually entered into and influenced the jury's verdict, but it is sufficient to show that the ruling would have been likely to produce that effect in order for it to constitute an abuse of discretion on the part of the trial court. Poole v. State, 100 Ga. App. 380, 111 S.E.2d 265 (1959).

Court's statement to counsel as to guilt out of hearing of jury. — Court's

General Consideration (Cont'd)

statement to counsel for the defendant, not made before a jury, that the court believes that the defendant is guilty, cannot be made the basis for legal error when it is not contended that the court so acted as to communicate this belief to the jury during the trial. Morton v. State, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

Direction that witness be arrested for perjury made in jury's presence. — As a general rule, directions by the court, in the presence of the jury, that a witness who has testified on behalf of the defendant, or a witness for the state who has refused to testify to matters prejudicial to the defendant, be arrested for perjury, constitutes reversible error in that the statement is a comment upon, or expression of opinion as to, the credibility of such witness, and as to the guilt of the defendant, expressly prohibited by this section. Benton v. State, 58 Ga. App. 633, 199 S.E. 561 (1938).

Arrest of evasive or unresponsive witnesses. — Distinction must be drawn between cases of this character and cases where the witness is ordered into custody because of persistent refusal to answer and evasion of questions propounded. The trial judge is given wide discretion in dealing with and controlling witnesses and in adjudging them in contempt, and as a general rule the judge's action in placing a refractory witness under arrest for refusal to respond to questions propounded does not amount to an expression or intimation of opinion prohibited by this section. Benton v. State, 58 Ga. App. 633, 199 S.E. 561 (1938).

Remarks made before trial. — This section relates only to statements made during the progress of the case or in the charge to the jury. It is not applicable to remarks made by the judge prior to the trial, though made in open court and in the presence of persons who afterwards served on the jury in the case. White v. State, 7 Ga. App. 20, 65 S.E. 1073 (1909).

Remedies when judge makes prejudicial remarks in jury's presence. — When remarks are made by the trial judge to counsel in a criminal case in the hearing of the jurors, which counsel contend were of such a character as to prejudice the minds of the jurors hearing the remarks against the cause of their client, counsel should either move for a postponement of the hearing in order that other jurors may be impaneled than those present when the remark is made, or, if the jurors have actually been selected and impaneled to try the particular case, a motion should be made to have a mistrial declared. Counsel, having failed to make such motion and having proceeded without objection with the trial, cannot after conviction raise the question as to the prejudicial nature of the remarks complained of in a motion for a new trial. Navarra v. State, 51 Ga. App. 321, 180 S.E. 375 (1935).

Objection or motion for mistrial required. — Question of whether O.C.G.A. § 17-8-57 has been violated is not reached unless objection or motion for mistrial is made. Smith v. State, 158 Ga. App. 330, 280 S.E.2d 162 (1981); Davitt v. State, 232 Ga. App. 427, 502 S.E.2d 300 (1998); Zehner v. State, 241 Ga. App. 345, 525 S.E.2d 416 (1999).

Comment to keep clients under control due to laughing. — Trial court did not violate O.C.G.A. § 17-8-57 when the court warned trial counsel about keeping the clients under control based on the defendant's inappropriate behavior in laughing as the comment was not directed toward a material issue nor was it an intimation on the defendant's guilt or innocence during the defendant's trial for aggravated assault and possession of a firearm during the commission of a crime. Wright v. State, 294 Ga. App. 20, 668 S.E.2d 505 (2008).

No violation by judge. — Trial court did not undermine the integrity of the process or improperly enhance the credibility of the witness by engaging in a brief, friendly exchange with the witness to which defendant posed no objection at the time. O'Hara v. State, 241 Ga. App. 855, 528 S.E.2d 296 (2000).

No error occurred regarding comments the trial court made during trial as the comments did not involve the trial court's expression of opinion about what had or had not been proven concerning the defendant's guilt. Mai v. State, 259 Ga. App. 471, 577 S.E.2d 288 (2003).

Trial court did not impermissibly comment on the evidence in violation of O.C.G.A. § 17-8-57 when the judge merely directed that the witness be allowed to finish the witness's answer; the trial court did not assume any facts or intimate to the jury the judge's opinion of the evidence. Patterson v. State, 259 Ga. App. 630, 577 S.E.2d 850 (2003).

Defendant waived any error resulting from the trial court's violation of O.C.G.A. § 17-8-57 by commenting on the length of the indictment as the defendant neither objected nor moved for a mistrial after the statement was made; further, the statement was not a violation of the statute as the statement was not a comment on the evidence or the guilt of the defendant, but only on the length of the indictment. Osterhout v. State, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Trial judge did not breach the limitations of O.C.G.A. § 17-8-57 when the judge made it clear to the jury that the judge would not address the facts of the case and did not express any opinion as to what had been proven at trial. Copeny v. State, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

At defendant's trial for drug possession and sale, O.C.G.A. § 17-8-57 was not violated when the trial judge commented on the sufficiency of the evidence because the purpose of § 17-8-57 is to prevent the jury from being influenced, and the jury was not present at the time of the remarks. Clowers v. State, 324 Ga. App. 264, 750 S.E.2d 169 (2013).

Comment by the trial judge that a crime was no less punishable if committed against a bad person than a good person was not reversible error as the jury was instructed not to construe any comment by the trial court as an expression of opinion upon the facts or evidence, credibility of witnesses, or guilt or innocence of the accused. Murray v. State, 295 Ga. 289, 759 S.E.2d 525 (2014).

Court's statement requiring that the medical examiner state that the autopsy photographs would assist the medical examiner's testimony did not express or intimate an opinion in alignment with the state. Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015).

Because defense counsel in opening and closing remarks explained to the jury that the defendant fired the gun at the second victim in defense of another person, whom the defendant thought was in danger, two witnesses observed the defendant fire the gun at the second victim, and the defendant told police that the defendant fired the gun at the second victim, it was undisputed and never contradicted by any evidence that the defendant shot the second victim; thus, the trial court's instruction to the jury regarding identity as to the robbery count, in which the trial court stated that the defendant admitted to shooting and firing the weapon at the second victim, did not constitute an impermissible comment on the evidence. McNeal v. State, 302 Ga. 222, 805 S.E.2d 820 (2017).

Incident in which the trial judge gave an audible grunt, and tossed a pen down on the bench did not constitute a comment on the evidence because the second defendant had already left the witness stand when the incident took place; thus, the record did not support the second defendant's contention that the incident intimated to the jury that the second defendant's testimony was other than truthful and had to be taken by the jury as a derogatory remark on the second defendant's credibility. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Trial judge's comments during cross-examination of the victim, which arose during the colloquy between the trial court and defense counsel regarding the prosecution's objection to defense counsel's instruction to the victim not to assume, were the judge's explanations of the judge's reasons for rulings on evidentiary objections or concerned undisputed facts, so the comments did not violate O.C.G.A. § 17-8-57. Jenkins v. State, 354 Ga. App. 674, 839 S.E.2d 698 (2020).

Comment that child witness would not testify not violation. — Although a trial court stated that a child witness would not testify at trial because the child kept crying, because the child was present and available to testify at trial, the child's hearsay statements did not occur pursu-

General Consideration (Cont'd)

ant to former O.C.G.A. § 24-3-16 (see O.C.G.A. § 24-8-820); the judge's comment that the witness would not testify was not an improper comment on the evidence under O.C.G.A. § 17-8-57. Brock v. State, 270 Ga. App. 250, 605 S.E.2d 907 (2004).

Defendant's counsel was not ineffective in failing to object to comments or questions made by the trial court judge in the defendant's criminal proceeding as the statements did not constitute improper judicial comment under O.C.G.A. § 17-8-57; the judge's remarks included a correction of the attorney's misstatement in cross-examination of a police officer, a clarification of a language communication problem, and a clarification of a term of art. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Trial court did not express an opinion in violation of O.C.G.A. § 17-8-57, an inmate's rights to confrontation, or a fair and impartial jury when the court explained to those in the courtroom during jury deliberations that the court had received two notes from the jury describing a communication received by a juror that offered the juror a bribe in exchange for changing the juror's vote to not guilty; the trial court's comment did not suggest that the inmate had directed the bribery attempt because the court merely reviewed the jurors' notes and did not go beyond the notes, and it added nothing to that which the jurors already knew. Greer v. Thompson, 281 Ga. 419, 637 S.E.2d 698 (2006).

After a thorough review of the questioning by the trial court revealed that the court's efforts were directed toward keeping the judicial proceedings in compliance with evidentiary rules, no comment or question posed by the court reflected upon either the evidence or the defendant in violation of O.C.G.A. § 17-8-57. Meeker v. State, 282 Ga. App. 77, 637 S.E.2d 806 (2006).

Because the defendant failed to specifically cite to that part of the record relating to the trial judge's alleged improper comment on the cross-examination of a witness, and in the only instance where the appellate court could find anything close to a violation, such occurred after the verdict had already been rendered; thus, the defendant's claim that the trial court violated O.C.G.A. § 17-8-57 lacked any factual basis. Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

A 27-year-old rape victim was mentally retarded and had the mind of a ten-year-old. The trial court's solicitous attitude and comments to the victim did not constitute an expression of the court's opinion as to the defendant's guilt under O.C.G.A. § 17-8-57, nor did the comment bolster the victim's credibility. Kent v. State, 294 Ga. App. 134, 668 S.E.2d 442 (2008).

Trial court did not violate O.C.G.A. § 17-8-57 when the court told the jury that the defendant's absence from the second day of trial was unexplained and that it would proceed in the defendant's absence. The statements did not express an opinion about whether the evidence had proven a material issue, whether a witness was credible, or whether the defendant was guilty; moreover, the statements were appropriate as the statements were intended to explain the defendant's absence. Howard v. State, 298 Ga. App. 98, 679 S.E.2d 104 (2009).

Trial judge's comment to the jury while directing a verdict for a defendant on a count in the indictment that, "as the prosecutor explained in his opening statement, they were not going to bring a witness from Texas to testify as to that offense," did not improperly suggest to the jury that the trial judge believed the defendant to be guilty. Dixon v. State, 300 Ga. App. 183, 684 S.E.2d 679 (2009).

Trial court did not violate O.C.G.A. § 17-8-57 by commenting upon the intent and credibility of the state's witness in its curative instructions because the trial court's remarks did not express an opinion as to the credibility of the state's witness but were responsive to the defendant's objection to the witness's testimony and only served to explain the rationale for the trial court's decision to deny the defendant's motion for mistrial. Kohler v. State, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Effort to clarify testimony to ensure fair trial. — Trial judge did not violate O.C.G.A. § 17-8-57 by improperly

commenting on the evidence because the trial judge's actions or remarks did not amount to an expression of opinion with regard to the defendant's guilt or innocence or to what had or had not been proven at trial in violation of § 17-8-57; the statute does not prohibit the trial judge from taking such measures as necessary to ensure the orderly administration of the trial, and the trial judge may even propound questions to a witness to clarify testimony when necessary in order to enforce the court's duty to ensure a fair trial. Moore v. State, 301 Ga. App. 220, 687 S.E.2d 259 (2009), cert. denied, No. S10C0544, 2010 Ga. LEXIS 333 (Ga. 2010), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Judge's comment about pro se defendant's opening statements. — During the defendant's opening statement, the defendant in a DUI case, proceeding pro se, stated that the field sobriety tests had an accuracy rating of only 65 percent. The judge's comment interrupting the defendant and stating that the defendant would not have evidence to substantiate the statement was not an inadmissible judicial comment under O.C.G.A. § 17-8-57 because the opening statement was supposed to give the jury an outline of the evidence to be presented. Steed v. State, 309 Ga. App. 546, 710 S.E.2d 696 (2011).

Trial court's comments to a prosecution witness did not improperly bolster that witness's credibility because although some of the trial court's comments seemed to suggest approval of the witness and should have been avoided to prevent even the slightest intimation of partiality, the remarks did not undermine the integrity of the process or improperly enhance the credibility of the witness or comment upon what was proved or the defendant's guilt. Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Trial court did not impermissibly comment on the evidence when the court granted a directed verdict on the count of the indictment charging the defendant with felony murder based on the underlying crime of fleeing and attempting to elude police because during the court's main charge to the jury, the trial court emphasized to the jury that the court had no opinion as to what had or had not been proved regarding the defendant's guilt; the trial court's statement regarding the existence of a scrivener's error in the indictment referred only to the incomplete count and did not contain an expression or intimation regarding the remaining counts of the indictment. Johnson v. State, 289 Ga. 650, 715 S.E.2d 99 (2011).

Isolated use of term "swearing" by judge. — Trial court's single, isolated use of the term "swearing" was not impermissible under O.C.G.A. § 17-8-57 because, in the context of the testimony, the term referred to the sworn trial testimony, not the trial court's opinion with regard to the facts at issue. Foster v. State, 314 Ga. App. 642, 725 S.E.2d 777 (2012).

Trial court's statement that the state would introduce evidence in support of the charges contained in the indictment did not violate O.C.G.A. § 17-8-57; judicial comments limited to a clarification of procedures and which do not address the credibility of witnesses or any fact at issue in the trial do not violate O.C.G.A. § 17-8-57. Foster v. State, 290 Ga. 599, 723 S.E.2d 663 (2012).

Violation of section did not warrant trial. — Because the trial court did improperly comment on the defendant's credibility, in violation of O.C.G.A. § 17-8-57, but only directed the defendant to answer the questions being asked, and expressed no opinion as to the truthfulness of the defendant's testimony, whether responsive or not, those comments did not warrant a new trial. Anthony v. State, 282 Ga. App. 457, 638 S.E.2d 877 (2006).

Trial court did not err in denying the defendant's motion for a new trial on the ground that the trial judge made comments which unduly highlighted and overemphasized the testimony of the DNA expert, in violation of O.C.G.A. § 17-8-57, as the comments were clearly directed at one juror to encourage that juror to stay awake and pay attention to the presentation of the evidence. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Trial court's statement that a trial was "like a jigsaw puzzle" and that "all of the pieces" were "not there" was not an im-

General Consideration (Cont'd)

proper comment on the evidence or an impermissible shifting of the burden of proof; the trial court did not indicate that certain things should be considered as facts or intimate to the jury what the trial court thought the evidence showed, and furthermore the statement was immediately followed by a comprehensive charge on the state's burden of proof. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

Trial judge did not erroneously admonish the victim to tell the truth during a portion of the victim's testimony since: (1) the record showed that the victim was a reluctant witness; (2) the admonishment was made outside the presence of the jury; (3) the judge's comments were not improper and did not amount to the court leaving the court's position of impartiality during the trial or interfere with the factfinding process of the jury; and (4) it was clear from the record that the comments did not alter the victim's testimony as the victim's subsequent trial testimony was consistent with previously written statements to the police. Morales v. State, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Trial judge did not err in questioning the victim in the presence of the jury as the action did not imply, express, or intimate an opinion on the facts of the case or as the defendant's guilt, nor was the question argumentative; moreover, contrary to the defendant's argument, the question could not reasonably be construed as tending to discredit the victim or the victim's testimony, or as authorizing a reasonable inference by the jury that the trial court entertained an inference unfavorable to the defendant. Morales v. State, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Aggravated assault and aggravated battery convictions were upheld on appeal as: (1) sufficient evidence was presented for the jury to reject the defendant's self-defense claim; (2) two photographs were properly admitted as innocuous demonstrative aids to show the scene of the crime and the defendant's location; and (3) the trial court did not improperly give the court's opinion about the evidence, but merely attempted to clarify the state's position; furthermore, with respect to the latter, the jury was properly instructed that no ruling or comment by the court was intended to express an opinion on the facts of the case, the credibility of witnesses, the evidence, or the defendant's guilt or innocence. Whitaker v. State, 287 Ga. App. 465, 652 S.E.2d 568 (2007).

Because the defendant conceded that the specific comment made by the trial judge that the defendant complained of on appeal was not made in the presence of or to the jury, the defendant's argument on appeal presented no basis for reversal of the defendant's convictions for aggravated assault with a deadly weapon, possession of a firearm during the commission of a felony, and fleeing or attempting to elude a police office McClendon v. State, 287 Ga. App. 238, 651 S.E.2d 165 (2007).

Trial court's admonishment, outside the presence of the jury, that the victim tell the truth, was certainly an appropriate exercise of discretion in controlling the trial and was not unfair or prejudicial to the defendant; moreover, contrary to the defendant's assertion, the comments were not improper and did not amount to the court leaving its position of impartiality during the trial. Morales v. State, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Trial court did not violate O.C.G.A. § 17-8-57 by expressing to two jurors an opinion that the defendant was guilty as the court merely sought to determine whether the two jurors should be excused from further service because of the jurors' relationship with the defendant's family and resolved the issue in the manner the defendant requested; moreover, the defendant's right to a public trial was not violated when the trial judge ordered the spectators out of the courtroom at this time as the judge was accommodating a request of one of the jurors for a more private setting. Berry v. State, 282 Ga. 376, 651 S.E.2d 1 (2007).

Defendant was not entitled to a mistrial based on the trial judge's alleged violation of O.C.G.A. § 17-8-57 because even if the judge's reference to the victim as such was erroneous, the judge's curative instruction corrected any misstatement and clearly did not intimate to the jury what the court believed the evidence to be. Warner v.

State, 287 Ga. App. 892, 652 S.E.2d 898 (2007).

When defense counsel attempted to impeach a witness about a statement in the witness's guilty plea that the witness was a first offender, the trial court did not violate O.C.G.A. § 17-8-57 by stating that the witness had not sought first offender status and that the witness's attorney had described the witness as a first offender in a form completed by the attorney; the comments were limited in scope to a clarification of the procedure utilized by the trial court in accepting a guilty plea, and the comments did not address the witness's credibility in general or any fact at issue. John v. State, 282 Ga. 792, 653 S.E.2d 435 (2007).

Trial court's references to the trial as a "murder case," an estimate of the time that would be required for the guilt/innocence phase, reference to the trial court and the parties collectively using the word "we," comments regarding the nature of cross-examination, and questions propounded by the trial court to a witness, were not improper under a plain error standard. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Trial court's comment, in ruling on the admissibility of an item of evidence, on whether the item was identifiable without expert testimony as being a gun silencer was not improper; comments made in the course of ruling on objections are generally not the type of comments prohibited by O.C.G.A. § 17-8-57, and the defendant had not requested that the objection be heard outside the jury's presence. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

While the trial court erred in expressly informing the jury, prior to the presentation of evidence, of the court's opinion of fact that fingerprint testimony was rarely presented at trial and that fingerprint evidence was very hard to get, the error did not necessitate reversal because the defendant could not show that the trial court's instruction affected the defendant's substantial rights given that the fingerprint evidence was not vital to placing the defendant at the scene of the crime. Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

No error if jury not misled or confused. — There is no reversible error when the court made a verbal error in a charge by substituting "is" for "if" and the error clearly could not have misled or confused the jury. Graham v. State, 242 Ga. App. 361, 529 S.E.2d 641 (2000).

Judge's reference to defendant as "criminal" defendant during voir dire did not place the defendant's character in issue and was not a comment on the defendant's guilt. Hodo v. State, 272 Ga. 272, 528 S.E.2d 250 (2000).

Judge's reference to identification. — Trial judge did not improperly comment on the evidence when the judge directed that the record would reflect that the victim and the witness had identified the defendant during their testimony because the jurors were present in the courtroom and able to determine for themselves whether someone in the courtroom matched the man identified by the victim and by the witness; and, in context, the trial judge's statement served to clarify the victim's and witness's words, as the words would later be transcribed, not to indicate to the jury whether the state had proved that the defendant was the man who visited the victim's home and, months later, broke in and attacked the victim. Crenshaw v. State, 341 Ga. App. 406, 801 S.E.2d 92 (2017).

Admonishment of pro-se defendant's comments. — When, during pro-se defendant's brief cross-examination of his ex-girlfriend, the trial court was forced to admonish him three times not to argue with her about their children, the comments were appropriate and intimated no opinion with regard to the case or the defendant's guilt or innocence. Brooks v. State, 243 Ga. App. 246, 532 S.E.2d 763 (2000).

Plain error doctrine not applicable. — Defendant's attempt to invoke the plain error doctrine with regard to the state's closing argument allegedly eliciting sympathy for the victim in violation of the

General Consideration (Cont'd)

prohibition against asking the jurors to place themselves in the same position of the victim was misplaced when the plain error doctrine applied only to capital cases and criminal cases in which a violation of O.C.G.A. § 17-8-57 occurred, and neither category applied to the defendant's trial for armed robbery. Foster v. State, 267 Ga. App. 363, 599 S.E.2d 309 (2004).

Plain error doctrine had been limited to capital cases and to criminal cases in which the trial judge allegedly intimated an opinion of the defendant's guilt in violation of O.C.G.A. § 17-8-57 and had no application to a defendant's claims that a child molestation victim's hearsay statements served to bolster the victim's credibility and lacked sufficient indicia of reliability. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Plain error rule applies. — Plain error rule applies to death penalty cases and other criminal cases in which the trial court violates O.C.G.A. § 17-8-57, and thus any alleged violation of § 17-8-57 must be reviewed in accordance with the plain error rule; the Georgia Supreme Court disapproves Price v. State, 280 Ga. 193, 625 SE2d 397 (2006) and Raheem v. State, 275 Ga. 87, 560 SE2d 680 (2002), to the extent the analysis therein is inconsistent regarding review for plain error. Patel v. State, 282 Ga. 412, 651 S.E.2d 55 (2007).

Plain error doctrine not applicable. — Defendant was not entitled to a plain error review of a colloquy at trial, held outside the jury's presence, between the court and a witness called by the state who was reluctant to testify because the alleged error did not involve error in the sentencing phase of a trial resulting in the death penalty, in a trial judge's expression of opinion to the jury, or in the jury charge. Solomon v. State, 293 Ga. 605, 748 S.E.2d 865 (2013).

Judge's comment regarding venue was error. — Defendant was entitled to a new trial after a trial court violated O.C.G.A. § 17-8-57 by stating, during defense counsel's opening, that venue in the defendant's prosecution under O.C.G.A. § 16-12-100.2 was proper in Fayette County; the language prohibiting judicial comments of that type was mandatory and neither the fact that the trial court might not have meant to express an opinion, nor the fact that the trial court gave curative instructions after making the comment, could excuse or cure the violation. Patel v. State, 282 Ga. 412, 651 S.E.2d 55 (2007).

It was reversible error under O.C.G.A. § 17-8-57 when the trial court asked the prosecutor whether venue had been established and, after the prosecutor responded, stated, "I just wanted to make sure." In making these comments, the trial court improperly expressed the court's opinion as to what had been proven on a disputed issue of fact; the fact that the defendant did not object was immaterial because a violation of § 17-8-47 was plain error. Anderson v. State, 297 Ga. App. 733, 678 S.E.2d 498 (2009), aff'd, 287 Ga. 159, 695 S.E.2d 26 (Ga. 2010).

Comments by judge during defense counsel's closing argument did not constitute plain error. — Defendant was not entitled to a new trial because the trial judge's comments were limited in scope, were for the purpose of controlling the trial conduct and ensuring a fair trial, did not involve the issue of the defendant's guilt or innocence, and did not express an opinion on the evidence as to what was proved or not; comments by the trial judge during defense counsel's closing arguments were for the purpose of preventing misstatements to the jury concerning matters not in evidence and were not improper under O.C.G.A. § 17-8-75. Mathis v. State, 276 Ga. App. 205, 622 S.E.2d 857 (2005).

Cited in Davis v. State, 91 Ga. 167, 17 S.E. 292 (1893); Suddeth v. State, 112 Ga. 407, 37 S.E. 747 (1900); Alexander v. State, 114 Ga. 266, 40 S.E. 231 (1901); Hodge v. State, 116 Ga. 929, 43 S.E. 370 (1903); Battise v. State, 124 Ga. 866, 53 S.E. 678 (1906); Southern Express Co. v. State, 1 Ga. App. 700, 58 S.E. 67 (1907); Johnson v. State, 2 Ga. App. 405, 58 S.E. 684 (1907); Darby v. State, 16 Ga. App. 171, 84 S.E. 724 (1915); Peyton v. State, 18 Ga. App. 691, 90 S.E. 359 (1916); Peek v. State, 155 Ga. 49, 116 S.E. 629 (1923); Thompson v. State, 160 Ga. 520, 128 S.E.

756 (1925); Spivey v. State, 38 Ga. App. 213, 143 S.E. 450 (1928); Bailey v. State, 167 Ga. 318, 145 S.E. 456 (1928); Norris v. State, 40 Ga. App. 232, 149 S.E. 158 (1929); Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930); Holleman v. State, 171 Ga. 200, 154 S.E. 906 (1930); Pope v. State, 171 Ga. 655, 156 S.E. 599 (1930); Smith v. State, 43 Ga. App. 213, 158 S.E. 447 (1931); Parker v. State, 174 Ga. 453, 162 S.E. 812 (1932); De Vere v. State, 45 Ga. App. 330, 164 S.E. 485 (1932); Belmont v. State, 175 Ga. 15, 165 S.E. 45 (1932); McKee v. State, 176 Ga. 717, 168 S.E. 862 (1933); McDow v. State, 176 Ga. 764, 168 S.E. 869 (1933); Fussell v. State, 48 Ga. App. 119, 172 S.E. 73 (1933); Kryder v. State, 57 Ga. App. 200, 194 S.E. 890 (1938); Morgan v. State, 59 Ga. App. 903, 2 S.E.2d 502 (1939); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121 (1941); Sanders v. State, 66 Ga. App. 128, 17 S.E.2d 251 (1941); Canady v. State, 68 Ga. App. 735, 23 S.E.2d 870 (1942); Elmore v. State, 70 Ga. App. 832, 29 S.E.2d 713 (1944); Pressley v. State, 201 Ga. 267, 39 S.E.2d 478 (1946); Williams v. State, 77 Ga. App. 51, 47 S.E.2d 782 (1948); Harris v. State, 207 Ga. 287, 61 S.E.2d 135 (1950); Robinson v. State, 207 Ga. 337, 61 S.E.2d 475 (1950); Osborne v. State, 209 Ga. 345, 72 S.E.2d 317 (1952); Frost v. State, 92 Ga. App. 614, 89 S.E.2d 524 (1955); Moultrie v. State, 93 Ga. App. 396, 92 S.E.2d 33 (1956); Scoggins v. State, 98 Ga. App. 360, 106 S.E.2d 39 (1958); Maddox v. State, 99 Ga. App. 438, 108 S.E.2d 758 (1959); Bedgood v. State, 100 Ga. App. 736, 112 S.E.2d 430 (1959); Williamson v. State, 217 Ga. 162, 121 S.E.2d 782 (1961); Parker v. State, 218 Ga. 654, 129 S.E.2d 850 (1963); Gaddis v. State, 107 Ga. App. 661, 131 S.E.2d 126 (1963); Gore v. State, 110 Ga. App. 344, 138 S.E.2d 471 (1964); Wheeler v. State, 220 Ga. 535, 140 S.E.2d 258 (1965); Seay v. State, 111 Ga. App. 22, 140 S.E.2d 283 (1965); Anthony v. State, 112 Ga. App. 444, 145 S.E.2d 657 (1965); Barnes v. State, 115 Ga. App. 431, 154 S.E.2d 878 (1967); Rowell v. State, 122 Ga. App. 568, 177 S.E.2d 812 (1970); Tutt v. State, 122 Ga. App. 673, 178 S.E.2d 339 (1970); Sheffield v. State, 124 Ga. App. 295, 183 S.E.2d 525 (1971); Ezzard v. State, 229 Ga. 465, 192 S.E.2d 374 (1972); Karavos v. State, 128 Ga. App. 268, 196 S.E.2d 355 (1973); White v. State, 230 Ga. 327, 196 S.E.2d 849 (1973); Knight v. State, 130 Ga. App. 551, 203 S.E.2d 911 (1974); Williams v. State, 232 Ga. 213, 205 S.E.2d 859 (1974); DeFreese v. State, 232 Ga. 739, 208 S.E.2d 832 (1974); Stone v. State, 132 Ga. App. 703, 209 S.E.2d 121 (1974); Davis v. State, 133 Ga. App. 452, 211 S.E.2d 406 (1974); Ross v. State, 135 Ga. App. 169, 217 S.E.2d 170 (1975); Evans v. State, 235 Ga. 396, 219 S.E.2d 725 (1975); Ray v. State, 235 Ga. 467, 219 S.E.2d 761 (1975); Hayes v. State, 136 Ga. App. 746, 222 S.E.2d 193 (1975); Moon v. State, 136 Ga. App. 905, 222 S.E.2d 635 (1975); Hughes v. State, 136 Ga. App. 927, 222 S.E.2d 645 (1975); McNeese v. State, 236 Ga. 26, 222 S.E.2d 318 (1976); Waters v. State, 237 Ga. 64, 226 S.E.2d 596 (1976); Campbell v. State, 237 Ga. 76, 226 S.E.2d 601 (1976); Copeland v. State, 139 Ga. App. 55, 227 S.E.2d 850 (1976); Powell v. State, 237 Ga. 490, 228 S.E.2d 875 (1976); Decker v. State, 139 Ga. App. 707, 229 S.E.2d 520 (1976); Bass v. State, 140 Ga. App. 788, 232 S.E.2d 98 (1976); Ansley v. State, 141 Ga. App. 314, 233 S.E.2d 272 (1977); Roberts v. State, 141 Ga. App. 550, 234 S.E.2d 138 (1977); Pitts v. State, 141 Ga. App. 845, 234 S.E.2d 682 (1977); Collins v. State, 143 Ga. App. 583, 239 S.E.2d 232 (1977); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); State v. Griffin, 240 Ga. 470, 241 S.E.2d 230 (1978); Clempson v. State, 144 Ga. App. 625, 241 S.E.2d 495 (1978); Aufderheide v. State, 144 Ga. App. 877, 242 S.E.2d 758 (1978); Foushi v. State, 144 Ga. App. 608, 244 S.E.2d 14 (1978); Perdue v. State, 147 Ga. App. 648, 249 S.E.2d 657 (1978); Thomas v. State, 242 Ga. 712, 251 S.E.2d 294 (1978); Patterson v. State, 149 Ga. App. 438, 254 S.E.2d 445 (1979); Boatright v. State, 150 Ga. App. 283, 257 S.E.2d 314 (1979); Schuh v. State, 150 Ga. App. 700, 258 S.E.2d 328 (1979); Boling v. State, 244 Ga. 825, 262 S.E.2d 123 (1979); Tucker v. State, 245 Ga. 68, 263 S.E.2d 109 (1980); Moret v. State, 246 Ga. 5, 268 S.E.2d 635 (1980); Chapman v. State, 154 Ga. App. 532, 268 S.E.2d 797 (1980); Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415 (1981); Brady v. State, 159 Ga. App. 389, 283 S.E.2d 617 (1981); Laney v. State, 159

General Consideration (Cont'd)

Ga. App. 609, 284 S.E.2d 114 (1981); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982); Gibson v. State, 160 Ga. App. 615, 287 S.E.2d 595 (1981); Ferry v. State, 161 Ga. App. 795, 287 S.E.2d 732 (1982); Buford v. State, 162 Ga. App. 498, 291 S.E.2d 256 (1982); Suddeth v. State, 162 Ga. App. 460, 291 S.E.2d 430 (1982); Henderson v. State, 162 Ga. App. 320, 292 S.E.2d 77 (1982); McKenzie v. State, 162 Ga. App. 522, 292 S.E.2d 722 (1982); Williams v. State, 249 Ga. 822, 295 S.E.2d 293 (1982); Johnson v. State, 164 Ga. App. 7, 296 S.E.2d 202 (1982); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Johnson v. State, 165 Ga. App. 773, 302 S.E.2d 626 (1983); Millwood v. State, 166 Ga. App. 292, 304 S.E.2d 103 (1983); Bethea v. State, 251 Ga. 328, 304 S.E.2d 713 (1983); Johnson v. State, 169 Ga. App. 104, 311 S.E.2d 528 (1983); Magsby v. State, 169 Ga. App. 637, 314 S.E.2d 473 (1984); Kelley v. State, 169 Ga. App. 917, 315 S.E.2d 916 (1984); Davis v. State, 170 Ga. App. 126, 316 S.E.2d 573 (1984); In re Crane, 171 Ga. App. 31, 318 S.E.2d 709 (1984); McDonald v. State, 170 Ga. App. 884, 318 S.E.2d 749 (1984); Hufstetler v. State, 171 Ga. App. 106, 319 S.E.2d 869 (1984); Buffington v. State, 171 Ga. App. 919, 321 S.E.2d 418 (1984); 134 Baker St., Inc. v. State, 172 Ga. App. 738, 324 S.E.2d 575 (1984); Frankum v. State, 174 Ga. App. 660, 331 S.E.2d 52 (1985); Johnson v. State, 254 Ga. 591, 331 S.E.2d 578 (1985); Jackson v. State, 177 Ga. App. 863, 341 S.E.2d 324 (1986); Worth v. State, 179 Ga. App. 207, 346 S.E.2d 82 (1986); Dixon v. State, 179 Ga. App. 278, 346 S.E.2d 93 (1986); Price v. State, 179 Ga. App. 691, 347 S.E.2d 365 (1986); Smith v. Pierce, 179 Ga. App. 724, 347 S.E.2d 692 (1986); Williams v. State, 180 Ga. App. 854, 350 S.E.2d 837 (1986); Lobdell v. State, 256 Ga. 769, 353 S.E.2d 799 (1987); Russell v. State, 184 Ga. App. 657, 362 S.E.2d 392 (1987); House v. State, 184 Ga. App. 724, 362 S.E.2d 429 (1987); Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988); Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988); Pless v. State, 187 Ga. App. 772, 371 S.E.2d 406 (1988); Johnson v. State, 258 Ga. 856, 376 S.E.2d 356 (1989); Barker v. State, 191 Ga. App. 451, 382 S.E.2d 115 (1989); Stephen v. State, 259 Ga. 820, 388 S.E.2d 519 (1990); Newton v. State, 259 Ga. 853, 388 S.E.2d 698 (1990); Mullen v. State, 197 Ga. App. 26, 397 S.E.2d 487 (1990); Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568 (1990); Lewallen v. State, 199 Ga. App. 798, 406 S.E.2d 255 (1991); Anderson v. State, 200 Ga. App. 29, 406 S.E.2d 791 (1991); Ledbetter v. State, 262 Ga. 370, 418 S.E.2d 57 (1992); Williams v. State, 208 Ga. App. 153, 430 S.E.2d 42 (1993); Jordan v. State, 220 Ga. App. 627, 470 S.E.2d 242 (1996); Carter v. State, 224 Ga. App. 445, 481 S.E.2d 238 (1997); Griffin v. State, 267 Ga. 586, 481 S.E.2d 223 (1997); Bryant v. State, 226 Ga. App. 135, 486 S.E.2d 374 (1997); Crews v. State, 226 Ga. App. 232, 486 S.E.2d 61 (1997); Lewandowski v. State, 267 Ga. 831, 483 S.E.2d 582 (1997); Parker v. State, 229 Ga. App. 217, 493 S.E.2d 558 (1997); Mullins v. State, 269 Ga. 157, 496 S.E.2d 252 (1998); Richards v. State, 232 Ga. App. 584, 502 S.E.2d 519 (1998); Scroggins v. State, 237 Ga. App. 122, 514 S.E.2d 252 (1999); Murphy v. State, 270 Ga. 72, 508 S.E.2d 399 (1998); Thomas v. State, 238 Ga. App. 42, 517 S.E.2d 585 (1999); Hudson v. State, 242 Ga. App. 218, 529 S.E.2d 218 (2000); Humphrey v. State, 249 Ga. App. 805, 549 S.E.2d 144 (2001); Mitchell v. State, 275 Ga. 42, 561 S.E.2d 803 (2002); Coggins v. State, 275 Ga. 479, 569 S.E.2d 505 (2002); Bates v. State, 275 Ga. 862, 572 S.E.2d 550 (2002); Anderson v. State, 264 Ga. App. 362, 590 S.E.2d 729 (2003); Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003); Cheek v. State, 265 Ga. App. 15, 593 S.E.2d 55 (2003); Smith v. State, 265 Ga. App. 236, 593 S.E.2d 695 (2004); Parker v. State, 276 Ga. 598, 581 S.E.2d 7 (2003); Appling v. State, 281 Ga. 590, 642 S.E.2d 37 (2007); Boyt v. State, 286 Ga. App. 460, 649 S.E.2d 589 (2007); Delgado v. State, 287 Ga. App. 273, 651 S.E.2d 201 (2007); Dasher v. Dasher, 283 Ga. 436, 658 S.E.2d 571 (2008); Connelly v. State, 295 Ga. App. 765, 673 S.E.2d 274 (2009); Tidwell v. State, 306 Ga. App. 307, 701 S.E.2d 920 (2010); Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011); Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013); Anderson v. State, 350 Ga. App.

369, 829 S.E.2d 453 (2019); Collins v. State, 308 Ga. 515, 842 S.E.2d 275 (2020); Keller v. State, 308 Ga. 492, 842 S.E.2d 22 (2020).

Inquiries by the Judge

Judge has right to propound questions to develop the truth of the case. — Trial judge has the right to propound a question or a series of questions to any witness for the purpose of developing fully the truth of the case. The extent to which the examination conducted by the court shall go is a matter within the judge's discretion. Smith v. State, 52 Ga. App. 88, 182 S.E. 816 (1935); Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978); Eubanks v. State, 240 Ga. 544, 242 S.E.2d 41 (1978); Calloway v. State, 199 Ga. App. 272, 404 S.E.2d 811 (1991), overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019); Sanders v. State, 211 Ga. App. 859, 440 S.E.2d 745 (1994).

Because the defendant did not allege that the trial judge exhibited discriminatory behavior applicable to any of the prohibited categories in O.C.G.A. § 17-8-57 and because there was no jury in defendant's juvenile case, the trial judge did not violate Ga. Code Jud. Conduct Canon 3(B)(5) by asking a witness questions concerning the pry marks and the defendant's fingerprints on a window to fully develop the truth in the defendant's burglary case. In the Interest of J.D., 275 Ga. App. 147, 619 S.E.2d 818 (2005).

Trial judge was allowed to propound questions to a witness to develop the truth of the case, to clarify testimony, to comment on pertinent evidentiary rules, and to exercise the court's discretion when controlling the conduct of counsel or witnesses in order to enforce the court's duty to ensure a fair trial to both sides; a trial judge's questions, remarks, and directions during the defense examination of a witness did not amount to an expression of opinion with regard to the defendant's guilt or innocence or to what had or had not been proven. Dickens v. State, 280 Ga. 320, 627 S.E.2d 587 (2006).

Trial court did not violate O.C.G.A. § 17-8-57 by questioning a state's witness regarding a prior statement the witness gave to police and the statement's conflict with the witness's trial testimony, nor in repeating to the jury the state's contention as to what crime had been committed, nor in responding to jury questions without indicating what the trial court believed the evidence to be. Finley v. State, 286 Ga. 47, 685 S.E.2d 258 (2009).

Trial court did not violate O.C.G.A. § 17-8-57 by questioning an emergency room worker as to whether the worker had seen fresh or dried blood on the victim in a child cruelty case. Once the witness's testimony had been clarified on this relevant point, the trial court expressed no opinion as to what had been proved or the testimony's significance as to the defendant's guilt. Chambers v. State, 313 Ga. App. 39, 720 S.E.2d 358 (2011).

Provided the judge expresses no opinion as to what has been proved. — There is nothing per se erroneous in a trial judge propounding questions to witnesses on the stand. The only limitation on the judge's right in this connection is not to express or intimate any opinion as to what has or has not been proved. Parker v. State, 51 Ga. App. 295, 180 S.E. 390 (1935).

Trial court did not err by soliciting the jury for questions to ask the witnesses because the court followed the proper procedure for juror questions; the questions were then shared with counsel, who were given an opportunity to object before the court posed any questions the court found proper to the witness; the questions the court asked on behalf of the jury did not improperly intimate the court's opinion about the evidence or the defendant's guilt or innocence; the parties were allowed to ask follow-up questions to the witness; and the defendant did not identify in the defendant's brief a single jury question asked by the court that was improper, much less harmful. Hernandez v. State, 299 Ga. 796, 792 S.E.2d 373 (2016).

Trial judge may, in order to elicit the truth, propound to a witness a leading

Inquiries by the Judge (Cont'd)

question, provided in so doing the judge does not violate the provisions of this section, forbidding the judge to express or intimate any opinion as to what has or has not been proved. Deese v. State, 137 Ga. App. 476, 224 S.E.2d 124 (1976).

Trial judge did not err in questioning the victim in the presence of the jury as the single question to the victim did not express or intimate an opinion as to proof or as to guilt, nor was the question argumentative; moreover, contrary to the defendant's argument, the question could not reasonably be construed as tending to discredit the victim or the victim's testimony or as authorizing a reasonable inference by the jury that the trial court entertained an inference unfavorable to the defendant. Morales v. State, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Trial judge's review and approval of the questions by the jurors and posing the questions in the manner that the judge believed to be most appropriate for developing the truth of the case and clarifying the witness' testimony consistent with the jurors' requests was proper as the trial court fulfilled the court's duty to ensure a fair trial for both sides and did not inappropriately intimate or express an opinion as to the matters proved at trial or the guilt or innocence of the accused. Benton v. State, 301 Ga. 100, 799 S.E.2d 743 (2017).

Trial counsel was not ineffective for failing to object to the trial court judge's question to a witness because the trial court's question did not constitute plain error since the court's questioning of the neighbor was asked for the purpose of developing the truth of the case, and the court did not express or intimate an opinion as to proof or as to guilt, or bolster the credibility of the neighbor or victim. Bradley v. State, 342 Ga. App. 486, 804 S.E.2d 144 (2017).

Court's inquiry into sleeping arrangements. — Trial court's straightforward inquiries regarding sleeping arrangements and why young girls who were molested were required to sleep outside in a truck with the defendant were not an improper expression of the trial court's opinion of the case and did not constitute a violation of O.C.G.A. § 17-8-57. Jackson v. State, 251 Ga. App. 171, 554 S.E.2d 202 (2001).

Asking about expert's title. — Trial judge's questioning as to clarification of expert witness's title as a doctor, viewing the trial court's statement in the proper context, could not reasonably be construed as commenting upon the expert's credibility. Cox v. State, 306 Ga. 736, 832 S.E.2d 354 (2019).

Lengthy examination is generally permissible. — Lengthy examination by the court of a witness called by either party is not cause for a new trial, even though some of the questions propounded by the court were leading in character, unless the court, during the examination of the witness, expresses or intimates an opinion on the facts of the case, or as to what has or has not been proved, or the examination takes such course as to become argumentative in character. Smith v. State, 52 Ga. App. 88, 182 S.E. 816 (1935); Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

Difficult for court to question without advocating. — Although the court has the right, even the duty, to question witnesses, and may even ask leading questions, the trial judge must not express or intimate the judge's opinion in any way, and it is difficult for the court to conduct extensive questioning of a witness without becoming an advocate. Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

Inquiry regarding admissibility of testimony and direction of questioning. — Trial court did not improperly comment on the evidence because the trial court's interruption of defense counsel to inquire regarding the admissibility of testimony or the direction which counsel was going with a particular line of questioning did not constitute an opinion as to the proof or the guilt of the accused; and the trial court gave two curative instructions to the jury, admonishing the jury that the court had no opinion about the proof in the case or about the guilt or innocence of the

defendants. Holmes v. State, 301 Ga. 143, 800 S.E.2d 353 (2017).

Even if testimony elicited is detrimental to a party. — Court may properly propound questions to a witness on the stand with a view to elicit the truth of the case. If in such examination the court does not express or intimate an opinion as to the credibility of the witness, or as to what has or has not been proved, the mere fact that competent testimony of the witness so elicited may be detrimental to the interest of a party will not be cause for granting that party a new trial. Fraser v. State, 52 Ga. App. 92, 182 S.E. 418 (1935).

When examining witnesses, judge should avoid impressing jury. — Although the trial judge has the right to examine witnesses, the utmost caution should be used to avoid impressing the jury by the examination, and when in a criminal case it appears that there is a probability that the circumstances, or the form of the examination, has conveyed to the jury an intimation of the court's belief in the guilt of the accused, a new trial should be granted. Nobles v. State, 13 Ga. App. 710, 79 S.E. 861 (1913).

Trial court committed plain error when the trial court judge improperly bolstered the victims' credibility when the court asked a witness specific questions regarding the victims, in violation of O.C.G.A. § 17-8-57, and the error was compounded when the trial court denied the defendant the right to cross-examine the witness, pursuant to former O.C.G.A. § 24-9-64 (see O.C.G.A. § 24-6-611), in an attempt to rebut the bolstering of the victims' credibility that was performed by the trial court. Craft v. State, 274 Ga. App. 410, 618 S.E.2d 104 (2005).

Question to witness as to whether witness realizes the witness is under oath. — When the solicitor general (now district attorney) stated to the court that the solicitor had been entrapped by the witness then on the stand, and requested and was granted leave to cross-examine the witness, the action of the judge in thereafter asking the witness during such examination, if the witness realized the witness was under oath, did not per se amount to an expression or intimation of opinion within the meaning of this section and when it appears that the examination continued, and the testimony of the witness was neither favorable nor unfavorable to the state or the accused, a new trial will not be granted. Benton v. State, 58 Ga. App. 633, 199 S.E. 561 (1938).

Questions as to witness's truthfulness improper. — Trial court's questions to a witness in a forged/unauthorized prescription case, which consisted of asking the witness whether the witness was lying or being truthful, clearly intimated the court's opinion regarding the credibility of the witness's testimony and were therefore patently improper under O.C.G.A. § 17-8-57, necessitating a new trial. Price v. State, 310 Ga. App. 132, 712 S.E.2d 135 (2011).

Court may inquire into how jury stands if unable to reach a verdict. — Trial court may, after the jury indicates that it is unable to agree on a verdict, inquire how the jury stands numerically. Muhammad v. State, 243 Ga. 404, 254 S.E.2d 356 (1979).

Remarks to jury upon learning how jury stands. — For a judge to ask the jurors how the jurors stand is of doubtful propriety, and when, in response to the query, the information is given that the jurors stand "11 to one," to state that "usually, where the jury stands 11 to one, the one juror comes to the 11," is presumptively hurtful although the judge adds to the statement that the question is one of individual conscience, as the 11 might be wrong and the one right. Unless the verdict is demanded by the evidence, the error disclosed by such suggestive colloquy requires the grant of a new trial. Ball v. State, 9 Ga. App. 162, 70 S.E. 888 (1911).

Inquiries by judge of counsel out of jury's presence. — Judge does not become an advocate for the state or in any way express or intimate an opinion to the jury that something has not been proven when the judge makes an inquiry of counsel out of the jury's presence, as what a judge can do directly the judge can do indirectly. The trial judge has the right to propound a question or a series of questions to any witness for the purpose of developing fully the truth of the case and the extent to which the examination con-

Inquiries by the Judge (Cont'd)

ducted by the court shall go is a matter within the judge's discretion. Hall v. State, 151 Ga. App. 700, 261 S.E.2d 442 (1979).

Trial court's statement, "If the State needs a material witness warrant, they need to get it to me right now.... Get people out looking. Otherwise call the rest of your witnesses in early," did not violate the trial court's duty under O.C.G.A. § 17-8-57 by advising the prosecution how to proceed with the prosecution's case; the comments were made outside the presence of the jury. Carson v. State, 843 S.E.2d 421, No. S20A0288, 2020 Ga. LEXIS 348 (2020).

Inquiry to determine admissibility of evidence appropriate. — Question by the trial court to the witness regarding the effects of the reversal medication and defendant's resulting level of coherence was proper because it was not an expression of an opinion but a means to determine whether admission of the nurse's statement would be permitted. Shields v. State, 272 Ga. 32, 526 S.E.2d 845 (2000).

Discussion about witness's testimony concerning defendant's crying. — Denial of a defendant's motion for a new trial was proper as the trial counsel did not provide ineffective assistance of counsel by failing to object and to move for a mistrial on the basis of the trial court's comments during a discussion of whether and why the trial counsel should be allowed to continue a line of questioning of the defendant's housemate regarding the defendant's crying after the defendant's arrest; there was nothing to support the defendant's claim that the trial court improperly commented on the evidence under O.C.G.A. § 17-8-57 when the court discussed whether and why the court should allow the line of questioning to continue. Temples v. State, 280 Ga. App. 874, 635 S.E.2d 249 (2006).

Inquiry of witness for clarification. — When the trial court asked a witness a question to clarify the witness's testimony, the court did not make an improper comment on the testimony. Middlebrooks v. State, 255 Ga. App. 541, 566 S.E.2d 350 (2002).

Defendant's claim that the defendant's rights to due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and to effective assistance of counsel under Ga. Const. 1983, Art. I, Sec. I, Para. XIV were violated by the trial court's comments on the evidence allegedly in violation of O.C.G.A. § 17-8-57 failed; three of the comments were permissible because the comments were merely reflecting grounds for sustaining objections, another comment was not erroneous because the witness was permitted to answer the question over the state's objection, the trial court's questioning of victims was permissible because the questions were attempts to clarify the children's testimony, and any error by the expert in bolstering the testimony of certain witnesses was a self-induced error. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Because the presiding judge's questions about how the defendant shot backwards and how many shots the defendant fired were interposed to clarify the defendant's testimony and to develop the truth in the defendant's case, the superior court erred in finding that the questions constituted a violation of O.C.G.A. § 17-8-57, and the defendant was not entitled to a new trial on that basis. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Trial court did not violate O.C.G.A. § 17-8-57 when the court questioned a witness at trial about a prior statement to police because the question only asked for clarification of whom the witness was referring to when the witness used a plural pronoun and did not express or intimate an opinion regarding the credibility of the evidence being offered or the guilt of the accused. Alexander v. State, 294 Ga. 345, 751 S.E.2d 408 (2013).

Trial court did not improperly comment on the evidence during the defendant's cross-examination because the trial court attempted to clarify the defendant's testimony as to whether the defendant, an attorney, had a duty to correct a client's misstatement and, in so doing, did not express an opinion as to the defendant's guilt or credibility; and the trial court

cautioned the jury explicitly that no ruling or comment which the trial court made during the trial was intended to express any opinion upon the facts of the case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014), cert. denied, 136 S. Ct. 199, 193 L. Ed. 2d 128 (U.S. 2015).

Asking about time and date. — In asking a witness the time and date events occurred, the trial court did not violate O.C.G.A. § 17-8-57; the court simply asked two clarifying questions and did not express an opinion on the evidence or comment on an issue of fact. Griffith v. State, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

Trial court did not violate O.C.G.A. § 17-8-57 when the court questioned the victim's wife because the wife's testimony concerning prior statements in which she did not identify the defendant as the shooter of the victim was, at times, confusing and unclear, and the trial court's questions were posed for the purpose of clarifying her testimony and fully developing the truth of the case; questions posed merely for the purpose of clarifying certain testimony does not violate § 17-8-57. Callaham v. State, 305 Ga. App. 626, 700 S.E.2d 624 (2010).

Questions posed by a trial judge to a defendant's cousin, defendant's alibi witness, were aimed at clarifying the cousin's testimony and were not an expression or intimation regarding the evidence or the defendant's guilt, and were therefore not prohibited by O.C.G.A. § 17-8-57. Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534 (2010).

O.C.G.A. § 17-8-57 did not prohibit a trial judge from taking such measures as necessary to ensure the orderly administration of a trial, and the court was permitted to propound questions to a witness to clarify testimony when necessary to enforce the court's duty to ensure a fair trial. Foster v. State, 314 Ga. App. 642, 725 S.E.2d 777 (2012).

Trial court did not violate O.C.G.A. § 17-8-57 by asking a prosecution witness if the witness told a judge before whom the witness pled guilty to robbery that the witness was forced to commit the crime because the question was intended to clarify the witness's testimony explaining why the witness pled guilty when the witness claimed the witness was threatened, and did not express or intimate an opinion as to the witness's credibility. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Trial court can examine a witness. — Trial court's examination of a witness called by either side is not cause for a new trial unless the court, during the court's examination of the witness, expresses or intimates an opinion on the facts of the case or as to what has or has not been proved, or the questioning becomes argumentative. Shields v. State, 272 Ga. 32, 526 S.E.2d 845 (2000).

If nothing about the questions posed by the trial court constituted the expression or intimation of an opinion as to what was or was not proven regarding the guilt of the accused, and when, despite the defendant's complaint that the court interrupted defendant's re-cross examination and took the questioning from the defendant, the transcript showed that defense counsel was not prevented from continuing the examination of the witness and that the trial court did not violate O.C.G.A. § 17-8-57. Walker v. State, 267 Ga. App. 155, 598 S.E.2d 875 (2004).

Although bordering on adversarial, a trial court's questioning of a defendant did not seriously affect the fairness, integrity, and public reputation of the trial; therefore, reversal under O.C.G.A. § 17-8-57 was not required. Milner v. State, 270 Ga. App. 80, 606 S.E.2d 91 (2004).

When the judge in a criminal trial questioned witnesses called by both the defendant and the state about facts that could have been considered both beneficial and detrimental to each side's case, the judge's actions did not constitute statements of the judge's opinion, argumentative questioning by the judge, or extreme anxiety on the part of the judge to develop the truth as to facts which, if proved, would have been peculiarly beneficial to one of the parties in the case and correspondingly detrimental to the other, from which the jury could have inferred the court's opinion. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Inquiries by the Judge (Cont'd)

Trial court did not violate O.C.G.A. § 17-8-57 when the court merely asked a witness questions about the locations of events and did not refer to whether venue had been proven. Rawls v. State, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

Questions propounded by the court must be objected to at the time, if at all. — When the trial court propounds certain questions to a witness, which examination, it is insisted, is conducted in such manner as to prejudice the rights of the plaintiff in error, such action by the court will not cause a reversal in the absence of any objection raised thereto at the time. Almond v. State, 128 Ga. App. 758, 197 S.E.2d 836 (1973).

Questions addressed to relevant issues. — When questions by the court to clarify the state's inquiry did not contain any expressions or intimations and were addressed to relevant issues so as to assist the jury in ascertaining the truth, this did not entitle the defendant to a mistrial. Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

Trial judge did not violate O.C.G.A. § 17-8-57 when the questions the judge propounded to a witness did not contain any expressions or intimations of opinion and were addressed to relevant issues so as to assist the jury in ascertaining the truth. Mathis v. State, 194 Ga. App. 498, 391 S.E.2d 130 (1990); Eagle v. State, 264 Ga. 1, 440 S.E.2d 2 (1994); Denny v. State, 226 Ga. App. 432, 486 S.E.2d 417 (1997).

Judge's questions in a shoplifting trial regarding whether the department store was located in Coweta County and whether the value of the items taken had been stated were proper questions to develop the case. Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Court addressing leading question to witness. — Trial court may address a leading question to a witness in order to elicit the truth or clarify an issue, provided that the judge does not violate the statutory prohibition set forth in O.C.G.A. § 17-8-57 against expressions or intimations of opinion as to what has or has not been proved or as to the guilt of the accused. Cannon v. State, 179 Ga. App. 142, 345 S.E.2d 623 (1986).

Trial judge's inquiry of defense counsel about where defense counsel was going with a line of questioning about a pool party the victim attended out of which none of the charges against the defendant arose was not improper as the trial court did not comment on what the evidence did or did not show, or comment on the guilt of the defendant, and, thus, the trial court did not err in denying the defendant's motion for a new trial. Creed v. State, 255 Ga. App. 425, 565 S.E.2d 480 (2002).

Questions did not result in grave miscarriage of justice or affect fairness of proceeding. — At a defendant's trial for violating a county junk vehicle ordinance, a trial court's questions to a code inspector as to whether the vehicles were "junk vehicles" and whether the vehicles were properly licensed, and the court's question to the defendant as to whether the defendant had moved the vehicles so that the vehicles were no longer in the defendant's backyard or whether the defendant had merely moved the vehicles from one part of the defendant's backyard to another, were not so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or seriously affect the fairness, integrity, or public reputation of the judicial proceeding. Litman v. State, 304 Ga. App. 690, 697 S.E.2d 855 (2010).

Trial court did not violate O.C.G.A. § 17-8-57 when, during the witness's cross-examination, the court became concerned about how upset the witness was and stopped the proceedings to briefly question the witness about the witness's well-being and by informing the jury of the source of the witness's discomfort, the court did not express a favorable opinion on the witness's abilities, did not give an opinion of the witness, and did not intimate an opinion as to the believability of the testimony. Smith v. State, 297 Ga. 268, 773 S.E.2d 269 (2015).

Judge's interruption of cross-examination did not express improper opinion. — During a defendant's trial for charges arising out of a road rage incident, the trial court did not express an improper opinion in violation of O.C.G.A. § 17-8-57 by interrupting defense counsel's cross-examination to point out that

the defendant was being tried on the charges because a grand jury had indicted the defendant on the charges: the comments did not amount to plain error because the comments demonstrated authorized attempts to control the conduct of the trial and to guide the defense attorney to ensure a fair trial and the orderly administration of justice, and the comments were limited in scope, did not involve the defendant's guilt or innocence, and did not express an opinion on what had or had not been proved. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Judge's interruption of closing argument did not express opinion. — Trial judge did not violate O.C.G.A. § 17-8-57 by interrupting defense counsel's closing argument because the judge's comment was not an improper expression of the judge's opinion of the case; rather, it was an accurate statement of the law. The judge simply interjected to instruct the jury on the applicable law as charged in the indictment, but did not comment on the evidence or the guilt of the defendant. Klausen v. State, 294 Ga. App. 463, 669 S.E.2d 460 (2008).

Challenge to take polygraph test. — When, during trial, the judge in effect dared the appellant to take a polygraph test on the central issue of the appellant's guilt or innocence, it was inferable that the court did not believe the appellant, and such statement constituted a violation of O.C.G.A. § 17-8-57. Crane v. State, 164 Ga. App. 638, 298 S.E.2d 619 (1982).

Questions to defendant when jury absent. — There was no violation of O.C.G.A. § 17-8-57 with regard to the defendant's assertion that the defendant's right to a fair trial was prejudiced when a trial judge questioned the defendant in a "prosecutorial" manner, since the allegedly improper questions were asked at a time when the jury was not present in the courtroom. Jones v. State, 250 Ga. 498, 299 S.E.2d 549 (1983).

Court putting questions to forensic chemist. — Trial court did not abuse the court's discretion in propounding questions to a forensic chemist when the court was trying to clarify an issue as to whether the defendant's blood sample had putrefied, and the court did not intimate or express an opinion as to what had or had not been proved, or as to the guilt or innocence of the defendant. Thurman v. State, 172 Ga. App. 16, 321 S.E.2d 780 (1984).

Inquiry into qualifications of expert witness. — Defendant was not denied a fair trial by a colloquy that took place between the trial court and the State of Georgia's expert witness regarding the witness's qualifications, wherein the court referred to the witness as the "God Father" of the medical examiners in the witness's department of an investigative agency of the State of Georgia as the statement was not an impermissible comment on the witness's credibility. McKee v. State, 275 Ga. App. 646, 621 S.E.2d 611 (2005).

Comments on reliability of expert and one-on-one showups. — Trial court did not violate O.C.G.A. § 17-8-57 by making comments about the reliability of an expert witness and of one-on-one show-ups because when the trial court interrupted defense counsel to make inquiry concerning the admissibility of testimony or the direction that counsel was going with a particular line of questioning, the trial court's comments did not constitute an opinion as to the proof or the guilt of the accused; the trial court promptly gave curative instructions disclaiming any intent by any ruling or comment to express an opinion on the facts of the case, on the credibility of any witness, or on the guilt or innocence of either defendant, stating that the questions in the case had to be decided by the jury, and expressing the trial court's absence of any inclination in the case. Butler v. State, 290 Ga. 412, 721 S.E.2d 876 (2012).

Judge's comment that special agent was very thorough investigator. — Trial judge did not violate O.C.G.A. § 17-8-57 after referring to a special agent as a very thorough investigator because the reference to the witness being a very thorough investigator was solely in the context of explaining the court's concern for the orderly and efficient presentation of testimony to ensure that the state would not require the witness to testify about everything learned during

Inquiries by the Judge (Cont'd)

the investigation, and the court's comment was limited in scope, did not involve defendant's guilt or innocence, and did not express an opinion on what had or had not been proved. Smith v. State, 292 Ga. 588, 740 S.E.2d 129 (2013).

Judge's expression that detectives conduct was "quite all right". — Trial court violated O.C.G.A. § 17-8-57 in commenting to the jury that it was "quite all right" for detectives to provide false information to a suspect during a custodial interview to "test" the suspects; the trial court went beyond ruling that defense counsel's question was argumentative to gratuitously commenting on the propriety of the lead detective's technique. Haymer v. State, 323 Ga. App. 874, 747 S.E.2d 512 (2013).

Comment to a juror during voir dire. — In a child enticement case under O.C.G.A. § 16-6-5(a), a trial court's comment to a juror that the juror did not look the juror's age during voir dire did not constitute improper comments on the defendant's credibility under O.C.G.A. § 17-8-57 based on the defendant's claim that the defendant believed the child was older than the child said because the comment did not express an opinion as to what had or had not been proved. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, No. S12C0500, 2012 Ga. LEXIS 263 (Ga. 2012).

In the defendant's murder trial, the trial court's question during voir dire, asking jurors to raise their hands if the jurors were impartial, and then, when no one raised a hand, the trial court rephrased the question, did not constitute an expression of opinion as to what had been proved as to the guilt of the accused in violation of O.C.G.A. § 17-8-57. There was no plain error because the potential jurors freely expressed the jurors' biases in response to defense counsel's more specific questions. Mitchell v. State, 304 Ga. 56, 816 S.E.2d 9 (2018).

Questioning if juror had been contacted outside court room. — Defendant's conviction was affirmed because the trial court's comments to the juror whether the man who attempted to contact the juror at lunch was in the courtroom, and the directions for the bailiff to accompany the jurors to the parking deck and for the defendant's family members to remain in the courtroom did not "express or intimate" the trial court's opinion regarding the evidence or the defendant's guilt. Perkins v. State, 319 Ga. App. 651, 738 S.E.2d 106 (2013), overruled on other grounds, Worthen v. State, 2019 Ga. LEXIS 22 (Ga. 2019).

Comment in context of telling jurors not to do own investigation. — Trial judge's statement to the jury that "you now have a pretty good idea where things happened," was not an impermissible comment on the evidence requiring a new trial, but was made in the context of telling jurors not to do their own investigation. Graham v. State, 337 Ga. App. 193, 786 S.E.2d 857 (2016).

Expression of opinion as to an uncontested and undisputed fact concerning Intoxilyzer. — When the trial court made the court's comments regarding the history of the Intoxilyzer, defense counsel expressly agreed with the comments and then went on to clarify counsel's question about the history of the Intoxilyzer to the patrol officer. As such, the statement by the trial court concerning a fact that was uncontested or was not in dispute did not constitute a violation of O.C.G.A. § 17-8-57. Rolland v. State, 321 Ga. App. 661, 742 S.E.2d 482 (2013).

Judge's comment on similarity and probative value of evidence. — Trial court erred by commenting on the similarity and probative value of the similar transaction evidence, particularly since the defendant never conceded the similarity of the prior and present offenses and the trial court's statement that the other crime was similar and, therefore, probative of the defendant's guilt was damaging to the defendant's theory of defense, that the state's proof was insufficient and the state was using the defendant's prior guilty plea to improperly bolster the state's weak evidence. Huff v. State, 334 Ga. App. 254, 779 S.E.2d 29 (2015).

Rulings by the Judge

Ruling by the court on a point of law is not an expression of opinion. Jackson v. State, 154 Ga. App. 514, 268 S.E.2d 784 (1980).

When an informant pled the Fifth Amendment during the informant's testimony, and the state asked the trial court to tell the informant that the informant had use immunity, the trial court did not express or intimate the court's opinion as to what had or had not been proved so as to violate O.C.G.A. § 17-8-57 when the court stated, "You need to answer the question. What the DA says is true." Winn v. State, 345 Ga. App. 359, 813 S.E.2d 400 (2018).

Trial court's simple statement sustaining an objection did not in any way implicate O.C.G.A. § 17-8-57. Leggon v. State, 249 Ga. App. 467, 549 S.E.2d 137 (2001).

Judge may give reasons for ruling. — Recognizing the rule that the expression of an opinion by the trial court prohibited by this section is reversible even though harmless, that rule does not apply when counsel makes a motion which invokes a ruling on the part of the trial court and which ruling necessarily is based on some opinion which the trial court holds relative to the evidence. Poole v. State, 100 Ga. App. 380, 111 S.E.2d 265 (1959).

Remarks of a judge assigning a reason for the judge's ruling are neither an expression of opinion nor a comment on the evidence. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980); Goode v. State, 171 Ga. App. 901, 321 S.E.2d 410 (1984); Colsson v. State, 177 Ga. App. 840, 341 S.E.2d 318 (1986); Faulkner v. State, 186 Ga. App. 879, 368 S.E.2d 820 (1988); Adams v. State, 260 Ga. 298, 392 S.E.2d 866 (1990); Mitchell v. State, 200 Ga. App. 146, 407 S.E.2d 115 (1991); Crowe v. State, 265 Ga. 582, 458 S.E.2d 799 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996); Young v. State, 269 Ga. 490, 500 S.E.2d 583 (1998); Johnson v. State, 234 Ga. App. 58, 506 S.E.2d 212 (1998); Gillman v. State, 239 Ga. App. 880, 522 S.E.2d 284 (1999); Dickerson v. State, 241 Ga. App. 593, 526 S.E.2d 443 (1999); Brown v. State, 246 Ga. App. 517, 541 S.E.2d 112 (2000); Pena v. State, 247 Ga. App. 211, 542 S.E.2d 630 (2000).

Remarks of a trial judge which inform the jury of the reason for a ruling excluding evidence generally constitute neither an expression of opinion nor a comment on the evidence within the meaning of O.C.G.A. § 17-8-57. Santone v. State, 187 Ga. App. 789, 371 S.E.2d 428 (1988); Wigley v. State, 194 Ga. App. 7, 389 S.E.2d 769, cert. denied, 194 Ga. App. 913, (1989).

O.C.G.A. § 17-8-57 is not violated by the remarks of the trial court when giving reasons for a ruling. Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577 (1990).

Trial court did not violate O.C.G.A. § 17-8-57 under the plain error standard of review, based on defendant's failure to have objected or to have sought a mistrial during the trial, when comments were made by the judge during a motion in limine hearing which was held outside of the presence of the jury; further, the trial court's explanation for ruling on objections did not express opinions on what had or had not been proved and did not constitute an expression of opinion or amount to a comment on the evidence. Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729 (2004).

Defense counsel cross-examined a witness, who admitted talking to another witness in the hallway; the trial court instructed the witness not to discuss the witness's testimony with anyone, and stated that as the conversation took place before any witnesses had been sworn, the rule of sequestration had not been violated. The trial court did not violate O.C.G.A § 17-8-57 by expressing an opinion on the witness's credibility; the trial court was giving the reasons for the court's ruling, which did not violate § 17-8-57. Rogers v. State, 294 Ga. App. 195, 670 S.E.2d 106 (2008).

Because O.C.G.A. § 17-8-57 was not violated by the trial court's remarks when giving reasons for a ruling, any objection to that comment by the defendant's trial counsel would have been without merit. Artis v. State, 299 Ga. App. 287, 682 S.E.2d 375 (2009).

Appellate court rejected a DUI defendant's claim that the trial court erred in

Rulings by the Judge (Cont'd)

commenting on the evidence in violation of O.C.G.A. § 17-8-57; the trial court merely gave the court's reasons for refusing the jury's request to rehear the officer's testimony regarding the officer's observation of the defendant prior to administering the breathalyzer test. The trial court did not give an expression or intimation regarding the court's opinion as to the matters proved or the defendant's guilt. Jacobson v. State, 306 Ga. App. 815, 703 S.E.2d 376 (2010), cert. denied, No. S11C0498, 2011 Ga. LEXIS 582 (Ga. 2011).

Trial court did not express or intimate the court's opinion with regard to the defendant's guilt or make a statement with respect to what had been proven but was announcing the court's ruling on the admissibility of the evidence and the purposes for which the jury could consider the evidence. Person v. State, 340 Ga. App. 252, 797 S.E.2d 172 (2017), overruled on other grounds by Flowers v. State, 307 Ga. 618, 837 S.E.2d 824 (2020).

Trial court's comments, which provided a reason for an evidentiary ruling, did not amount to comments on the veracity of the witness or the defendant's guilt and, thus, were not in violation of O.C.G.A. § 17-8-57. Sessions v. State, 304 Ga. 343, 818 S.E.2d 615 (2018).

No violation of O.C.G.A. § 17-8-57 for post-verdict comment. — Trial court's comment on the legal effect of the verdicts that had already been returned obviously could have had no influence on the jury's determination as to the defendant's guilt or innocence. Baker v. State, 263 Ga. 79, 428 S.E.2d 340 (1993).

Reopening evidence to admit an unredacted statement after defendant's testimony not error. — In the defendant's joint kidnapping trial with the defendant's brother, the defendant's statement was admitted, redacted to remove references to the defendant's brother; after the defendant testified, the trial court's act of reopening the evidence to allow an unredacted statement into evidence did not constitute an expression of opinion by the trial court regarding the veracity of the evidence in violation of O.C.G.A. § 17-8-57. Hunsberger v. State, 348 Ga. App. 898, 825 S.E.2d 391 (2019).

On objections to testimony and evidence. — When an objection is made to evidence offered, the judge has a right, if the judge deems proper, to give the reasons for the judge's decision on the objections. Such reasons so given, if pertinent to the objections made, do not constitute an expression of opinion. Reed v. State, 163 Ga. 206, 135 S.E. 748 (1926).

Trial judge may, without violating the principles of this section, give the judge's reasons for a ruling on objections to testimony, though these reasons may state somewhat of the facts that have been shown in the case. Brown v. State, 40 Ga. App. 546, 150 S.E. 460 (1929); Wooten v. State, 47 Ga. App. 301, 170 S.E. 392 (1933).

Statements of the court in rulings on objections to testimony do not usually amount to expressions of opinion, nor are statements made during argument of such objections in colloquy between court and counsel. Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843 (1954).

Trial court's commenting on the nine-year-old victim's competency to testify in connection with defense counsel's "leading questions" objection was not an expression of opinion or a comment on the evidence. Norris v. State, 240 Ga. App. 231, 523 S.E.2d 80 (1999).

When the veracity of a witness is in issue, a prior consistent statement is admissible as substantive evidence, and it is well settled that remarks of a judge assigning a reason for the judge's ruling on the admissibility of evidence are neither an expression of opinion nor a comment on the evidence. Brown v. State, 242 Ga. App. 347, 529 S.E.2d 650 (2000), overruled on other grounds, Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

Although a defendant failed to object to certain judicial commentary, the remarks were not in violation of O.C.G.A. § 17-8-57 because the defendant failed to show plain error since the comments were made by the trial judge when ruling on objections by the state, assigned reasons for the rulings, and neither expressed an opinion nor a comment regarding the evidence. Walker v. State, 308 Ga. App. 176,

707 S.E.2d 122 (2011).

On admitting or excluding evidence. — Generally, what the court says in stating to counsel the reason for denying a motion to exclude or rule out evidence is, if pertinent to the question raised by counsel, not error, although the reason given involves a statement as to certain testimony which is already in, or as to there being nothing in evidence showing that the circumstances are as counsel claim. Brown v. State, 40 Ga. App. 546, 150 S.E. 460 (1929).

Under O.C.G.A. § 17-8-57, a judge is allowed to state the judge's reasons for admission or exclusion of evidence, when the judge does not judicially approve any of the testimony or go out of the legitimate sphere of discussion. Forbes v. State, 51 Ga. App. 465, 180 S.E. 914 (1935).

Statement made by a judge in ruling on the admissibility of certain testimony, that a witness has testified to certain facts stated and that the evidence is admissible on the question thus raised by this evidence, is not an intimation or expression of opinion as to what has been proved, but is an explanation to counsel of the judge's ruling on the evidence. Garcia v. State, 52 Ga. App. 80, 182 S.E. 526 (1935).

Trial judge may state the judge's reasons for admitting or excluding evidence, if the reasons are pertinent to the evidence and the ruling made thereon, and such a statement will not violate the rule that the court should not intimate or express an opinion to the jury upon the facts of the case. Fraser v. State, 52 Ga. App. 92, 182 S.E. 418 (1935).

Judge has a right to state the judge's view of the law as to why testimony is admissible. Peters v. State, 72 Ga. App. 157, 33 S.E.2d 454 (1945).

Judge's statement: "as to the photograph, I don't know that I officially ruled on that, but I will allow that to be introduced as evidence" did not violate O.C.G.A. § 17-8-57. Hutson v. State, 216 Ga. App. 100, 453 S.E.2d 130 (1995).

Trial court did not make improper comments in violation of O.C.G.A. § 17-8-57 by ruling that exhibits reflecting the defendant's pretrial statements would be admitted and published though the defendant objected. Pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining the court's rulings do not constitute prohibited expressions of opinion. Boyd v. State, 286 Ga. 166, 686 S.E.2d 109 (2009).

In discussing the admissibility question with counsel, the judge never expressed any opinion about the veracity of the evidence itself and during the colloquy, considered as a whole, it was clear that the trial court was leaving it up to the jury to decide what the evidence did or did not show. Pyatt v. State, 298 Ga. 742, 784 S.E.2d 759 (2016).

Trial court did not violate O.C.G.A. § 17-8-57 because the trial court was not suggesting the court's opinion as to the appellant's presence at the crime scene or indeed as to where any particular person was, or even who the people were, rather, the court was explaining that the detective need not repeat what was learned from eyewitnesses to the crimes. Burney v. State, 299 Ga. 813, 792 S.E.2d 354 (2016).

On motion for continuance. — In ruling on a motion for a continuance, the trial judge may, in the statement of the judge's reasons, refer to the evidence without violating the provisions of this section. Cochran v. State, 136 Ga. App. 125, 220 S.E.2d 477 (1975).

Even if ruling may intimate facts shown. — Trial judge may give the judge's reasons for ruling on the admissibility of testimony, though these reasons may intimate somewhat of the facts that have been shown in the case. Brown v. State, 119 Ga. 572, 46 S.E. 833 (1904); Hall v. State, 7 Ga. App. 115, 66 S.E. 390 (1909).

Prejudice to accused in stating reasons for ruling. — If in giving reasons for ruling on admissibility the court makes a statement prejudicial to the accused, the accused must make a timely motion for a mistrial based upon the statement if the accused wishes to take advantage of the error. Waddell v. State, 29 Ga. App. 33, 113 S.E. 94 (1922).

Objection to opening statement. — Comments of the trial court, in response to an objection by the state's attorney during the opening statement of defense counsel, who commented that a former

Rulings by the Judge (Cont'd)

boyfriend of a state's witness was presently in prison, which the court refused to permit, stating ". . . what somebody's husband is doing . . . is far beyond what will be admissible . . .," did not constitute an improper expression or intimation of opinion. Mathis v. State, 171 Ga. App. 620, 320 S.E.2d 861 (1984).

Objection to closing statement. — Trial court properly sustained the prosecution's objection to defense counsel's allegation in closing argument that police officers, in general, routinely shaded the officers' testimony and violated police rules as counsel was unable to show any evidence to support this allegation; the trial court did not, in so ruling, comment on the evidence in violation of O.C.G.A. § 17-8-57. Martinez v. State, 259 Ga. App. 402, 577 S.E.2d 82 (2003).

Reminder to counsel to confine comments to evidence. — Trial court did not violate O.C.G.A. § 17-8-57 by reminding defense counsel that counsel was supposed to confine counsel's arguments to facts in evidence after the prosecutor objected to defense counsel's argument that a codefendant testified to get a lighter sentence, and the appellate court rejected the defendant's argument that defendant was entitled to a new trial because the trial court violated § 17-8-57. Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309 (2003).

Trial court's ruling on an objection did not clearly refer to the court's earlier ruling on the voluntariness of the defendant's statement so as to constitute a judicial comment that was plain error under O.C.G.A. § 17-8-57(b). Priester v. State, 350 Ga. App. 200, 828 S.E.2d 439 (2019).

Comments on ruling should not express opinion as to guilt. — Once the preliminary issue of voluntariness has been determined by the trial judge outside of the jury's presence, the ultimate question of the voluntary character of a statement and the statement's truthfulness is for the jury, and the jury is bound by the trial court's earlier determination on this issue. The trial judge's comments concerning the judge's prior ruling should not express an opinion as to the guilt of the accused. Spence v. State, 252 Ga. 338, 313 S.E.2d 475 (1984).

Trial court's statements regarding the location of the shooting did not improperly express the court's opinion about whether venue and the shooting had been proven and the defendant did not show plain error because the trial court framed the court's statement in terms of allegations and never mentioned the venue for the charge; and the defendant did not show that the court's statement orienting the prospective jurors to the case had any effect on the outcome of the defendant's trial as the state presented evidence that the victim was shot, including the surveillance recording showing the shooting and expert testimony from a medical examiner; and the prosecutor elicited undisputed testimony from several witnesses that the crimes occurred in Fulton County. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646 (2018).

Comment as to "consistent" nature of testimony. — When, on cross-examination, a witness is asked the same question several times, to which an objection is raised and, to this objection, the trial court responds that the witness has "consistently testified a number of times," the trial court's comment does not relate to the overall credibility of the witness but is explanatory of the trial court's subsequent ruling that the question could be posed to the witness only once more. Saladine v. State, 169 Ga. App. 425, 313 S.E.2d 714 (1984).

Trial court's comments did not seriously affect the fairness, integrity, or public reputation of the proceedings and were not reversible error when, in responses to objections, the trial court: (1) stated that a witness had answered consistently; (2) noted that an officer had testified that the defendant had consented to a search of the vehicle and that the officer conducted a pat-down search of the defendant to protect the officer during the vehicle search; (3) stated that the officer had not changed the officer's testimony; and (4) noted that the officer did not testify that the officer was trying to shoot the defendant, but that the officer was trying to keep the defendant from removing the officer's fire-

arm from the firearm's holster; the trial court's statements were not likely to confuse or prejudice the jurors and the jury was explicitly instructed that none of the rulings or comments should be interpreted to express any opinion upon the facts, the credibility of witnesses, the evidence, or the defendant's guilt or innocence. Bolden v. State, 281 Ga. App. 258, 636 S.E.2d 29 (2006).

Judge's comments did not disparage credibility. — When the judge responded to the witness' statement by informing the witness that the judge had not made a deal with the defendant, the trial judge's comments were limited in their scope and did not in fact disparage the witness' credibility in general or the witness's credibility with regard to any fact at issue in the trial or with regard to the guilt or innocence of defendant, nor did they tend to leave the jury with the impression that the witness supporting defendant's story had lied under oath. Nance v. State, 204 Ga. App. 653, 420 S.E.2d 348 (1992).

Trial court did not display judicial bias against the defendant in certain rulings the court rendered and statements the court made during closing arguments since the ruling and statements all pertained to the jury's duty to determine the evidence based on arguments made by counsel. Seidenfaden v. State, 249 Ga. App. 314, 547 S.E.2d 578 (2001).

Judge's statement on what was and was not evidence. — Trial court did not improperly comment on the evidence during the state's opening statement because the trial court's statement that the prosecutor was talking about what was evidence and what was not evidence was not an improper expression of the trial court's opinion as the trial court did not express or intimate an opinion as to any issue of fact, as to the veracity of any witness, as to the weight of any evidence, or as to the guilt of any of the defendants; instead, the trial court merely explained the reason for the court's ruling. Anthony v. State, 303 Ga. 399, 811 S.E.2d 399 (2018).

Colloquies between judge and counsel as to admissibility of evidence allowable. — Inhibition against an expression or intimation of opinion by the trial judge as to the facts of the case does not extend to colloquies between the judge and counsel as to the admissibility of certain evidence, especially when the judge is ruling upon a point made by counsel for the accused. Pratt v. State, 167 Ga. App. 819, 307 S.E.2d 714 (1983); McGinnis v. State, 258 Ga. 673, 372 S.E.2d 804 (1988); McGarity v. State, 190 Ga. App. 139, 378 S.E.2d 179 (1989).

Rule which prohibits an expression or intimation of opinion by the trial court as to what has or has not been proved does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Kinsman v. State, 259 Ga. 89, 376 S.E.2d 845, cert. denied, 493 U.S. 874, 110 S. Ct. 210, 107 L. Ed. 2d 163 (1989); Kitchens v. State, 198 Ga. App. 284, 401 S.E.2d 552 (1991); Ivory v. State, 199 Ga. App. 283, 405 S.E.2d 90 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 90 (1991).

At a trial in which after defense counsel asked the defendant if the defendant had received a bronze star, the trial court stated in front of the jury that if defense counsel asked that question the court would consider that the defendant put the defendant's character into evidence, there was not plain error under O.C.G.A. § 17-8-57 because that statement, and interruptions of defense counsel during voir dire, did not intimate an opinion as to the defendant's guilt. Bozzuto v. State, 276 Ga. App. 614, 624 S.E.2d 166 (2005); Edvalson v. State, 339 Ga. App. 348, 793 S.E.2d 545 (2016).

Trial judge did not violate O.C.G.A. § 17-8-57 by stating "I think it is admissible as a prior consistent," after the defendant objected to the prosecutor's attempt to admit a document because the statement was made in the context of a colloquy and did not amount to an expression of an opinion on the proof or the guilt of the accused. Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

Trial court's comments to counsel regarding the admissibility of evidence and the formation of counsel's questions did not constitute comments on disputed issues of fact contrary to O.C.G.A. § 17-8-57. Scott v. State, 332 Ga. App. 559, 774 S.E.2d 137 (2015).

Rulings by the Judge (Cont'd)

Trial court was admonishing defense counsel to correct what the court believed to be a misleading question to the victim, which did not rise to the level of an expression or intimation of opinion by the judge and did not warrant a mistrial as the trial court did not express the court's belief that the defendant's sex with the victim was in fact without the victim's consent, but rather the court was preventing defense counsel from misrepresenting the victim's prior statement to the investigator. Durham v. State, 844 S.E.2d 499, No. A20A0356, 2020 Ga. App. LEXIS 328 (2020).

Judge's expression that defendant's character had not been placed in evidence not improper. — Judge's expression of opinion and in response to defense objection to testimony in the presence of the jury that the defendant's character had not been placed in evidence was not an expression of what had or had not been proved, nor was it an opinion as to the guilt of the accused. Smith v. State, 165 Ga. App. 669, 302 S.E.2d 414 (1983).

Comment on voluntariness of confession held reversible error. — Trial court's comment, in the presence of the jury, that the court was ruling that the defendant's incriminating statement "was freely and voluntarily made" was reversible error since the issue of voluntariness was one which ultimately had to be decided by the jury. Ray v. State, 181 Ga. App. 42, 351 S.E.2d 490 (1986).

When the defendant was convicted of malice murder and possession of a firearm during the commission of a crime in connection with the death of the victim, a new trial was necessary because, when the state sought to introduce a recording of the second interview with the defendant, the trial court improperly commented on the evidence by stating that the court had already ruled that the defendant's statement was freely and voluntarily given. Freeman v. State, 295 Ga. 820, 764 S.E.2d 390 (2014).

Prejudicial comments regarding status of witness. — Trial court's comments, adding the influence of the court's personal opinion on the expert status of a witness and identifying the witness in common with the court as a state-paid employee, were prejudicial comments on the evidence during a competency trial. Jones v. State, 189 Ga. App. 232, 375 S.E.2d 648 (1988).

On expert witnesses. — In a prosecution for felony murder, the court did not violate the proscriptions of O.C.G.A. § 17-8-57 when the court ruled that a medical examiner and micro-analyst were experts in their respective fields. Marshall v. State, 266 Ga. 304, 466 S.E.2d 567 (1996).

Trial court did not violate O.C.G.A. § 17-8-57 by stating, after hearing a pathologist recite the pathologist's qualifications and after the state tendered the pathologist as an expert, that "the court will receive him as an expert." Williams v. State, 239 Ga. App. 30, 521 S.E.2d 27 (1999).

Trial court's request simply clarified the basis for the witness' testimony by identifying the exhibits the witness was discussing and did not violate O.C.G.A. § 17-8-57, which provides that it is error for a trial court in a criminal case to express or intimate the court's opinion as to what has or has not been proved or as to the guilt of the accused. Whitehead v. State, 258 Ga. App. 271, 574 S.E.2d 351 (2002).

Comment on codefendant's directed verdict. — Trial court's statement that the court was directing a verdict of not guilty for one codefendant based on insufficient evidence was not an improper comment suggesting sufficient evidence towards other defendants. Holmes v. State, 210 Ga. App. 118, 435 S.E.2d 492 (1993).

Comment on trial strategy. — Overall import of the judge's comment was an explanation of the ruling on the state's hearsay objection; while the judge's brief musing about defense counsel's strategy was unnecessary, and such comments should be avoided, the judge's comment in no way constituted the type of direct comment on the substance or weight of the evidence that had been held to violate O.C.G.A. § 17-8-57. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672 (2015).

Lack of appellate jurisdiction for improper questioning by judge. — Be-

cause the defendant did not file either a cross-appeal to the state's appeal or a separate notice of appeal regarding the superior court's adverse rulings on the other alleged violations of the statute regarding the presiding judge's allegedly improper questioning of the defendant, the appellate court lacked jurisdiction to consider the defendant's allegations of error arising from the superior court's adverse rulings. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Error in determining jury issue as a matter of law. — Trial court erred in convicting the defendant of riot in a penal institution under O.C.G.A. § 16-10-56 because the question of whether a county jail qualified as a penal institution under O.C.G.A. § 16-10-56 was properly for the jury, and the trial court violated O.C.G.A. § 17-8-57 in determining the issue as a matter of law; whether the jail constituted a penal institution was an element of the offense, and the trial court's direction went beyond clarifying the law on a particular issue because the direction involved applying the law to the evidence to draw a conclusion on an element of the state's case. Paul v. State, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

Jury Charges and Curative Instructions

Expression or intimation of opinion in jury charge as to what has been proved. — It is error for the judge, in the judge's charge to the jury, to express or intimate an opinion as to what has or has not been proved, and it is the duty of the court to grant a new trial when such error is committed, whether, in the court's opinion, substantial justice has or has not been done by the verdict. This section, which is imperative and must be obeyed, denies to the Supreme Court discretion in this matter in sustaining a verdict rendered in accordance with the justice of the case. Cook v. State, 40 Ga. App. 125, 149 S.E. 79 (1929).

Because the trial court's charge to the jury regarding the defendant's inculpatory statement amounted to plain error in expressing an opinion as to what had been proven, thereby violating O.C.G.A. § 17-8-57, a new trial was ordered on remand. Chumley v. State, 282 Ga. 855, 655 S.E.2d 813 (2008).

Technical violation when instructing on multiple violations not amounting to judge's opinion. — Trial counsel did not provide ineffective assistance by failing to object to an alleged violation of O.C.G.A. § 17-8-57 in a trial court's final charge because: (1) the jury instructions given on accomplice testimony tracked the standard pattern jury instruction; (2) the complained-of language adequately instructed the jurors that each of the defendants had been charged with multiple counts and the jurors were to consider each count independently in assessing whether evidence corroborating the testimony of a single witness was required; and (3) assuming that the cited language, in isolation, could be viewed as a "technical violation," it was clear that the charge did not otherwise assume things as facts and intimate to the jury what the judge believed the evidence to be, so the court's additional instructions concerning accomplice testimony corrected any error. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

General comments to jury acceptable. — Trial court's instruction that "this is not a case in which you'll be sequestered or have to consider any issues in regard to sentencing in the event that it were to go that far" and "you are only concerned with the guilt or innocence of this accused. You're not to concern yourselves with punishment" did not constitute an expression of opinion. Smith v. State, 268 Ga. 42, 485 S.E.2d 189 (1997).

Trial court's instruction: "The evidence in this case was the witness was asked did you conspire with another person, weren't you the one behind all of this. The answer to that question was, no. And until evidence is produced to change your opinion about that, the evidence is no" was not an improper expression of opinion as to what had been proved because it restated only what the testimony was, absent the improper inferences, and there was no evidence to the contrary. Caldwell v. State, 247 Ga. App. 191, 542 S.E.2d 564 (2000).

Explanation of redacted defendant's video interview. — Trial court did not impermissibly comment on the

Jury Charges and Curative Instructions (Cont'd)

evidence when the court explained to the jury that the co-defendant's video recorded interview with the police had been redacted so that it included only the relevant portions because the trial court did not express or suggest any opinion the court had regarding the defendant's guilt or innocence or about what had or had not been proved as the trial court's challenged comment was meant simply to explain to the jury that the reduced length and the discernable interruptions in the video the jury saw were due to the agreed-upon redactions to leave what was relevant to the case. Brown v. State, 302 Ga. 454, 807 S.E.2d 369 (2017).

O.C.G.A. § 17-8-57 violated only when charge intimates opinion of judge as to evidence. — It is only when the charge of the court assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be, that the rule of this section is infringed. Mitchell v. State, 190 Ga. 571, 9 S.E.2d 892 (1940).

When the court intimated no opinion whatsoever, assured an elimination from jury consideration of the whole impermissibly introduced subject of the defendant's lack of bond, and not merely what might have prompted a judge to deny bond, and emphasized to the jury in the court's final charge that no comments or rulings of the court were intended to express an opinion upon the facts of the case, no incursion of the strict rule of O.C.G.A. § 17-8-57 transpired. Gutierrez v. State, 235 Ga. App. 878, 510 S.E.2d 570 (1998).

Trial court did not violate O.C.G.A. § 17-8-57 when the court instructed the jury on how to consider evidence of any custodial statements made by the defendant as the instruction, taken as a whole, did not assume facts or intimate an opinion relating to defendant's custodial statements. Milligan v. State, 307 Ga. App. 1, 703 S.E.2d 1 (2010).

Trial court's comments did not violate O.C.G.A. § 17-8-57 because the comments amounted to no more than an explanation that clarified the trial court's charge applicable to an alco-sensor field test. The trial court's explanation was a correct statement of the law pertaining to alco-sensor test results and did not express or intimate an opinion regarding the evidence. Black v. State, 309 Ga. App. 880, 711 S.E.2d 428 (2011).

Trial court's instruction on a statement by a child describing sexual contact or physical abuse was erroneous as the jurors could have reasonably taken the instruction to be an expression or intimation of the trial court's opinion that the child's statements were reliable or true. Palmer v. State, 330 Ga. App. 870, 769 S.E.2d 600 (2015).

Trial court did not violate O.C.G.A. § 17-8-57 when the court charged the jury on intent given that the court explained to the jury that intent was only one of the elements of the crimes charged and that the jury could not find the defendant guilty of any crime unless the state proved every element beyond a reasonable doubt; thus, there was no likelihood that the jury considered the reference to "the defendants' intentions" as an indication of the trial court's beliefs about what the state had proven at trial. Scudder v. State, 298 Ga. 438, 782 S.E.2d 638 (2016).

Jury charge on an inference of the recent possession of stolen property was proper and was not an improper comment on the defendant's guilt by the trial judge in violation of O.C.G.A. § 17-8-57 because the trial court's comments did not constitute a comment before the jury on a disputed issue of fact or intimate an opinion about the defendant's guilt, but merely instructed the jury on the permissible inference of possession. Cooper v. State, 342 Ga. App. 351, 801 S.E.2d 589 (2017), cert. denied, No. S17C2017, 2018 Ga. LEXIS 7 (Ga. 2018), cert. dismissed, No. S17C2022, 2018 Ga. LEXIS 10 (Ga. 2018), cert. denied, 138 S. Ct. 2039, 2018 U.S. LEXIS 3176, 201 L. Ed. 2d 288 (U.S. 2018).

Court's explanation for denying request of jury. — Trial court did not violate O.C.G.A. § 17-8-57 in presenting the court's reasons for denying the juror's request to see the cell phone used to facilitate drug trafficking since the court's comment was limited to a clarification of procedures and did not address the credi-

bility of witnesses or any fact at issue in the trial. Ferrell v. State, 312 Ga. App. 122, 717 S.E.2d 705 (2011).

Charge to the jury must be viewed as a whole and not taken as single instructions in artificial isolation. Moses v. State, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993).

When passing on exception to part of charge, whole charge may be examined. — In passing upon the question of whether a particular part of a charge excepted to as expressing an opinion on the fact is fairly liable to such exception, the whole charge, written and in the record, may be considered. Driggers v. State, 51 Ga. App. 370, 180 S.E. 619 (1935); Mitchell v. State, 190 Ga. 571, 9 S.E.2d 892 (1940).

Expression not viewed as opinion when the point is stated still to be in issue. — To determine whether an expression in the charge of the court intimates the opinion of the trial judge as to what has or has not been proved, it is proper, in a doubtful case, to construe the expression in connection with the entire charge, and when the trial judge elsewhere in the judge's charge, in ample and unmistakable language, tells the jury that the particular matter about which it is claimed the judge has expressed an opinion as to its having been proved is an issue in the case, such expression will not be construed as an expression or intimation of opinion on the facts. Hanvey v. State, 68 Ga. 612 (1882); Moon v. State, 68 Ga. 687 (1882); Washington v. State, 24 Ga. App. 65, 100 S.E. 31 (1919).

Whole charge must be considered as to whether excerpt constitutes an opinion. — Whether or not an excerpt from a charge constitutes an expression of opinion must be determined from the charge as a whole. Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843 (1954).

Jury charge as a whole, and not isolated segments thereof, is to be looked to in determining whether or not the trial court fully and fairly covered the points contained in the refused instructions. Amerson v. State, 177 Ga. App. 97, 338 S.E.2d 528 (1985), overruled on other grounds, Watts v. State, 274 Ga. 373, 552 S.E.2d 823 (2001), overruled on other grounds, Watts v. State, 261 Ga. App. 230, 582 S.E.2d 186 (2003).

In order to determine whether a trial court has improperly expressed an opinion in the court's charge as to what has or has not been proved, the whole charge may be considered. Mullinax v. State, 255 Ga. 442, 339 S.E.2d 704 (1986).

Slip of the tongue as to a single word did not amount to a violation of O.C.G.A. § 17-8-57 when considered in light of the entire charge. Dukes v. State, 224 Ga. App. 305, 480 S.E.2d 340 (1997).

While it is error for a judge to express the judge's opinion as to the guilt of the accused, a mere verbal inaccuracy in a charge, which results from a palpable slip of the tongue, and clearly could not have misled or confused the jury, is not reversible error; when the trial court gave curative instructions following the court's slip of the tongue in giving the instructions, there was no error. Sutton v. State, 263 Ga. App. 188, 587 S.E.2d 379 (2003).

When a trial judge gave an extensive pattern charge on self-defense, and in one sentence of the charge, the judge stated that "for the use of force to be justified under the law, the accused must have acted, really acted under the influence of the fears of a reasonable person and not in the spirit of revenge," and when defense counsel conceded that the trial court's second mention of the word "acted" in one sentence of the jury charge stemmed from a mere slip of the tongue, and when, reviewing the charge as a whole, the sentence appeared not to have been an improper comment by the trial judge on the evidence, but rather a slip of the tongue as to a single word, and that the charge as a whole revealed that the trial judge gave sufficient context to the circumstances under which the jury could have found that the defendant acted in self-defense, no violation of O.C.G.A. § 17-8-57 occurred. Robinson v. State, 267 Ga. App. 634, 600 S.E.2d 729 (2004).

With regard to a defendant's convictions for aggravated sodomy and kidnapping, the misreading of the word "in" instead of "and" when the indictment was read to the

Jury Charges and Curative Instructions (Cont'd)

jury regarding the aggravated sodomy count did not constitute an improper comment on the evidence. Considering the charge as a whole, the appellate court was satisfied that the jury could not have been misled or confused by the trial court's minor slip of the tongue since the singular use of "in" instead of "and" constituted harmless error. Smith v. State, 294 Ga. App. 692, 670 S.E.2d 191 (2008).

By charging the jury in the language of the indictment as to the physical acts of the defendant which amounted to the crimes charged, the court did not express an opinion as to the evidence. Weaver v. State, 137 Ga. App. 470, 224 S.E.2d 110 (1976).

Judge should carefully avoid invading the province of the jury. — Judge should refer to the evidence only so far as is necessary to present the leading issues in the cause, leaving the minor contentions of opposing counsel to the consideration of the jury under appropriate general intimation. It should contain no such summary of the evidence as might, to a jury, either seem to be an argument, or amount to the expression or intimation of an opinion thereon. Gallman v. State, 127 Ga. App. 849, 195 S.E.2d 187 (1973).

For instruction held to invade province of jury, see Johns v. State, 178 Ga. 676, 173 S.E. 917 (1934), overruled on other grounds, Corbin v. State, 211 Ga. 400, 86 S.E.2d 221 (1955).

Use of explanatory illustration in charging the jury. — When, in charging the jury, the court correctly states the law governing the case, but exception is taken to an illustration used by the court explanatory of a legal principle, this court will not narrowly scrutinize the illustration if satisfied that, whether right or wrong, the illustration was not calculated to mislead, and did not in fact mislead the jury. Hamilton v. State, 169 Ga. 613, 151 S.E. 17 (1929).

When a trial court correctly instructs the jury on the law but an exception is made to a hypothetical illustration offered by way of explanation, unless a showing is made that the illustration confused or misled the jury, the court of appeals will not narrowly scrutinize that illustration. Grimes v. State, 245 Ga. App. 277, 537 S.E.2d 720 (2000).

Repetition of instruction to correct omission not improper. — During a defendant's trial for charges arising out of a road rage incident, the trial court did not violate O.C.G.A. § 17-8-57 by repeating the jury instruction on self-defense twice; given that the charge was repeated solely for the purpose of correcting an unintended omission, and that the corrected charge was an accurate statement of law, the trial court's repetition of the instruction did not amount to an improper expression of opinion or a comment on the evidence. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Answering hypothetical question from jury. — Trial court, by answering a hypothetical question from the jury by stating that it would not have been illegal for the victim to express a desire to drop the charges, was not impermissibly expressing an opinion on the defendant's guilt or on what facts had been proven during the trial. Simmons v. State, 251 Ga. App. 682, 555 S.E.2d 59 (2001).

Providing jury with illustrative examples of what verdict might be. — In a trial for murder, when the evidence involves the offense of voluntary manslaughter, it is not an expression of an opinion by the court as to what verdict the jury should return, to define voluntary manslaughter, give the jury the penalty, and to give several illustrations as to what their verdict could be as to the minimum and maximum term of years they might wish to impose, and the effect of such verdict in regard to serving the minimum and maximum of the years fixed by the verdict, when the court also gives a correct and proper charge as to murder and justifiable homicide, also involved under the evidence. Harrell v. State, 69 Ga. App. 482, 26 S.E.2d 151 (1943).

Charge that jury should acquit if the jury believes the defendant. — When the trial court charges the jury that if the jury believes the contentions of the defendant, it is the jury's duty to acquit, the court does not lead the jury to believe

that the jury does not have to find proof of the defendant's guilt beyond a reasonable doubt, when the trial judge further instructs the jury that if the jury believes beyond a reasonable doubt that the defendant committed the offense for which the defendant is charged, the jury would be authorized to find the defendant guilty. White v. State, 151 Ga. App. 559, 260 S.E.2d 554 (1979).

Classification of evidence as to weight or consideration. — It is reversible error for the trial judge in the judge's charge to classify the evidence as to the weight or consideration, or to intimate any opinion thereon. Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971).

Charging point of law. — Trial court's instruction that it was not essential for the state to locate physical evidence of gunfire to establish the crime of aggravated assault was not an impermissible comment on the evidence; it simply charged a point of law. Willis v. State, 214 Ga. App. 479, 448 S.E.2d 223 (1994); Salahuddin v. State, 241 Ga. App. 168, 525 S.E.2d 422 (1999).

Because the court's instruction to the jury, made in overruling a defense objection during the cross-examination of a witness, was not an improper expression of the court's opinion of the case, but was an accurate statement of the law of implied consent, there was no violation. Hunt v. State, 247 Ga. App. 464, 542 S.E.2d 591 (2000).

Judge's reference in jury instructions to "the deadly weapon used by the defendant" was not an improper opinion that the gun used was a "deadly weapon" and that the defendant was the person who used the gun to kill the victim; rather, the statement was drawn verbatim from a case holding that it was not necessary for the state to admit into evidence the deadly weapon used by the defendant, and referred to "defendant" generically. Wells v. State, 295 Ga. 161, 758 S.E.2d 598 (2014).

Instruction to not base verdict on inferences or speculation. — Trial court's instruction that "you must not base your verdict on inferences or speculation or anything that is not supported by the evidence" was a correct statement of the law and was not plain error on the basis of a claim that such instruction interfered with the jury's function as sole arbiter of the credibility of witnesses. Caldwell v. State, 247 Ga. App. 191, 542 S.E.2d 564 (2000).

Charge stating contents of indictment. — There was no violation when the court merely stated the contents of the indictment and properly instructed that the court does not express an opinion as to whether the accused has been involved in any offenses. Jones v. State, 268 Ga. 12, 483 S.E.2d 871 (1997); Anderson v. State, 244 Ga. App. 643, 536 S.E.2d 540 (2000).

Charge that witnesses are presumed to be truthful. — Instruction that "when witnesses appear and testify they are presumed to speak the truth and are to be believed" does not erroneously shift the burden of proof to the defendant, requiring the defendant to produce evidence that would be sufficient to overcome such presumption, when the quote and context of the charge is relevant and actually beneficial to the defendant. Ivie v. State, 151 Ga. App. 496, 260 S.E.2d 543 (1979).

Charge regarding expert testimony. — In a prosecution for driving under the influence of alcohol, the trial court did not improperly comment on the evidence when the court charged the jury that "any statement during the course of this trial which would suggest that [the defense expert's] testing procedures or methods have been approved by the appellate courts of this state shall be disregarded by you," since, considered in context, the charge was in the nature of a curative instruction necessitated by the plaintiff's inappropriate attempt to bolster the credibility of the witness. Campbell v. State, 248 Ga. App. 162, 545 S.E.2d 6 (2001).

Court may presume police officer's information reliable. — Trial court's statement that information that a police officer receives from another is presumed to be reliable was not an improper comment on the evidence since the statement was offered to explain the correct proposition of law that officer A may act on information received from a reliable source, even if the reliable source spoke to officer B, who then communicated the

Jury Charges and Curative Instructions (Cont'd)

information to officer A. Ellis v. State, 216 Ga. App. 232, 453 S.E.2d 810 (1995).

Comment on weight and consideration to be given statements of the defendant. — In charging upon a statement made by one on trial for crime, it is erroneous to use language calculated to impress the jury that the jury ought to be cautious in giving credit to what the defendant said. Alexander v. State, 114 Ga. 266, 40 S.E. 231 (1901).

While under former Code 1933, § 81-1104 (see O.C.G.A. § 17-8-57) a trial judge should not, in charging upon a statement made by one on trial for a criminal offense, use language calculated to impress the jury that the jury should be cautious in giving credit to what the accused says, or in any manner to use language which might disparage the statement of the accused, it was not error for the trial judge, in charging upon the statement of the accused under former Code 1933, §§ 38-415 and 38-416 (see O.C.G.A. § 24-5-506), to remind the jury of the circumstances which may impair the force of such statement, or which should enable the jury to give the accused's statement the weight to which the statement was entitled. Henderson v. State, 50 Ga. App. 16, 176 S.E. 811 (1934).

Charge that defendant contended defendant was not guilty. — Trial court's instructions informing the jury that the defendant contended to be not guilty of the crime charged in the indictment was not an expression of the court's opinion that the state's case was true when other parts of the instructions informed the jury that the defendant was clothed with a presumption of innocence that could be overcome only by proof of guilt beyond a reasonable doubt, and that the defendant was not required to prove the defendant's innocence. Beam v. State, 265 Ga. 853, 463 S.E.2d 347 (1995).

Charge regarding character evidence. — Trial court did not commit plain error in the court's charge to the jury on good character evidence because the defendant used the idea that the defendant did not have a reputation for violence as a means of attempting to show the defendant's good character, and the trial court merely reflected that in the court's charge to the jury; and the jury was properly left to determine whether the defendant would have acted consistently with the defendant's purported character with respect to violence, which was to not act violently towards anyone, including the victim; further, giving that proper charge did not amount to the trial court commenting on the evidence. Jacobs v. State, 303 Ga. 245, 811 S.E.2d 372 (2018).

Charge that jury should convict if convinced beyond a reasonable doubt. — It is not error as an expression of opinion by the court to charge, in a criminal case, that if the jury were convinced of the defendant's guilt beyond a reasonable doubt, it was the jury's duty to convict the defendant. Caraway v. State, 72 Ga. App. 504, 34 S.E.2d 303 (1945).

In a prosecution on multiple counts of public indecency, the trial court did not err in giving an instruction that it was for the jury to determine whether the evidence showed beyond a reasonable doubt that the defendant was "the perpetrator of the alleged crimes," because when read as a whole, the charge adequately instructed the jury on the jury's duty to consider each count separately. Callahan v. State, 249 Ga. App. 108, 547 S.E.2d 741 (2001).

Charge as to presumption that every act unlawful in itself is criminally intended. — It is not error for the court to charge the jury: "therefore the law presumes that every act which in itself is unlawful was criminally intended until the contrary is made to appear, but the question of intention rests finally with you," as such instruction does not constitute an expression of opinion by the trial judge that the defendant committed an unlawful act. Van Pelt v. State, 87 Ga. App. 103, 73 S.E.2d 115 (1952).

Charge that civil remedies were available. — In a prosecution for aggravated assault arising out of a melee involving the amount owed the defendants for construction work, the trial court correctly charged that civil remedies were available to resolve the controversy. Powell v. State, 228 Ga. App. 56, 491 S.E.2d 135 (1997).

Charge that state's evidence tends to establish guilt. — When the state's evidence is wholly circumstantial, a charge that the state has introduced evidence tending to establish the fact that the defendant is guilty of the charge is clearly, though inadvertently, an intimation of the court's opinion as to what has been proved in the case and constitutes reversible error. Rowland v. State, 71 Ga. App. 154, 30 S.E.2d 368 (1944).

Failure to give charge when evidence would support charge. — If there is evidence in the case from which the jury could find that the acts of the defendant were lawful, and the charge given eliminates this phase of the case from the consideration of the jury, the charge amounts to an expression of an opinion that the acts of the defendant are unlawful and constitutes error by the court. Patterson v. State, 181 Ga. 698, 184 S.E. 309 (1936).

Failure to adjust charge to the evidence. — Trial court erred by not adjusting a charge regarding statements by the defendant to private persons to omit the court's reference to the situation in which such a statement was made while the defendant was in custody because there was no evidence in the defendant's case to show that the defendant had made any such statements while in custody, but it was highly probable that the charge, although not properly adjusted to the evidence actually presented at trial, did not contribute to the jury's guilt/innocence phase or sentencing phase verdicts; the charge simply provided the law governing the admissibility of certain types of statements without implying that any such statements existed. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

"Apparent purpose" included in instruction. — In a prosecution for burglary, use of the phrase "apparent purpose" in an instruction stating "That the defendant did not accomplish his apparent purpose would not necessarily prevent a finding of guilt of the offense of burglary" was not an improper comment on the evidence. Batchelor v. State, 229 Ga. App. 563, 494 S.E.2d 357 (1997).

Use of "consistent" in curative instructions. — Trial court's use of "consistent" in the court's curative instructions following the defendant's motion for mistrial did not assume certain things as fact and did not intimate to the jury what the judge believed the evidence to be. Instead, the trial court, using a term to which the defense counsel did not object when the prosecutor informed the court of the extent of the prosecutor's expert's testimony, attempted to inform the jury of the limited nature of the expert testimony inaccurately summarized by the prosecutor in the prosecutor's opening statement. Jones v. State, 277 Ga. 36, 586 S.E.2d 224 (2003).

Charge given during evidentiary phase. — Trial court's correct instruction to the jury during the evidentiary phase of a criminal proceeding did not constitute an improper comment on the defendant's guilt, although it might have been the better practice for the court to give the instruction during the jury charge at the close of the evidence. Polizzotto v. State, 248 Ga. App. 814, 547 S.E.2d 390 (2001).

Omission of instruction on witness immunity not error. — During a defendant's trial for charges arising out of a road rage incident, the trial court's failure to give a jury instruction regarding immunity or leniency granted to witnesses did not violate O.C.G.A. § 17-8-57 or the defendant's due process rights; although the trial court began to give the instruction and stopped after a few words, the failure to provide the entire charge was not error because there was no evidence that any witness who testified at trial had been granted immunity or leniency. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Although the judge had two ex parte discussions with the prosecutor, no curative instruction was required because the court made no comments to the jury; however, the better practice would be to avoid all such ex parte conversations. Chambers v. State, 224 Ga. App. 245, 480 S.E.2d 288 (1997).

Slip of the tongue did not mislead jury. — Court's substitution of "the court" for "the State" amounted to a slip of the tongue that clearly could not have misled

Jury Charges and Curative Instructions (Cont'd)

or confused the jury. Mitchell v. State, 242 Ga. App. 694, 531 S.E.2d 143 (2000).

Referring to the deceased as the "victim" in the charge on aggravated assault did not amount to an improper expression of the accused's guilt under O.C.G.A. § 17-8-57. Camphor v. State, 272 Ga. 408, 529 S.E.2d 121 (2000).

In the defendant's vehicular homicide trial, the trial court's use of the word "victim" in referring to the deceased did not amount to an improper comment on the guilt of the accused. Hartzler v. State, 332 Ga. App. 674, 774 S.E.2d 738 (2015).

Evidence of victim's struggling with defendant not sufficient. — In a prosecution for malice murder, evidence that the victim struggled with the defendant when the defendant announced the defendant's intent to kill the victim and brandished a gun was not evidence of provocation which justified the giving of a charge on voluntary manslaughter. Beam v. State, 265 Ga. 853, 463 S.E.2d 347 (1995).

Instruction as to matter on which no evidence introduced. — When the court charges the jury on the law of flight, and there is no evidence of flight on the part of the accused, the court has erred and a new trial should be granted. Griffin v. State, 47 Ga. App. 188, 170 S.E. 106 (1933).

Theory of culpability which is supported by testimony but not advanced at trial. — Trial court errs in charging a theory of criminal culpability supported by testimony but not advanced during the trial. Gallman v. State, 127 Ga. App. 849, 195 S.E.2d 187 (1973).

Statement by judge as to only grade of offense involved. — Charge "the only grade of manslaughter involved in this case and the only one I charge you upon is voluntary manslaughter," does not violate the rule against expression by the judge of an opinion on the proof or the guilt of the accused, when the judge has just charged the general laws on manslaughter, which have to do with both voluntary and involuntary manslaughter. McMullen v. State, 199 Ga. 521, 34 S.E.2d 892 (1945).

Judge's comment that judge would probably get reversed if charge not read. — Trial judge's statement that the judge would "get reversed probably" if the judge failed to read the jury charge did not violate O.C.G.A. § 17-8-57(a)(1) because the statement was not made in connection with any evidence against the defendant or in a context that would have implied that the judge believed the defendant would be found guilty. The clear import of the judge's statement was that jury instructions are so important that the judge's failure to read the instruction would be a violation of the judge's duty. DeLoach v. State, 308 Ga. 283, 840 S.E.2d 396 (2020).

Failure to give lower charge is not expression of opinion. — When the evidence did not warrant the submission to the jury of involuntary manslaughter in the commission of a lawful act without due caution and circumspection, it cannot be said that the trial judge, by reason of having charged the higher grade of involuntary manslaughter and not the lower, intimated and expressed an opinion that the defendant was guilty of the higher grade. Swearingen v. State, 63 Ga. App. 605, 11 S.E.2d 423 (1940).

Charge that a crime has been committed when nothing would dispute this. — When there is nothing in the evidence or in the defendant's statement to dispute the fact that the alleged crime was committed and the defendant's defense rests solely upon the contention that the defendant did not participate in the offense, the court, in charging the jury, does not violate this section in assuming that a crime has been committed. Driggers v. State, 51 Ga. App. 370, 180 S.E. 619 (1935).

Reference in charge to facts established by the evidence. — When a fact is established by the disputed evidence, it is not error for the judge in the judge's charge to assume or intimate that the fact has been proved. Lastinger v. State, 58 Ga. App. 376, 198 S.E. 559 (1938).

Charge on circumstantial proof of weapon proper. — In a prosecution for armed robbery, the trial court was entitled to charge the jury that "a replica having the appearance of an offensive weapon

means any reasonable belief on the part of the victim that an offensive weapon is present, which is obtained by the victim through the use of his senses." Smith v. State, 209 Ga. App. 540, 433 S.E.2d 694 (1993).

Error to assume or seem to assume that transaction was a crime. — In charging the jury in a criminal case, it is error for the court to assume or seem to assume that a transaction was a crime. Bell v. State, 47 Ga. App. 216, 169 S.E. 732 (1933).

Reference to acts charged as "crimes" is not erroneous expression of opinion or erroneous assumption. — Charge of the trial judge in a prosecution for subornation of perjury, wherein the judge refers to perjury and subornation of perjury as "crimes," is not erroneous as expressing or intimating an opinion that a crime has been committed, nor is it erroneous as assuming or seeming to assume that any transaction involved under the evidence is a crime. Taylor v. State, 59 Ga. App. 1, 200 S.E. 237 (1938).

Reference to "his crime" in charge as to recommendation of punishment. — Charge that if the jury should find the defendant guilty, the jury can, if the jury sees fit, recommend that the defendant be punished by imprisonment for life, "and, in that event, he would be sent to the penitentiary to serve the rest of his life for his crime," does not, when construed in context, violate the rule that the judge shall not express or intimate any opinion as to what has or has not been proved, or as to the guilt of the accused. McMullen v. State, 199 Ga. 521, 34 S.E.2d 892 (1945).

Reference to "all criminals" and not "all defendants". — In defendant's trial on charges of operating a motor vehicle after receiving notice that the defendant's license was revoked as an habitual violator, driving a motor vehicle under the influence of alcohol, and driving a motor vehicle under the influence of alcohol while transporting a child under the age of 14 years, the trial court did not violate O.C.G.A. § 17-8-57 by telling the jury that the state had the burden of proving guilt beyond a reasonable doubt for "all criminals who come into criminal court" and then correcting itself by telling the jury that the court meant to say "all defendants who come into criminal court." Floyd v. State, 263 Ga. App. 3, 587 S.E.2d 166 (2003).

Use of "the defendant" rather than "a defendant". — See Fowler v. State, 187 Ga. 406, 1 S.E.2d 18 (1939).

When the court uses the article "the" instead of the article "a" preceding the word "defendant" in charging the jury on admissions, the court does not express an opinion that the defendant has made an admission when the defendant had not. Nelson v. State, 187 Ga. 576, 1 S.E.2d 641 (1939).

Undue stress on state's contentions. — Motion for new trial complaining that the court erred in unduly stressing throughout the charge the contentions of the state, stating the contentions repeatedly, and in unduly stressing, by repetition all through the charge, under what circumstances the jury would be authorized to find the defendant guilty, all of which amounts to an expression of opinion on the part of the court, and is prejudicial to the defendant, affords no cause for new trial. Jillson v. State, 187 Ga. 119, 200 S.E. 707 (1938).

Summing up of state's case and arguments in charge to jury. — Charge should contain no such summary of the evidence as might to a jury either seem to be an argument or amount to the expression or intimation of an opinion thereon. It is therefore error for the presiding judge to repeat the substance of the testimony of the state's witnesses as detailed from the stand, and submit this with the argumentative deductions drawn therefrom by the state's counsel as the issues in the case. Rouse v. State, 2 Ga. App. 184, 58 S.E. 416 (1907).

Detailed recapitulation of testimony in charge to jury. — Judge should not in the judge's charge take up and recapitulate in detail the testimony of the witnesses as the testimony was delivered from the stand, in such a way as is calculated to leave the impression upon the minds of the jury that the testimony of such witnesses has established the fact contended for by one of the parties, or that such testimony is of a nature that it is

Jury Charges and Curative Instructions (Cont'd)

entitled to more consideration than other testimony in the case. Ryan v. State, 46 Ga. App. 347, 167 S.E. 720 (1933).

If the charge of the court is argumentative and so strongly stated the contentions of one of the parties as to weaken and disparage those of the opposite party, and thus is liable to impress the jury that the court is of the opinion that the defendant is guilty, a new trial should be granted. Ryan v. State, 46 Ga. App. 347, 167 S.E. 720 (1933).

Charge as to evidence of other similar offenses committed by defendant. — See Adams v. State, 55 Ga. App. 729, 191 S.E. 280 (1937).

Charge as to evidence of other similar transactions committed by defendant. — Trial court did not make an improper comment on the evidence while instructing the jury on similar transaction evidence because the statement notified the jury that the prosecutor was about to present certain evidence mentioned in an opening statement regarding other acts, but, it did not express or intimate the trial court's opinion as to whether any fact had been or had not been proved; and, before making the statement, the trial court told the jury that, by giving the instruction, the trial court in no way suggested to the jury that the defendant had or had not committed any other acts, nor whether such acts, if committed, proved anything. Ashley v. State, 340 Ga. App. 539, 798 S.E.2d 235 (2017).

Charge on impeachment. — Trial counsel was not effective for failing to object to an instruction regarding impeachment of a witness by proof of prior contradictory statements because the charge did not constitute an expression of opinion as to the guilt of the accused in violation of O.C.G.A. § 17-8-57; the charge stated the law accurately and was mere surplusage that did not mislead the jury. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Trial judge's charge to a jury on impeachment of a witness by a prior conviction did not amount to an improper comment on the evidence as the prior conviction was undisputed and the charge did not require the jury to disbelieve the defendant's testimony based on the prior conviction. Coleman v. State, 325 Ga. App. 700, 753 S.E.2d 449 (2014).

Witness answers are evidence, not questions. — Trial court's sua sponte instruction that the witness's answers, rather than the questions put to the witness, were evidence, was not error, after conflicting testimony about the author of the witness's report to the police. Hardwick v. State, 250 Ga. App. 390, 551 S.E.2d 789 (2001).

Instruction that jury should disregard remark made in jest. — See Edwards v. State, 55 Ga. App. 187, 189 S.E. 678 (1937).

Expression of opinion as to what has been proved. — An expression of opinion by the court with regard to what has or has not been proved cannot be eradicated by an instruction to the effect that anything the court said or did during trial was not intended to suggest which party should prevail. Brundage v. State, 143 Ga. App. 1, 237 S.E.2d 473 (1977).

Effort to eradicate effect of acknowledged erroneous expressions held insufficient. — See Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976).

Instruction as to what evidence has been ruled out as objectionable. — For the trial court to repeat objectionable evidence ruled out by the court in order to identify the evidence for the jury, in connection with the court's instructions to the jury to disregard the evidence, is not improper or prejudicial to the rights of the defendant. Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843 (1954).

Charge as to consideration of evidence which has been ruled out or excluded. — Failure to instruct the jury in the formal charge not to consider evidence which has been ruled out of the case in the absence of a timely request to do so is not error, nor is it error to instruct the jury not to consider excluded evidence. Such a charge is not an expression of opinion as to what has been proved on the trial of the case. Pritchard v. State, 225 Ga. 690, 171 S.E.2d 130 (1969).

Charge as to one defendant as implicating codefendants. — Charge: "I

charge you as a matter of law that the codefendant, a witness for the state, is an accomplice so far as your consideration of his testimony is concerned," amounts to an expression of the trial court's opinion that the evidence demands a finding that the codefendant and some other person or persons have committed the offense charged, and is calculated to mislead the jury into believing that the court believes that the defendant is implicated. Middleton v. State, 72 Ga. App. 817, 35 S.E.2d 317 (1945).

In two defendants' joint trial for murder, the trial court's justification charge (requested by one defendant but not the other) did not constitute an improper comment on the evidence under O.C.G.A. § 17-8-57 by suggesting that the non-requesting defendant had been one of the shooters. Nalls v. State, 304 Ga. 168, 815 S.E.2d 38 (2018).

Instruction that witness who admits participation in crime is an accomplice. — To be accomplices of each other, both the defendant and the state's witness must have been involved in the criminal enterprise. One cannot be the accomplice of an innocent man. It therefore constitutes an expression of opinion by the court as to the guilt of the accused to instruct the jury that a witness who testified as to the defendant's guilt and admitted the witness's participation in the crime would be an accomplice of the accused. Millwood v. State, 102 Ga. App. 180, 115 S.E.2d 829 (1960).

Reference to a witness as an "accomplice." — Court's charge, "the state has offered the testimony of an accomplice," which declares the witness to be an accomplice instead of leaving it to the jury to decide from the evidence whether or not this had been proved, is a violation of the inhibition expressed in this section against an expression by the trial court as to what has been proved in the case. Brock v. State, 91 Ga. App. 141, 85 S.E.2d 177 (1954), commented on in 17 Ga. B.J. 501 (1955).

When the trial court simply charged the jury that a defendant cannot be convicted on the uncorroborated testimony of an accomplice, but did not point to either of the codefendants as an accomplice, there was no violation of O.C.G.A. § 17-8-57. Isaac v. State, 269 Ga. 875, 505 S.E.2d 480 (1998).

Assumption or intimation in murder trial that accused assaulted the deceased. — In the trial of one accused of murder, it is reversible error for the court in charging the jury to assume or intimate that the accused had "assaulted" the deceased, since the evidence and the defendant's statement did not demand a finding that an assault had been made. Tyner v. State, 70 Ga. App. 56, 27 S.E.2d 351 (1943).

Instructions in murder case held not to shift burden of rebuttal to defendant. — See Felts v. State, 244 Ga. 503, 260 S.E.2d 887 (1979).

Charge that law presumes malice from use of deadly weapon. — See Kennedy v. State, 191 Ga. 22, 11 S.E.2d 179 (1940).

Charge as to malice. — In a prosecution for murder, a charge regarding malice did not improperly comment on the evidence and was permissible under the statute since the charge did not attempt to tell the jury what had been shown by the evidence but, instead, made clear that the jury was the ultimate arbiter of fact and specifically instructed that if the jury found that the defendant drew a deadly weapon and thereby escalated the argument, then the jury was entitled, but not obligated, to infer malice therefrom. Carter v. State, 269 Ga. 891, 506 S.E.2d 124 (1998).

Charges as to assault with intent to rape and lesser offense of assault and battery. — In prosecution for assault with intent to rape, charge to the jury on the lesser offense of assault and battery, which used the words "which was by the laying on of hands of the defendant upon her," does not involve an intimation or expression of opinion by the court considering the charge as a whole. Watkins v. State, 63 Ga. App. 282, 11 S.E.2d 62 (1940).

Instruction that "the evidence shows that there was a robbery and a robbery by force" is clearly the expression of an opinion by the trial judge as to what had been proved, even though the judge's purpose was to eliminate from the

Jury Charges and Curative Instructions (Cont'd)

consideration of the jury the charges of robbery by intimidation and robbery by sudden snatching, which offenses were also charged in the indictment but not supported by the evidence. Coleman v. State, 211 Ga. 704, 88 S.E.2d 381 (1955).

Instruction on killing and then committing robbery. — Trial court did not unlawfully comment on the evidence in violation of O.C.G.A. § 17-8-57 when the court instructed the jury that an armed robbery could be committed by killing the victim first and then taking the property because the challenged charge neither assumed certain things as facts nor intimated to the jury what the trial court believed the evidence to be; it appeared that the defendant was arguing that the trial court gave an incorrect statement of law but couched the defendant's enumeration using § 17-8-57 because the defendant failed to object to the charge at defendant's trial, but parties cannot circumvent the requirements of O.C.G.A. § 17-8-58 with such a maneuver. Vergara v. State, 287 Ga. 194, 695 S.E.2d 215 (2010).

Charge on armed robbery not supported by any evidence. — Trial court's jury charge in an armed robbery trial suggested facts that were not supported by any evidence, specifically, that the assailant held the assailant's hand underneath the assailant's shirt during the robbery. The erroneous charge was an impermissible comment on the evidence in violation of O.C.G.A. § 17-8-57 and constituted plain error, entitling the defendant to a new trial. Gonzalez v. State, 306 Ga. App. 887, 703 S.E.2d 433 (2010).

Charge as to conspiracy which refers to "the crime" and "the conspiracy". — When charge gives to the jury a correct statement of the law upon the responsibility of a conspirator for acts of coconspirators, it does not intimate an opinion that a crime has been committed, or that a conspiracy existed, because the charge refers to crime as "the crime" and to conspiracy as "the conspiracy." Claybourn v. State, 190 Ga. 861, 11 S.E.2d 23 (1940).

Court's comment on underlying felony. — State supreme court rejected the defendant's claim that a trial court improperly commented on the evidence, in violation of O.C.G.A. § 17-8-57, when the court told the jury that the offense of possession of cocaine with the intent to distribute was a felony while instructing the jury before the jury deliberated to determine if the defendant was guilty as charged of possession of a firearm by a convicted felon. Trigger v. State, 275 Ga. 512, 570 S.E.2d 323 (2002), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Court's statement to jurors that jurors are deliberating a misdemeanor is error. — If the court charges the jury "that this case that you have heard and that you are deliberating now is a misdemeanor," the language is calculated to impress upon the jury that the court is of the opinion that the state has proved that the defendant committed a misdemeanor and is error in violation of this section. Hendricks v. State, 108 Ga. App. 259, 132 S.E.2d 845 (1963), overruled on other grounds, State v. Collins, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

Curative instruction precluded finding of plain error. — Even if the judge made an improper comment during trial, there was no plain error because the judge gave a sufficient curative instruction. Franklin v. State, 351 Ga. App. 539, 831 S.E.2d 186 (2019), cert. denied, No. S19C1590, 2020 Ga. LEXIS 107 (Ga. 2020).

Charges as to defense of insanity. — Portion of charge on the defense of insanity, the burden of proof, and the consideration of the evidence of insanity in connection with other evidence in the event the burden of establishing insanity has not been carried by the accused, is not an expression of opinion by the judge. Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944).

Charge as to delusional insanity which uses expression "connected with the criminal act." — In prosecution for homicide, part of charge upon delusional insanity, wherein the court uses the expression, "connected with the criminal act," when considered with the

charge as a whole, is not an expression of opinion that the homicide is a criminal act. Carroll v. State, 204 Ga. 510, 50 S.E.2d 330 (1948).

Charge that jury may recommend punishment if jury finds find verdict of guilty. — If the court has fully instructed the jury as to verdict forms applicable to both acquittal and conviction, it is not error, in connection with the latter form, to instruct that, "when" or "after" the jury finds such verdict of guilty, the jury may go further and recommend misdemeanor punishment. Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843 (1954).

Instruction that jury should not consider sentencing. — Statute was not violated since the trial court did not indicate that it thought some form of sentence was necessary for the defendant's actions; the court's instruction only informed the jury that the jury was not to be concerned with sentencing if sentencing became necessary. Moore v. State, 274 Ga. 229, 552 S.E.2d 832 (2001).

Charge as to aggravating circumstances and recommendation of death penalty. — There is no impermissible expression of opinion when the trial court instructs the jury that the defendant cannot be sentenced to death unless the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt and recommends that the death penalty be imposed. Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2017, 60 L. Ed. 2d 388 (1979).

If the judge instructs the jury to write the jury's verdicts at the top of the indictments, because later the jury will have to write the sentencing feature at the bottom, such charge is error within the meaning of this section. Gaither v. State, 234 Ga. 465, 216 S.E.2d 324 (1975).

Charge as to when defendant will be eligible for parole. — In murder trial, charge on voluntary manslaughter which directed the jury that, if the jury should convict the defendant of this offense, the jury should fix the defendant's sentence within the minimum and maximum fixed by law, and that, upon serving the minimum sentence fixed by the jury under the rules of the State Board of Pardons and Paroles, the accused will be eligible for parole, is not error on grounds that the charge intimated that the judge desired a verdict convicting the defendant of the offense of murder, and sought to take away from the board the power vested in the board by law. Thompson v. State, 204 Ga. 407, 50 S.E.2d 74 (1948).

Obvious slip of the tongue. — Trial judge's misstatement of defendant's not guilty plea as "the plea of guilty" in a jury charge was not reversible error because the judge immediately before referred to the plea as not guilty and the mistake was a palpable slip of the tongue. Edwards v. State, 169 Ga. App. 958, 315 S.E.2d 675 (1984).

Expression of opinion by court. — When the court charged the jury, in pertinent part: "Now, the state concedes and the court recognizes that there is no evidence in this case whatsoever that the defendant was ever in jail other than as a result of being arrested for the particular offenses involved in and named in this indictment. You will not consider his being in jail as referring to anything other than his being in jail as a result of an arrest made for the particular offenses listed in this indictment and you will not consider that evidence that the defendant has been in jail as in any way hurtful to the defendant in this case," the court's instruction was not an expression of opinion by the court, but was a statement of facts in evidence, namely, that the defendant was in jail for the offenses charged, and that there was no evidence whatsoever that the defendant was ever in jail for any other reason. Lee v. State, 186 Ga. App. 849, 368 S.E.2d 804 (1988).

When the defendant argued that certain portions of the trial court's instructions to the jury violated the statutory prohibition against expression or intimation by a judge of the judge's opinion as to what has or has not been proven or as to the guilt of the accused, and in responding to the jury's request for additional instruction, the trial judge attempted to distinguish circumstantial evidence from direct evidence and, by way of example, stated that the testimony of two eyewitnesses in the case was direct testimony, there was no error in the court's instruction to the

Jury Charges and Curative Instructions (Cont'd)

jury since the direct testimony of the eyewitnesses was sufficient to establish defendant's guilt beyond a reasonable doubt. Thornton v. State, 191 Ga. App. 801, 383 S.E.2d 181 (1989).

Fact that the judge intimated the opinion that the lineup was non-suggestive was not cause for a new trial because the defendant never claimed that the lineup was suggestive. Brown v. State, 251 Ga. App. 343, 554 S.E.2d 321 (2001).

Trial court's failure to make a requested change to the pattern jury charge on mere presence did not result in an expression of the trial court's opinion as to what had been proved in violation of O.C.G.A. § 17-8-57 because the trial court's charge did not vary materially from the pattern charge or make any implication about what the evidence in the case showed, but the instruction merely reflected an accurate statement of law; the trial court explicitly instructed the jury that no ruling or comment by the trial court was intended to express any opinion about the facts of the case or credibility of the witnesses or the guilt of the defendant. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Instructing jury on consequences of possible verdicts on issue of competency. — Court's action in instructing the jury at the close of the trial on the insanity plea regarding the consequences of the jury's possible verdicts on the issue of the defendant's competency to stand trial did not constitute an impermissible expression of opinion as to the appellant's guilt or innocence or as to what had or had not been proved so as to require reversal pursuant to O.C.G.A. § 17-8-57. Ross v. State, 173 Ga. App. 313, 325 S.E.2d 919 (1985).

Use of "ought to" in jury instruction. — There is no error in a judge instructing a jury that, if the jurybelieves beyond a reasonable doubt that the defendant committed the crime of which the defendant was accused, the jury "ought to" convict the defendant. Cothran v. State, 177 Ga. App. 58, 338 S.E.2d 513 (1985).

Instruction on justification proper as without commentary. — Trial court's jury instruction on justification was not erroneous for containing improper commentary because the statement in the charge neither intimated the trial court's opinion on what had or had not been proven nor intimated the trial court's opinion on the defendant's guilt or innocence. Hall v. State, 286 Ga. 358, 687 S.E.2d 819 (2010).

Court may explain to jurors that "auto-intoximeter" or similar device is considered accurate if properly operated and such explanation does not violate O.C.G.A. § 17-8-57. Henson v. State, 168 Ga. App. 210, 308 S.E.2d 555 (1983).

Charge on the scientific efficacy of the horizontal gaze nystagmus test in a prosecution for driving under the influence was not an erroneous expression of the court's opinion in violation of O.C.G.A. § 17-8-57. Waits v. State, 232 Ga. App. 357, 501 S.E.2d 870 (1998).

Court advising jury that officer complied with notice provisions. — Court, in ruling upon the issue of whether or not the defendant's constitutional and statutory rights were given to the defendant prior to the defendant's statement, errs in advising the jury that the officer complied with the Constitution and the statute with reference to notices required by law or warnings required by law and, thus, expresses an opinion as to the evidence with reference to voluntariness, in violation of O.C.G.A. § 17-8-57. Such a violation is a mandatory cause for a new trial. Dean v. State, 168 Ga. App. 172, 308 S.E.2d 434 (1983).

Charge that Miranda rights do not exist in driving under the influence cases. — Charge to the jury that "this so-called Miranda right does not exist in a case of driving under the influence of alcohol or drugs," was an incorrect statement of the law, but under the circumstances, the error was harmless. Stanfield v. State, 176 Ga. App. 424, 336 S.E.2d 337 (1985).

Instruction concerning inferences from flight not error. — When the court charged in terms of inferences allowed to be made by the jury, if it so chose, from the evidence of flight, the flight charge, either standing alone or taken in the context of the whole charge, could not have been

taken by the jury as an expression or intimation of the court's opinion. Alexander v. State, 180 Ga. App. 640, 350 S.E.2d 284 (1986).

Charge on imperfection of photographs. — When the trial court charged the jury: "Jurors, in regard to the photographs that have been entered into the evidence in the case, I charge you that it is difficult and often impossible to obtain a photograph of a scene of an alleged occurrence with precise exactness prevailing," the charge did not instruct the jury to excuse or overlook any failure by the state to produce a photograph of a relevant piece of evidence for the case. The plain language of that part of the charge merely reminded the jury of what common sense under the circumstances would dictate, the statement related to photographs admitted in evidence and not to any omission or absence of photographs and the caveat related equally to the state's and defendant's evidence, as both relied on photographs, so that there was no violation of O.C.G.A. § 17-8-57. Laymac v. State, 181 Ga. App. 737, 353 S.E.2d 559 (1987).

Charge on presumption of intoxication. — Charge that "a legal presumption of intoxication exists if you find the chemical analysis shows defendant's breath, urine, or blood contained .11 percent of alcohol" did not improperly intimate any conclusion on the part of the trial court regarding what the evidence had shown with respect to the alcohol content of the defendant's blood at the time of the defendant's arrest. Freeman v. State, 183 Ga. App. 264, 358 S.E.2d 623, cert. denied, 183 Ga. App. 906, 358 S.E.2d 623 (1987).

Charge on voluntary intoxication. — When the defendant takes exception to the judge's charge to the jury "that voluntary intoxication is not an excuse for any criminal act or omission," because no evidence was presented to the jury concerning the defendant's intoxication or consumption of alcohol, it was held that the extraneous instruction was harmless. Thurston v. State, 186 Ga. App. 881, 368 S.E.2d 822 (1988).

Trial court's charge on voluntary intoxication in a child molestation case was not an improper comment on the evidence under O.C.G.A. § 17-8-57, given evidence from all three complainants that the defendant was drinking Wild Turkey bourbon and the victim's testimony that the victim believed the defendant was drunk. Bright v. State, 301 Ga. App. 204, 687 S.E.2d 208 (2009).

Trial court's charge to the jury on voluntary intoxication did not constitute an improper expression of opinion evidence under O.C.G.A. § 17-8-57 because there was circumstantial evidence to support the giving of the charge, namely, testimony that alcohol was served at the party and that the defendant went to the liquor store to make a purchase; one witness testified that although the witness did not see the defendant consume alcohol, the witness "knew" that the defendant had in fact done so. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Trial court's use of the word "slayer" in an instruction did not constitute an opinion that the defendant acted with malice, when the term "slayer," fairly construed, did not refer to the defendant but back to the abstract word "person," thus instructing the jury as to what circumstances would, if this "person" had caused another's death, justify a finding of voluntary manslaughter. Mullinax v. State, 255 Ga. 442, 339 S.E.2d 704 (1986).

Accurate recharge on entrapment defense. — In responding to an inquiry from the jury, the judge's recharge fully and accurately informed the jury of the elements of the defense of entrapment and there was no violation of O.C.G.A. § 17-8-57. Jordan v. State, 211 Ga. App. 86, 438 S.E.2d 371 (1993).

Accurate statements of law are not improper instructions. — Trial court's accurate statements of the law involving the charges at issue, burglary and theft by receiving stolen property, did not involve improper comments on the evidence and, thus, the trial court did not improperly instruct the jury. Haney v. State, 261 Ga. App. 136, 581 S.E.2d 626 (2003).

Sequestration charge. — Sequestration charge given after the defendant's sister testified was not a comment on the sister's credibility nor a suggestion that

Jury Charges and Curative Instructions (Cont'd)

the sister violated the sequestration rule; remarks made by the trial court as to the admissibility of evidence or explaining the court's rulings were not a comment or an opinion as to what had or had not been proven. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Explanation of rule of sequestration. — Trial court judge did not violate O.C.G.A. § 17-8-57 by expressing an opinion in providing the explanation of the rule of sequestration because it was not a prohibited expression of opinion, was not a comment on the credibility of any of the witnesses, and was a neutral explanation of the rule of sequestration that did not favor either party. Booker v. State, 322 Ga. App. 257, 744 S.E.2d 429 (2013).

Instruction limiting jury's consideration of testimony. — Trial court's jury instructions did not violate O.C.G.A. § 17-8-57 because the instructions limiting the evidence that the jury could consider from a detective's testimony did not express or intimate the trial court's opinion with regard to the defendant's guilt or innocence. Graves v. State, 322 Ga. App. 24, 743 S.E.2d 582 (2013).

Charge on statement made at scene of crime error. — Because whether a tire store where a victim was found was the scene of the victim's rape and murder was a contested fact, the trial court's instructions regarding a statement defendant made "at the scene of the crime" violated O.C.G.A. § 17-8-57; however, under the plain error standard of § 17-8-57(b), which was applied retroactively as procedural, the error did not likely affect the outcome given the strong evidence of guilt. Willis v. State, 304 Ga. 122, 816 S.E.2d 656 (2018).

Necessity for Objection or Motion

Necessity for objection or motion for mistrial. — Prejudicial remarks of the judge in the presence and hearing of the jury are not cause for a new trial when there is no motion for a mistrial on account of the remarks. Williams v. State, 42 Ga. App. 225, 155 S.E. 511 (1930).

In order to take advantage of the conduct of the trial judge in propounding questions to witnesses as an expression or intimation of an opinion, it is necessary that counsel make a motion for mistrial or other valid objections. Parker v. State, 51 Ga. App. 295, 180 S.E. 390 (1935).

Prejudicial questions or statements purportedly in violation of this section are not reversible error in the absence of a motion for mistrial or other objection. Miller v. State, 122 Ga. App. 553, 177 S.E.2d 838 (1970); Nelson v. State, 136 Ga. App. 861, 222 S.E.2d 677 (1975).

Question of whether this section has been violated is not reached unless an objection or motion for mistrial is made. Driggers v. State, 244 Ga. 160, 259 S.E.2d 133 (1979); Turnbow v. State, 153 Ga. App. 479, 265 S.E.2d 832 (1980); Anglin v. State, 173 Ga. App. 648, 327 S.E.2d 776 (1985); Smith v. State, 173 Ga. App. 652, 327 S.E.2d 781 (1985); Coney v. State, 198 Ga. App. 272, 401 S.E.2d 304 (1991); Butts v. State, 198 Ga. App. 368, 401 S.E.2d 763 (1991), overruled on other grounds, Sims v. State, 266 Ga. 417, 467 S.E.2d 574 (1996); Cornelius v. State, 213 Ga. App. 766, 445 S.E.2d 800 (1994); Crowe v. State, 265 Ga. 582, 458 S.E.2d 799 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996); Brown v. State, 221 Ga. App. 454, 471 S.E.2d 527 (1996); Pickren v. State, 272 Ga. 421, 530 S.E.2d 464 (2000); Conger v. State, 245 Ga. App. 399, 537 S.E.2d 798 (2000); Hudson v. State, 246 Ga. App. 335, 539 S.E.2d 860 (2000).

If the trial judge is alleged to have made a prejudicial remark or to have asked a prejudicial question during the course of trial in violation of O.C.G.A. § 17-8-57, an objection or motion for mistrial must be made in order to preserve the issue for appeal. Thomas v. State, 158 Ga. App. 97, 279 S.E.2d 335 (1981); Lucas v. State, 197 Ga. App. 347, 398 S.E.2d 417 (1990); Gann v. State, 245 Ga. App. 448, 538 S.E.2d 97 (2000).

When on appeal the defendant argued that the trial judge violated O.C.G.A. § 17-8-57 but the defendant made no motion for mistrial, that enumeration of er-

ror was without merit. Miller v. State, 180 Ga. App. 525, 349 S.E.2d 495 (1986).

When a criminal defendant did not object at trial to the manner in which the court conducted the court's competency examination of a five-year old child nor indicate how the defendant was harmed, and the defendant failed to object to the court's conduct during the child's testimony before the jury, review was precluded. Hunter v. State, 194 Ga. App. 711, 391 S.E.2d 695 (1990); Herrington v. State, 243 Ga. App. 265, 533 S.E.2d 133 (2000), appeal dismissed, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

Although the trial court violated O.C.G.A. § 17-8-57 by taking an active role in the defendant's criminal trial, arising from an incident wherein the defendant was observed in a drug transaction, any potential error arising from the court's conduct which involved the questioning of several witnesses was waived by the defendant's failure to have either objected or sought a mistrial. Collins v. State, 263 Ga. App. 601, 588 S.E.2d 799 (2003).

Defendant's conviction of trafficking in more than 200 grams of cocaine in violation of O.C.G.A. § 16-13-31(a) was affirmed because the defendant waived any issue as to the judge's violation of O.C.G.A. § 17-8-57 by failing to object or move for a mistrial, but even if the defendant had objected, the transcript failed to show that the judge made an improper comment or gave the judge's opinion regarding the evidence. Castillo v. State, 263 Ga. App. 772, 589 S.E.2d 325 (2003).

Defendants' claimed violation of O.C.G.A. § 17-8-57 was not addressed on appeal as neither defendant objected to the court's alleged improper comments or moved for a mistrial. Graham v. State, 282 Ga. App. 576, 639 S.E.2d 384 (2006).

Trial court's statement during voir dire that the crimes allegedly took place near the intersection of Peachtree Road and Pharr Road in the Buckhead section of Atlanta was not objected to by the defendant, and therefore the defendant's claim that the statement improperly relieved the state of the state's obligation to establish venue, violating O.C.G.A. § 17-8-57, was not preserved. Green v. State, 300 Ga. App. 688, 686 S.E.2d 271 (2009).

Reservation of right to object deemed adequate. — General reservation of the right to later object to a jury charge preserves for review an alleged violation of O.C.G.A. § 17-8-57 which occurs during the charge, overruling Butts v. State, 198 Ga. App. 368, 401 S.E.2d 763 (1991); Payne v. State, 207 Ga. App. 312, 428 S.E.2d 103 (1993). Sims v. State, 266 Ga. 417, 467 S.E.2d 574 (1996).

Plain error exception. — While an argument not raised before the trial court is not generally considered by the appellate court for the first time, an exception exists for a violation of O.C.G.A. § 17-8-57 which results in "plain error." Simmons v. State, 251 Ga. App. 682, 555 S.E.2d 59 (2001).

Defendant's alleged errors were not reviewed for plain error because the defendant failed to object at trial as the Georgia Supreme Court limited the application of the plain error doctrine to either capital cases or cases in which there was an alleged violation of O.C.G.A. § 17-8-57, which prohibited a trial judge from intimating an opinion as to the guilt of an accused. Patten v. State, 275 Ga. App. 574, 621 S.E.2d 550 (2005).

Violation of O.C.G.A. § 17-8-57 will always constitute "plain error," meaning that the failure to object at trial will not waive the issue on appeal, and on appeal, the issue is simply whether there was such a violation, and, if so, the statutory language is mandatory, and a violation of § 17-8-57 requires a new trial; to the extent the "plain error rule" has been articulated otherwise in the context of an alleged violation of § 17-8-57, such cases are disapproved. State v. Gardner, 286 Ga. 633, 690 S.E.2d 164 (2010).

Murder defendant failed to object and failed to show plain error in a trial judge's comments in violation of O.C.G.A. § 17-8-57(a)(1); rather, the trial court intervened to prevent witnesses from giving improper testimony; questioned witnesses to clarify testimony; and cautioned counsel. Bamberg v. State, 308 Ga. 340, 839 S.E.2d 640 (2020).

Trial judge did not commit plain error when purportedly violating O.C.G.A. § 17-8-57 by commenting on the surveil-

Necessity for Objection or Motion (Cont'd)

lance video evidence that was played for the jury because even if the commentary was error, the defendant ignored the context in which the comments were made as the comments did not pertain to the substance of the video; the comments pertained to the process the judge intended to use with respect to that piece of evidence. Roberts v. State, 305 Ga. 257, 824 S.E.2d 326 (2019).

Error may be asserted for first time in motion for new trial. — When a judge during the progress of the trial or in charge to the jury, expresses or intimates the judge's opinion as to what has or has not been proved, or as to the guilt of the accused, such error may be taken advantage of for the first time in a motion for new trial. Allen v. State, 67 Ga. App. 607, 21 S.E.2d 280 (1942).

It is not necessary that motion was made at time of error or that injury resulted. — It is not necessary for the aggrieved party to allege in the motion for new trial that any sort of motion was made at the time of the alleged error, or to allege injury resulting from such violation of the statute, since the law conclusively presumes injury on account of the error, and the mandatory provisions of this section require reversal of the judgment of the trial court on proper assignment of error. Allen v. State, 67 Ga. App. 607, 21 S.E.2d 280 (1942).

Failure to make timely objection or motion. — When the defendant fails to properly except by motion for mistrial to allegedly improper remarks of judge and solicitor general (now district attorney) during examination of witnesses, the allegedly improper remarks were insufficient to support a motion for new trial. Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1936).

Failure of the aggrieved party to move for a mistrial, or to register a proper objection, because of prejudicial remarks of the judge in this connection, will preclude the party prejudiced thereby from complaining thereof after the verdict. Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943); Garrett v. State, 173 Ga. App. 292, 325 S.E.2d 911 (1985).

If the accused did not object to questions at the time the questions were propounded to witnesses by the trial judge and did not move for mistrial or to rule out the evidence that had been elicited as the result of the examination, the accused could not complain that the manner in which the judge conducted the examination was a prohibited expression of opinion upon the facts. Dyer v. State, 71 Ga. App. 41, 29 S.E.2d 922 (1944).

If no motion for mistrial is made, but error is complained of for the first time in an amended motion for new trial, asserting that the trial judge expressed an opinion as to what had been proved, in violation of O.C.G.A. § 17-8-57, such ground of motion for new trial is not meritorious. Shepherd v. State, 203 Ga. 635, 47 S.E.2d 860 (1948).

In the absence of any objection or motion for mistrial in the trial court, the appellant may not raise the issue of the trial judge's expression of opinion for the first time on appeal. Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976).

If no motion for mistrial is made when the judge asks questions complained of, the enumeration must be rejected on appeal. Beddington v. State, 149 Ga. App. 386, 254 S.E.2d 504 (1979).

If the defendant contends the trial court committed reversible error while charging the jury in expressing the court's opinion that the defendant fled the scene of the crime, but there was no objection at trial or request for mistrial, the defendant is estopped from raising the issue on appeal. McDaniel v. State, 169 Ga. App. 254, 312 S.E.2d 363 (1983); Barber v. State, 176 Ga. App. 103, 335 S.E.2d 594 (1985).

Defendant waived the right to contend that the court violated O.C.G.A. § 17-8-57 since the defendant did not contemporaneously object or move for a mistrial on this ground. Walker v. State, 258 Ga. 443, 370 S.E.2d 149 (1988); Wilson v. State, 268 Ga. 527, 491 S.E.2d 47 (1997).

Defendant failed to preserve for appeal the defendant's claim that the trial court violated O.C.G.A. § 17-8-57 by improperly commenting on the evidence as the defendant did not make an objection or a motion for a mistrial. Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

Appellate court refused to consider the defendant's claim that the trial judge violated O.C.G.A. § 17-8-57 when the judge commented on evidence that was introduced during the defendant's trial on charges of armed robbery and possession of a firearm during the commission of a crime because the defendant did not object to the comments or move for a mistrial. Garlington v. State, 268 Ga. App. 264, 601 S.E.2d 793 (2004).

In a first degree forgery prosecution, the trial court should not have instructed the jury that the jury was not bound to believe testimony as to facts incredible, impossible, or inherently improbable, but the defendant did not object; the defendant's failure to object, under O.C.G.A. § 17-8-57, waived the error given the strength of the evidence against the defendant and the trial court's charge in its entirety. Overton v. State, 277 Ga. App. 819, 627 S.E.2d 875 (2006).

Necessity for object waiver. — Because there was no contemporaneous objection, the right to urge a violation of O.C.G.A. § 17-8-57 was waived. Cammon v. State, 269 Ga. 470, 500 S.E.2d 329 (1998).

Failure to object does not waive plain error. — Under the Georgia Supreme Court's decision in Paul v. State, 272 Ga. 845 (2000), the failure to object to an alleged violation of O.C.G.A. § 17-8-57 in a criminal trial does not waive the right to assert error on appeal in the case of plain error. Patterson v. State, 259 Ga. App. 630, 577 S.E.2d 850 (2003).

Although the state argued that because the defendant failed to object to any of the first three comments of which the defendant complained, the defendant waived any error, a violation of O.C.G.A. § 17-8-57 always constituted plain error, meaning that the failure to object at trial would not waive the issue on appeal. On appeal, the issue was simply whether there was such a violation; if so, it was well established that the statutory language was mandatory and that a violation of § 17-8-57 required a new trial. Linson v. State, 287 Ga. 881, 700 S.E.2d 394 (2010).

Appeal of error not raised in trial court. — Defendant in criminal case may appeal and enumerate error on erroneous charge or erroneous failure to charge without first raising issue in trial court. Arnold v. State, 157 Ga. App. 714, 278 S.E.2d 418 (1981).

RESEARCH REFERENCES

C.J.S. — 89 C.J.S. (Rev), Trial, § 610 et seq.

ALR. — Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 A.L.R. 8; 68 A.L.R. 1068.

Remark of judge during trial of criminal case as comment on weight of evidence, 10 A.L.R. 1116.

Right to and propriety of instruction as to credibility of defendant in criminal case as a witness, 85 A.L.R. 523.

Comments and conduct of judge calculated to coerce or influence jury to reach verdict in criminal case, 85 A.L.R. 1420.

Propriety and correctness of instructions regarding maxim "falsus in uno, falsus in omnibus," 90 A.L.R. 74.

Scope and application of rule which permits judge in criminal case to comment on weight or significance of evidence, 113 A.L.R. 1308.

Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Instructions disparaging defense of alibi, 146 A.L.R. 1377.

Comments in judge's charge to jury disparaging expert testimony, 156 A.L.R. 530.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 A.L.R.2d 166.

Right to withdraw motion for mistrial, 100 A.L.R.2d 375.

Propriety of specific jury instructions as to credibility of accomplices, 4 A.L.R.3d 351.

Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities, 5 A.L.R.3d 974.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 A.L.R.3d 775.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 A.L.R.3d 1313.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 A.L.R.3d 617.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 842.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

Double jeopardy as bar to retrial after grant of defendant's motion of mistrial, 98 A.L.R.3d 997.

Propriety of jury instruction regarding credibility of witness who has been convicted of a crime, 9 A.L.R.4th 897.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense, 15 A.L.R.4th 118.

Post-retirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 A.L.R.4th 410.

Disqualification from criminal proceedings of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief, 45 A.L.R.5th 531.

Disqualification or recusal of judge due to comments at Continuing Legal Education (CLE) seminar or other educational meetings, 49 A.L.R.6th 93.

Justification and correction of remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as otherwise requiring new trial or reversal, 54 A.L.R.6th 429.

What constitutes accused's consent to court's discharge of jury or to grant of motion for mistrial which will constitute waiver of former jeopardy plea — silence or failure to object or protest, 103 A.L.R.6th 137.

17-8-58. Objections to jury charges prior to the jury retiring to deliberate; failure to raise objections.

(a) Any party who objects to any portion of the charge to the jury or the failure to charge the jury shall inform the court of the specific objection and the grounds for such objection before the jury retires to deliberate. Such objections shall be done outside of the jury's hearing and presence.

(b) Failure to object in accordance with subsection (a) of this Code section shall preclude appellate review of such portion of the jury charge, unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties. Such plain error may be considered on appeal even if it was not brought to the court's attention as provided in subsection (a) of this Code section.

History. — Code 1981, § 17-8-58, enacted by Ga. L. 2007, p. 595, § 1/HB 197.

Editor's notes. — Ga. L. 2007, p. 595, § 5/HB 197, not codified by the General Assembly, provides that this Code section shall apply to all trials which occur on or after July 1, 2007.

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration
Appellate Review

General Consideration

Failure to object to failure to define terms waives issue. — During the defendant's trial for aggravated stalking, aggravated assault, and making terroristic threats, the trial court did not err by failing to define "violent contact" in the court's charge to the jury because the defendant did not request that the term be defined for the jury, and the defendant did not object to the trial court's failure to define violent contact; because the defendant did not specifically object to the failure of the trial court to instruct the jury on the definition of violent contact at the conclusion of the jury charge, the defendant waived the right to urge error on appeal. Vaughn v. State, 301 Ga. App. 55, 686 S.E.2d 847 (2009), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Defendant stating no objection waives issue. — Because a defendant specifically stated that the defendant had no objection to the jury charge after it was given, the defendant waived appellate review of the charge. In fact, as to three of the four charges challenged on appeal, the defendant requested the same charges, precluding review even if the charge given was plain error. Blankenship v. State, 301 Ga. App. 602, 688 S.E.2d 395 (2009).

Omission of an essential element of an offense. — Failure to charge that the physical harm required to prove battery had to be substantial omitted an essential element of the crime of battery and amounted to reversible error as the jury was obviously confused and never properly instructed. Shaw v. State, 340 Ga. App. 749, 798 S.E.2d 344 (2017).

Renewal of prior objections insufficient. — Under O.C.G.A. § 17-8-58(b), the defendant waived the defendant's right to urge error in the jury charge because following the court's charge to the jury, the trial court inquired whether there were any exceptions to the charge other than those previously stated, and the defendant's counsel renewed those objections, but at the charge conference, defense counsel did not object to the trial court's ruling that the court would not give the defendant's requested charges; as such, defense counsel's "renewal" of prior objections did not comply with O.C.G.A. § 17-8-58(a). Lacey v. State, 288 Ga. 341, 703 S.E.2d 617 (2010).

Objection from codefendant not sufficient for defendant. — Trial court did not err in instructing the jury that the jury's verdict could not be influenced by sympathy or prejudice because after the trial court charged the jury, the defendant's counsel affirmatively stated that counsel had no objection to the jury instructions as given, and although the codefendant's counsel timely and specifically objected to the instruction, the defendant's counsel did not join in the objection, nor did defense counsel raise the objection when given another opportunity to do so before the jury returned the jury's verdict; therefore, pursuant to O.C.G.A. § 17-8-58(b), the defendant waived any objection to the instruction, and there was no reasonable probability that the jury's verdict would have been different if the trial court had not given the instruction at issue. Hughes v. State, 309 Ga. App. 150, 709 S.E.2d 900 (2011).

Failure to object to instruction on venue. — Because there was no objection made at trial as to the instruction on venue, appellate review was precluded in that no portion of the jury charge constituted plain error which affected substantial rights of the parties. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Defendant failed to demonstrate plain error based on the trial court giving an incorrect money laundering charge as reviewing the jury instructions as a whole, the record clearly demonstrated that the trial court read the indictment to the jury and the jury had a copy of the indictment in the jury room, the trial court properly

General Consideration (Cont'd)

instructed the jury on the state's burden, defined the crimes alleged, instructed the jury on the essential elements, and reminded the jury that the burden of proof did not shift to the defendant. Carr v. State, 350 Ga. App. 461, 829 S.E.2d 641 (2019), cert. denied, No. S19C1422, 2020 Ga. LEXIS 15 (Ga. 2020).

Objection untimely. — Defendant's objection to a jury instruction was untimely because the objection was made after the jury resumed deliberations. Curry v. State, 291 Ga. 446, 729 S.E.2d 370 (2012).

Court's error in defining "offensive weapon." — Defendant failed to preserve for appellate review the defendant's contention that the trial court erred in using the "offensive weapon" definition of O.C.G.A. § 16-8-41(a) as armed robbery was not one of the charged offenses because the defendant did not object to the charge and expressly declined the trial court's offer to recharge the jury. The charge did not constitute plain error because the definition of "offensive weapon" applicable to armed robbery mirrored very closely the definition of aggravated assault set forth in O.C.G.A. § 16-5-21(a)(2), and an "offensive weapon" under the armed robbery statute necessarily would fall within the category of weapons described in § 16-5-21(a)(2), and therefore the defendant could not show that the instruction affected the outcome of the proceedings. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Jury charge omitting explanation of "slight" movement. — In a kidnapping case, although the trial court's charge that omitted statutory language explaining "slight movement" was error, it was not plain error given that the evidence showed movement that was substantial, involving a number of miles. Deleon v. State, 344 Ga. App. 499, 811 S.E.2d 35 (2018).

No notification on court's decision on sexual battery instruction. — After the defendant was convicted of two counts of rape, the defendant could not show that the defendant was harmed when the trial court failed to notify trial counsel of the court's ruling on the sexual-battery charge before closing arguments, much less plain error, because the defendant could not be found guilty of rape or sexual battery if the jury believed the defense that the defendant had consensual sex with the victims and the victims fabricated the rape allegations; and an argument that the defendant was guilty of sexual battery instead of rape would have been in direct conflict with the defendant's own theory of defense. Seals v. State, 350 Ga. App. 787, 830 S.E.2d 315 (2019).

Only plain error review allowed. — Because the defendant failed to object to the trial court's instruction, the defendant's claim on appeal was subject only to plain error review under O.C.G.A. § 17-8-58. Dukes v. State, 290 Ga. 486, 722 S.E.2d 701 (2012).

Instruction on self-defense not plain error. — Defendant's trial counsel failed to preserve objections to the trial court's recharge of the jury under O.C.G.A. § 17-8-58. The trial court's instruction regarding self-defense as applicable to all counts was not plain error. Guajardo v. State, 290 Ga. 172, 718 S.E.2d 292 (2011).

No plain error in instruction on justification. — Because the trial court instructed the jury on the state's burden to disprove the affirmative defense beyond a reasonable doubt, the reasonable belief necessary to justify self-defense by use of force, including the use of deadly force, and when the jury had a duty to acquit based on justification, those instructions adequately covered justification, including self-defense, and the state's burden of proof, and the trial court's charge did not constitute plain error as it was not a clear or obvious error. Clark v. State, 306 Ga. 367, 829 S.E.2d 306 (2019), cert. denied, 2020 U.S. LEXIS 1059, 206 L. Ed. 2d 180 (U.S. 2020).

No plain error on charge of kidnapping. — Although the defendant argued that the trial court improperly charged the jury on the offense of kidnapping, no plain error existed as the defendant intentionally relinquished any claim of error related to the charge on kidnapping by inducing the alleged error because the defendant objected and specifically asked

the trial court not to include that language in the charge that the defendant now argued was erroneously omitted. Ashley v. State, 340 Ga. App. 539, 798 S.E.2d 235 (2017).

Failure to charge the jury on necessity of corroboration of accomplice testimony. — Trial court committed plain error by not providing a jury charge on the necessity of corroboration of the accomplice's testimony because by failing to give the required accomplice corroboration charge and instead charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact, the trial court impermissibly empowered the jury to find the defendant guilty based solely on the accomplice's testimony; while there was sufficient corroborating evidence to support a verdict, that evidence was in no way overwhelming; the outcome of the trial court proceedings was likely affected by the error; and the error seriously affected the fairness, integrity, or public reputation of the proceedings. Stanbury v. State, 299 Ga. 125, 786 S.E.2d 672 (2016).

Trial court did not err in failing to instruct the jury that the testimony of an accomplice had to be corroborated because, pretermitting whether the failure to instruct the jury on corroboration was error, the defendant could not successfully demonstrate that it was plain error as evidence from multiple witnesses, including the defendant's witnesses and the defendant, corroborated the shooter's testimony. Huff v. State, 300 Ga. 807, 796 S.E.2d 688 (2017).

While the trial court's failure to give a corroborating accomplice instruction was clear error, it did not amount to plain error because the defendant failed to establish that omitting the instruction probably affected the outcome of the trial given that the jury would have had to reject evidence from two separate sources in order to find that the accomplice's testimony was not corroborated. Lyman v. State, 301 Ga. 312, 800 S.E.2d 333 (2017).

Trial court properly granted the defendant a new trial because the court plainly erred in failing to instruct the jury that accomplice testimony required corroboration as the trial court's instructions deviated from the rule that unequivocally required corroboration of accomplice testimony in felony cases; the trial court impermissibly empowered the jury to find the defendant guilty based solely on the accomplice's testimony; the outcome of the trial court proceedings was likely affected by the trial court's failure to provide that charge to the jury because virtually all of the incriminating evidence flowed from the accomplice; and the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. State v. Johnson, 305 Ga. 237, 824 S.E.2d 317 (2019).

Failure to give accomplice corroboration jury instruction was not plain error because there was no evidence that three witnesses for the state were the defendant's accomplices in a gang robbery and murder; although there was evidence that the three were present near or at the time of the shooting, the accomplices were in a separate vehicle, and if the accomplices had committed the crimes, the defendant would have been completely innocent. Stripling v. State, 304 Ga. 131, 816 S.E.2d 663 (2018).

Failure to recharge on corroboration was not plain error. — Trial court's failure to recharge on corroboration was not plain error under O.C.G.A. § 17-8-58(b) or substantial error that was harmful as a matter of law under O.C.G.A. § 5-5-24(c) because in the court's instructions to the jury following closing argument, the trial court properly charged the jury that no person would be convicted of terroristic threats on the unsupported testimony of the party to whom the threat was made. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, No. S12C0473, 2012 Ga. LEXIS 277 (Ga. 2012).

No plain error in failing to instruct on corroboration of confession. — Assuming without deciding that any of the defendant's out-of-court statements, or all of the statements collectively, amounted to a confession, the defendant could not satisfy the third prong of the plain error test as the trial court proceedings were not likely affected by the trial court's failure sua sponte to give the jury instruction on corroboration of a defendant's confes-

General Consideration (Cont'd)

sion because there was ample corroborating evidence at trial, including the defendant's purported confession about the defendant's own behavior at the crime scene, evidence of the couple's discordant relationship, and the adult son's out-of-court statement that the defendant had previously threatened to kill the victim, the defendant's wife, over bills, and the forensic evidence. Clarke v. State, 308 Ga. 630, 842 S.E.2d 863 (2020).

Refusal to give instruction on mutual combat not error. — Trial court's refusal to give the defendant's requested jury instruction on mutual combat, O.C.G.A. § 16-3-21(b)(3), did not constitute plain error under O.C.G.A. § 17-8-58(b) because a charge on mutual combat was not adjusted to the evidence; there was no evidence of intent to engage in a mutual fight or combat by agreement. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012).

Trial court did not commit plain error in denying the defendant's requested jury charge on mutual combat because there was no evidence that the first victim and the defendant mutually agreed to do anything but playfully shadowbox and wrestle each other; and, when the playful mood of the encounter changed, and, after the first victim landed a punch to the defendant's eye, there was no mutual agreement to continue fighting, playfully or otherwise; and the defendant maintained the defendant shot the first victim in self-defense and had no intent to kill the first victim. Russell v. State, 303 Ga. 478, 813 S.E.2d 380 (2018).

Jury instruction not plain error. — Defendant's conviction for aggravated sexual battery was reinstated because the jury instruction error did not constitute plain error as even if the jury had been instructed that the state had to prove lack of consent, no rational juror could have concluded, based on the record presented at trial, that the state failed to prove that element in the case since the victim was the defendant's four-year-old granddaughter. State v. Williams, 308 Ga. 228, 838 S.E.2d 764 (2020).

Failure to charge on transferred justification not error. — Trial court's failure to give jury charges on transferred justification and transferred intent did not amount to plain error because such omission did not affect the outcome of the proceedings when the instructions as a whole made it clear that the jury should acquit the defendant if the jury determined that the defendant was justified in firing the weapon, regardless of who the bullet struck. Allen v. State, 290 Ga. 743, 723 S.E.2d 684 (2012).

Failure to instruct on duty to retreat not error. — Trial court's failure to give an instruction on no duty to retreat did not constitute plain error under O.C.G.A. § 17-8-58; even assuming that the charge should have been given sua sponte by the trial court, the failure to give the charge did not amount to plain error since self-defense was not the defendant's sole defense. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Failure to instruct on robbery by intimidation. — Trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery because the defendant denied committing any offense; and the evidence relied upon by the defendant did not show robbery by intimidation as there was no evidence that a robbery was committed without the use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Jury's return of not guilty verdicts on all 12 counts of possession of a firearm during the commission of a felony did not demonstrate that, had the jury been instructed on robbery by intimidation, it would have convicted the defendant of that lesser included offense, rather than of armed robbery; thus, the trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Instruction on unanimous verdict not error. — Trial court did not err by instructing the jury that the jury had to reach a unanimous verdict because viewing the charges as a whole, it appeared that the jury was adequately and properly instructed that any voluntary verdict that the jury reached had to be unanimous.

Dukes v. State, 290 Ga. 486, 722 S.E.2d 701 (2012).

Instruction on aggravated assault not error. — Trial court did not plainly err in the court's jury instruction on aggravated assault when the trial court's instructions included the definition of aggravated assault with a deadly weapon in O.C.G.A. § 16-5-21(a)(2) and tracked the applicable definition of simple assault in O.C.G.A. § 16-5-20(a)(1). Scott v. State, 290 Ga. 883, 725 S.E.2d 305 (2012).

Failure to charge jury on simple assault. — Even if the trial court gave an incomplete charge on aggravated assault by failing to charge the jury on simple assault, the omission did not constitute plain error as the omission probably did not affect the outcome at trial because the defendant admitted to intentionally firing a gun in the victims' direction, which was conduct that constituted aggravated assault. Bashir v. State, 350 Ga. App. 852, 830 S.E.2d 353 (2019).

Instruction on voluntary manslaughter not error. — In the defendant's trial for malice murder and felony murder, the trial court's instruction on voluntary manslaughter did not require the jury to unanimously decide that the defendant was not guilty of malice murder or felony murder before considering voluntary manslaughter; therefore, the charge was correct. Morris v. State, 303 Ga. 192, 811 S.E.2d 321 (2018).

Failure to instruct on voluntary manslaughter not error. — Trial court did not commit plain error by failing to sua sponte charge the jury on voluntary manslaughter because the defendant testified adamantly that the defendant shot the victim in self-defense and there was no evidence that the defendant acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation. Martin v. State, 306 Ga. 538, 832 S.E.2d 402 (2019).

Failure to instruct on retreat not error. — Trial court did not plainly err in refusing to give a defendant's requested jury instruction on the lack of a duty to retreat because justification was the sole defense and the issue of retreat was not raised by the evidence. White v. State, 291 Ga. 7, 727 S.E.2d 109 (2012).

Instruction on justification not plain error. — Defendant failed to show plain error in the jury charge on justification because the defendant could not demonstrate that the alleged error in the jury charge likely affected the outcome of the proceedings as the evidence was overwhelming that the defendant was the initial aggressor who attacked the unarmed victim with the metal bar and, thus, that the defendant did not act in self-defense and was guilty of aggravated assault. Tremblay v. State, 329 Ga. App. 139, 764 S.E.2d 163 (2014).

State had burden of disproving justification defense. — Trial court properly granted the appellee's motion for new trial on the ground that plain error was created by the trial court's failure to instruct the jury that the state had the burden of disproving the appellee's justification defense because evidence was presented to support the defense and the charge requested was a correct statement of the law. State v. Alvarez, 299 Ga. 213, 790 S.E.2d 66 (2016).

Instruction on weight of marijuana not error. — Even if the trial court erred in instructing the jury that knowledge of the weight of the marijuana possessed by the defendant was not required for a conviction of trafficking under O.C.G.A. § 16-13-31(c), because the issue was subject to reasonable dispute, it did not amount to plain error under O.C.G.A. § 17-8-58(b). Wilson v. State, 291 Ga. 458, 729 S.E.2d 364 (2012).

No plain error by giving jury charge on entire definition of trafficking. — Trial court did not commit plain error by charging the jury on the entire definition of trafficking as no evidence was introduced at trial suggesting that the defendant brought the cocaine at issue into the state, sold the cocaine, or that the defendant delivered the cocaine to anyone; rather, the evidence showed only that the defendant was in knowing possession of the cocaine for a brief period of time, thus, there was no reasonable possibility that the jury convicted the defendant of trafficking in a manner not charged in the indictment. Hernandez-Garcia v. State, 322 Ga. App. 455, 745 S.E.2d 706 (2013).

General Consideration (Cont'd)

Instruction on chain of custody not error. — Defendant was not entitled to a new trial because the defendant did not object to the trial court's chain of custody charge, the charge was a correct statement of the legal standard, and defendant's counsel was present and conferred with the prosecuting counsel and the trial court prior to the trial court's response to the jury's questions. Coleman v. State, 317 Ga. App. 409, 731 S.E.2d 94 (2012).

Instruction on age of consent. — Defendant's convictions for sexual battery had to be reversed because the trial court's jury instruction that an underage victim was not legally capable of consenting to sexual conduct was on its face an accurate statement of the law, but that statement regarding consent to sexual conduct did not belong in the jury instruction regarding sexual battery since sexual battery as defined in O.C.G.A. § 16-6-22.1(b) did not necessarily involve sexual conduct. Watson v. State, 297 Ga. 718, 777 S.E.2d 677 (2015).

Jury charge erroneous for failing to limit charge to manner of touching alleged in indictment. — Defendant's conviction for sexual battery was reversed because both the trial court's charge and recharge on sexual battery were erroneous given the court's failure to limit the charge to the manner of touching alleged in the indictment. Henderson v. State, 333 Ga. App. 759, 777 S.E.2d 48 (2015).

Language used in charge requested by the defendant. — Jury charge was not plain error as to confession of one joint offender or conspirator made after the enterprise because although not identical language of the charge was given, the language which defendant now found objectionable essentially was the use of the word co-conspirator and was requested by the defendant. Guerrero-Moya v. State, 350 Ga. App. 233, 828 S.E.2d 629 (2019), cert. denied, 2019 Ga. LEXIS 913 (Ga. 2019).

Cited in Gresham v. State, 289 Ga. 103, 709 S.E.2d 780 (2011); Fairwell v. State, 311 Ga. App. 834, 717 S.E.2d 332 (2011); Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011); Alvarez v. State, 312 Ga. App. 552, 718 S.E.2d 884 (2011); Bishop v. State, 314 Ga. App. 830, 726 S.E.2d 112 (2012); Morgan v. State, 290 Ga. 788, 725 S.E.2d 255 (2012); Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013); Mathis v. State, 293 Ga. 35, 743 S.E.2d 393 (2013); Ferguson v. State, 322 Ga. App. 565, 745 S.E.2d 784 (2013); Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013); Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013); McBurrows v. State, 325 Ga. App. 303, 750 S.E.2d 436 (2013); Long v. State, 324 Ga. App. 882, 752 S.E.2d 54 (2013); Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013); Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014); Whiting v. State, 296 Ga. 429, 768 S.E.2d 448 (2015); Shockley v. State, 297 Ga. 661, 777 S.E.2d 245 (2015); Lafavor v. State, 334 Ga. App. 125, 778 S.E.2d 377 (2015); DuBose v. State, 299 Ga. 652, 791 S.E.2d 9 (2016); Bradley v. State, 342 Ga. App. 486, 804 S.E.2d 144 (2017); Blackwell v. State, 302 Ga. 820, 809 S.E.2d 727 (2018); Gonzalez v. State, 350 Ga. App. 297, 829 S.E.2d 385 (2019); Keller v. State, 308 Ga. 492, 842 S.E.2d 22 (2020).

Appellate Review

Time of judging error under plain error standard. — When conducting review of asserted plain error under O.C.G.A. § 17-8-58(b), whether an error is clear or obvious is judged at the time of the appellate court's review. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859 (2017), cert. denied, No. S18C0094, 2018 Ga. LEXIS 322 (Ga. 2018).

Challenge to jury instruction waived. — Although the defendant argued that the trial court failed to instruct the jury with the definition of attempt in conjunction with the court's jury charge on hijacking a motor vehicle, the trial court provided the jury with a complete instruction on the elements of hijacking a motor vehicle and the defendant never requested a written charge on the definition of attempt and failed to specifically object to the trial court's failure to define attempt following completion of the jury charge. Accordingly, the defendant's failure to preserve the error constituted a

waiver of the issue. Johnson v. State, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Trial court's failure to give the defendant's requested supplemental charges could not be considered such plain error under O.C.G.A. § 17-8-58(b) as to offset the defendant's failure to object because the trial court gave the jury separate instructions that it was an affirmative defense that a person abandoned the persons's efforts to commit the crime and that when a defense is raised by the evidence the burden is on the state to negate or disprove the evidence beyond a reasonable doubt. Mikell v. State, 286 Ga. 434, 689 S.E.2d 286, overruled on other grounds, Manley v. State, 287 Ga. 338, 698 S.E.2d 301 (2010).

Because the defendant failed to lodge a specific objection to a jury charge and to assert the grounds for defendant's objection, the defendant's claim that the trial court erred in instructing the jury was waived for purposes of appellate review; it was highly probable that the charge did not contribute to the verdict because there were identification witnesses who were acquainted with the defendant, and the trial court instructed the jury of the state's burden of proving the identity of the perpetrator beyond a reasonable doubt. Hicks v. State, 287 Ga. 260, 695 S.E.2d 195 (2010), overruled on other grounds by McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

Trial court did not err in failing to instruct the jury that the defendant had no duty to retreat because the defendant's failure to object to the charge as given before the jury retired to deliberate constituted a waiver of the issue on appeal under O.C.G.A. § 17-8-58(a); even if justification was the defendant's sole defense, the issue of retreat on the defendant's part was not raised by the evidence because the defendant was not questioned as to why the defendant did not leave the scene. Higginbotham v. State, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial court did not unlawfully comment on the evidence in violation of O.C.G.A. § 17-8-57 when the court instructed the jury that an armed robbery could be committed by killing the victim first and then taking the property because the challenged charge neither assumed certain things as facts nor intimated to the jury what the trial court believed the evidence to be; it appeared that the defendant was arguing that the trial court gave an incorrect statement of law but couched the defendant's enumeration using § 17-8-57 because the defendant failed to object to the charge at the defendant's trial, but parties could not circumvent the requirements of O.C.G.A. § 17-8-58 with such a maneuver. Vergara v. State, 287 Ga. 194, 695 S.E.2d 215 (2010).

Because there was no objection to a jury charge, any complaint with regard to the trial court's charge was waived. Leverette v. State, 303 Ga. App. 849, 696 S.E.2d 62 (2010).

Defendant's contentions that the trial court erred by failing to instruct the jury on Miranda and the defense of accident were waived for lack of a timely request or proper objection, and there was no plain error. Crawford v. State, 288 Ga. 425, 704 S.E.2d 772 (2011).

Because the defendant was tried after the effective date of the 2007 amendment to O.C.G.A. § 17-8-58 and did not specifically object to an instruction regarding the prior difficulties the defendant had with the victim at the conclusion of the jury charge, the defendant waived the right to urge error on appeal. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Pursuant to O.C.G.A. § 17-8-58(a), the defendant waived the right to argue on appeal that the trial court erred in failing to instruct the jury on involuntary manslaughter and simple battery as lesser included offenses of felony murder because when the trial court asked if the defense had any exception to the jury instructions defense counsel replied "not as read"; the defendant did not assert that the failure to give the requested instructions constituted plain error under O.C.G.A. § 17-8-58(b), and no plain error appeared because only a charge on the greater offense of aggravated battery was warranted since the victim was seriously disfigured. Cawthon v. State, 289 Ga. 507, 713 S.E.2d 388 (2011).

Because the defendant failed to object to the lack of a jury instruction on knowledge, the defendant waived that claim

Appellate Review (Cont'd)

under O.C.G.A. § 17-8-58(b); the defendant did not establish that the defendant's substantial rights were affected because the defendant did not show that the omission of the pattern jury charge the defendant requested resulted in a miscarriage of justice, and the trial court's charge contained substantially the same principles as the charge the defendant requested. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Defendant's claim that the trial court made two omissions in the court's jury instructions was not reviewed on appeal because the defendant made an objection that was unrelated to the omissions asserted on appeal and failed to reserve further objections even though the defendant was tried before the effective date of O.C.G.A. § 17-8-58; the defendant failed to make any written request for the omitted instructions. Hill v. State, 290 Ga. 493, 722 S.E.2d 708 (2012).

Because, when the jury at the defendant's enticement of a child trial submitted a note asking "Does child molestation require sex?" the defendant's counsel suggested that the trial court tell the jury to refer back to the jury charge and indictment, which the trial court did; therefore,the defendant waived review of this issue on appeal. Wheeler v. State, 327 Ga. App. 313, 758 S.E.2d 840 (2014), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685 (Ga. 2018).

Failure to charge the jury on defense of accident waived. — In a vehicular homicide case, any error in the trial court's failure to charge the jury on the law of accident under O.C.G.A. § 16-2-2 was waived because the proposed charge was not in the record, and there was no evidence that it was the pattern charge, and the defendant failed to object after the charge was given as required by O.C.G.A. § 17-8-58(a). Rouen v. State, 312 Ga. App. 8, 717 S.E.2d 519 (2011).

Charge on truthfulness permitted. — Court of appeals could not consider the defendant's claims that the trial court's jury instructions were erroneous because the defendant requested two of the charges and made no objection to the remaining charge at any time during the trial; plain error under O.C.G.A. § 17-8-58(b) did not result from the trial court's reputation for truthfulness charge. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Instruction on impeachment. — Because the jury charge on impeachment made plain that the jury was the sole judge of witness credibility, the charge provided no cause for reversal, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b); the charge stated that a witness "may be" impeached, not that he or she "is" impeached, by proof of drug convictions, and the trial court at no time suggested that the court found the defendant's testimony less than credible, nor did the court otherwise impermissibly comment on the evidence by simply recognizing that the defendant's prior drug convictions were the only ones offered for impeachment purposes. Collier v. State, 288 Ga. 756, 707 S.E.2d 102 (2011).

Instructions on multiple defendants. — Trial court did not commit reversible error in the court's recharge by failing to instruct the jury that a verdict for one defendant did not demand the same verdict for the codefendant or that the charge had to be considered as a whole and that the initial charge and the recharge had to be given equal weight because the jury had been given the instructions in writing, and the codefendant failed to show any indication that the jury was confused or left with an erroneous impression of the law; neither the defendant nor the codefendant specifically objected to the instruction before the jury retired to deliberate, nor did either the defendant nor the codefendant object to the recharge on any ground set forth in the appeal. Howard v. State, 288 Ga. 741, 707 S.E.2d 80 (2011).

Reserving objections to jury charge. — In a malice murder prosecution, defense counsel was not ineffective for not reserving objections to the trial court's jury charge generally as this procedure was not allowed under O.C.G.A. § 17-8-58. Marshall v. State, 285 Ga. 351, 676 S.E.2d 201 (2009).

Instruction on intelligence of witnesses. — Trial court did not commit

reversible error, much less "plain error" pursuant to O.C.G.A. § 17-8-58(b), by instructing the jury that the jury could consider the intelligence of the witnesses to decide the witnesses' credibility because even assuming that the better practice was to omit intelligence as one of the factors in the credibility charge, its inclusion was not reversible error; because no reversible error occurred with respect to the jury instruction on credibility, the codefendant succeeded on the codefendant's alternative claim that trial counsel rendered ineffective assistance in failing to object to that instruction. Howard v. State, 288 Ga. 741, 707 S.E.2d 80 (2011).

In a plain error review due to defendant's failure to object, the appellate court held that the trial court did not err when the court charged that the jury may consider the intelligence of a witness in assessing the witness's credibility because the Georgia Supreme Court has held that it is not reversible error to include intelligence as a factor in the jury charge on witness credibility. Gamble v. State, 291 Ga. 581, 731 S.E.2d 758 (2012).

Appellate review proper despite lack of objection. — Although a defendant's counsel failed to object to a jury instruction that permitted the jury to find the defendant guilty of terrorist threats if the defendant threatened any crime of violence, whereas the indictment charged that the defendant threatened to kill the victim, the appellate court was authorized to review the instructions for plain error, because the defendant alleged a due process violation. However, no error was found. Martin v. State, 303 Ga. App. 117, 692 S.E.2d 741 (2010).

Pursuant to O.C.G.A. § 17-8-58(b), an error in a jury charge was considered on appeal notwithstanding the appellant's failure to object at trial because the charge constituted plain error which affected the appellant's substantial rights. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Because the language of O.C.G.A. § 17-8-58 refers to the jury "charge", the statute applies not only to instructions given orally to the jury, but necessarily must apply to any written instructions given to the jury, and preprinted verdict forms have been treated as a portion of the jury instructions; use of such a form is intended to assist the jury in arriving at a lawful verdict, and a party is necessarily obligated to raise any objection to such a form as set forth in § 17-8-58(a) and, accordingly, when objection is not made, error is reviewed as provided in § 17-8-58(b). Cheddersingh v. State, 290 Ga. 680, 724 S.E.2d 366 (2012).

Because the defendant voiced no objection to the jury charge as given other than to renew a request for a lesser included offense, absent plain error, the issue was precluded from appellate review pursuant to O.C.G.A. § 17-8-58(b). Sanders v. State, 290 Ga. 637, 723 S.E.2d 436 (2012).

Defendant's claim that the trial court erred by failing to give the full pattern jury charge on leniency was only reviewed to determine whether the trial court's leniency charge constituted plain error because the defendant did not object to the charge as given, even though the defendant was required to do so under O.C.G.A. § 17-8-58(a). Kegler v. State, 317 Ga. App. 427, 731 S.E.2d 111 (2012).

No plain error found. — Defendant's claim that there was a fatal variance between the indictment and the jury charge failed because there was no plain error as it was unlikely that any error affected the outcome of the proceedings since the jury was properly instructed that the indictment and the plea formed the issues to be decided and was properly instructed as to the burden of proof. Moore v. State, 354 Ga. App. 145, 840 S.E.2d 519 (2020).

No error found in refusing access to dictionary. — Trial court properly denied the appellant's motion for a new trial because the appellant failed to prove that the trial court committed any error in the court's fashioning of a supplemental instruction to the jury regarding the definition of "entice" and, thus, the first prong of the test for plain error was not satisfied and it was in the trial court's discretion in declining the juror's request for access to a dictionary during deliberations. Weyer v. State, 333 Ga. App. 706, 776 S.E.2d 304 (2015).

No error found. — To the extent the defendant sought review under O.C.G.A.

Appellate Review (Cont'd)

§ 17-8-58(b), of the trial court's charge to the jury on the court's consideration of child molestation, attempted child molestation, and indecent exposure, there was no error because the trial court explained that the jury needed to consider all three offenses at the same time and properly explained how the jury would record the jury's verdict. Machado v. State, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Trial court's failure to define "intent to distribute" when charging on intent to distribute marijuana under O.C.G.A. § 16-13-30(j)(1) was not error; the term "distribute" possessed only the ordinary and common dictionary meaning and did not need to be specifically defined. The defendant failed to object to the charge without the definition, and the charge as given was not plain error excusing the failure to object under O.C.G.A. § 17-8-58(b). Boring v. State, 303 Ga. App. 576, 694 S.E.2d 157 (2010).

Trial court did not commit plain error in instructing the jury that when operating a motor vehicle, every licensee had to display his or her license upon the demand of a law enforcement officer because there was no reasonable probability that the charge to the jury, when viewed as a whole, permitted the defendant's conviction under an erroneous theory; the trial court's charge enumerated for the jury the specific offenses with which the defendant was charged and instructed the jury to determine whether the defendant was guilty of those offenses, and it did not instruct the jury to determine whether the defendant was guilty of a violation of O.C.G.A. § 40-5-29. Edwards v. State, 308 Ga. App. 569, 707 S.E.2d 917 (2011).

During the defendant's trial for malice murder, the trial court did not commit reversible error, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b) by giving the pattern jury charge on voluntary manslaughter involving mutual combat because the trial court gave separate and full instructions on voluntary manslaughter, malice murder, and justification, and the jury, hearing the challenged instruction in the context of the charge as a whole and the evidence presented at trial, was not likely to be confused by the trial court's slip of the tongue; the defendant failed to inform the trial court of the specific objection and the grounds for such objection before the jury retired to deliberate; thus, O.C.G.A. § 17-8-58(a) thereby precluded appellate review of such portion of the jury charge. Dolphy v. State, 288 Ga. 705, 707 S.E.2d 56 (2011).

There was no reversible error, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b), because the statement the trial court made to the jury could not be considered coercive since the statement did not imply in any way that a verdict was required; the trial court did not emphasize the expense of trying the case, and the court's statement did not amount to an instruction for the jury to consider that expense in the jury's deliberations. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Trial court's instruction to the jury on alternative ways that the state could prove the state's case after deliberations had started and after questions had been asked by the jury was not plain error under O.C.G.A. § 17-8-58 as the court had previously upheld such a charge as reflecting a correct statement of law, and when considered with the jury charges given as a whole and the evidence in the case, there was no indication that the charge improperly affected the outcome of the proceeding. Emerson v. State, 315 Ga. App. 105, 726 S.E.2d 600 (2012).

There was no plain error in the trial court's charge to the jury that no criminal liability would attach if the defendant killed a neighbor's dog in order to protect livestock because the trial court's charge on animal cruelty, as a whole, was consistent with the language of O.C.G.A. § 16-12-4, and the charge adequately explained to the jury that a person was not prohibited from killing an animal if necessary to protect his or her person or property or that of another. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Defendant failed to establish plain error in the trial court's charge pursuant to O.C.G.A. § 17-8-58 because the trial court clearly instructed the jury that before the court was authorized to return a verdict of guilty of malice murder or felony murder,

the court had to first determine whether mitigating circumstances would cause the offense to be reduced to voluntary manslaughter; the structure of the actual verdict form made it clear that as to each victim, the jury was required to consider malice murder, felony murder, and voluntary manslaughter simultaneously. Ortiz v. State, 291 Ga. 3, 727 S.E.2d 103 (2012).

Under a plain error of review due to defense counsel's failure to object to the jury instructions at the defendant's trial for felony murder, the trial court did not err in the court's presentation of the concepts of justification that serves as a defense to criminal charges, and passion resulting from provocation that could reduce murder to voluntary manslaughter as the court gave the pattern jury instructions and did not mislead the jury to have understood wrongly that limitations on and conditions precedent to the application of the law of justification were also applicable to voluntary manslaughter. Terry v. State, 291 Ga. 508, 731 S.E.2d 669 (2012).

Trial court did not commit plain error by giving a level of certainty charge by instructing the jury on the reliability of eyewitness identification because the victims gave descriptions of the robbers to the police immediately, identified the defendant from mug shot books, and did not repeatedly testify as to the victims' certainty. Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012).

Trial court did not err by failing to charge the jury on unarmed robbery or theft by taking as lesser-included offenses to armed robbery in light of the overwhelming evidence of the defendant's guilt and the failure to give the lesser-included instructions neither created any reasonable likelihood that the state's burden of proving all essential elements of armed robbery was lessened, or that the charge as given likely affected the outcome of the proceedings. Boccia v. State, 335 Ga. App. 687, 782 S.E.2d 792 (2016).

Trial court did not commit plain error by charging the jury concerning the limited use of sexual assault extrinsic evidence admitted pursuant to O.C.G.A. § 24-4-413 because the charge was not erroneous as such evidence was admissible as relevant. Marlow v. State, 337 Ga. App. 1, 785 S.E.2d 583 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Defendant's conviction for possession of cocaine with intent to distribute was upheld because the defendant's claimed jury charge error failed as it did not affect the outcome of the trial since the defendant willingly removed the shoes when requested and expressly denied having anything, yet 32 bags of cocaine were found in the sock the defendant was wearing, which did not support the conclusion that the defendant did not know or was mistaken about the substance of the drugs found. Bailey v. State, 341 Ga. App. 694, 801 S.E.2d 614 (2017).

Trial court did not commit plain error with regards to the charge on good character evidence as the charge was substantially identical to the suggested pattern jury instruction on good character evidence; the defendant pointed to no authority for the proposition that the pattern charge was inadequate; and the charge given in the case on good character evidence properly explained how character evidence ought to be considered by the jury. Williams v. State, 304 Ga. 455, 818 S.E.2d 653 (2018).

Although the offense of criminal damage to property was a felony, the trial court should not have mentioned criminal damage to property in connection with the charge on felony murder as the indictment did not charge the defendant with felony murder predicated on criminal damage to property; however, the defendant did not show plain error as the defendant did not show that the error in the jury charge likely affected the outcome of the proceedings because the jury found the defendant guilty of the aggravated assault upon the victim with a handgun, which was one of the predicate felonies included in the indictment, and it was highly likely that the jury based the jury's felony murder verdict on that predicate felony. Williams v. State, 304 Ga. 455, 818 S.E.2d 653 (2018).

Trial court did not plainly err by giving the jury the state's requested instruction on revenge for a prior wrong because the evidence presented in the case authorized

Appellate Review (Cont'd)

the instruction as the appellant told the police during the second interview that the appellant was defending oneself when the appellant stabbed the victim once after the victim had indicated that the victim was going to get the appellant. Collins v. State, 308 Ga. 515, 842 S.E.2d 275 (2020).

Trial court did not plainly err by instructing the jury on voluntary manslaughter as a lesser-included offense of felony murder because such instruction was applicable to both defendants as the state presented evidence that immediately following a fight, in which both defendants were involved and in which the victim cut the second defendant, both defendants fired handguns at the victim. Hamlette v. State, 353 Ga. App. 640, 839 S.E.2d 161 (2020).

Because the defendant pointed to no evidence that the witness knew that the defendant was planning on assaulting the victim, and the defendant failed to cite precedent requiring an accomplice-corroboration instruction under circumstances similar to those presented, the appellate court concluded that the trial court did not commit obvious error in failing to instruct the jury on the need for corroboration of accomplice testimony. Wilson v. State, 351 Ga. App. 794, 833 S.E.2d 175 (2019).

Plain error did not occur as a result of the trial court failing to instruct the jury regarding leniency that could have been granted to the defendant in exchange for the defendant's testimony because the defendant specifically testified that the defendant was not promised any leniency regarding the two pending criminal indictments and the detective testified that the defendant was not promised any leniency. Wilson v. State, 351 Ga. App. 794, 833 S.E.2d 175 (2019).

No plain error found. — Trial court did not commit plain error because the court clearly instructed the jury that the other acts evidence presented in the case was to be considered only for the purpose of determining the defendant's intent with respect to the crimes for which the defendant was being tried, and for no other purpose; the jury instructions were not obviously erroneous; and the evidence that the defendant committed the acts of which the defendant was convicted was substantial. Manning v. State, 303 Ga. 723, 814 S.E.2d 730 (2018).

Trial court did not commit plain error in instructing the jury on how to determine the defendant's guilt or innocence because the court read to the jury each charge listed in the indictment; the court instructed the jury on the elements of each crime charged; the court explained the verdict form to the jury, noted that the form contained six counts, and instructed the jury that as to each count the form provided a space for the jury to check either guilty or not guilty; and the manner in which the trial court instructed the jury was not confusing with respect to whether the jury was to make a determination of guilt on each individual count of the indictment. Manning v. State, 303 Ga. 723, 814 S.E.2d 730 (2018).

No plain error on simple assault. — Trial court did not commit reversible error, much less "plain error" pursuant to O.C.G.A. § 17-8-58(b), by failing to inform the jury of the definition of simple assault because the defendant's defense was mistaken identity, and the undisputed evidence showed that the perpetrators intentionally fired the perpetrators' guns through a parking lot occupied by many pedestrians and in the direction of a vehicle; neither negligence nor reckless conduct was an issue and, thus, any error in the charge would not have affected the outcome of the case. Howard v. State, 288 Ga. 741, 707 S.E.2d 80 (2011).

No plain error in prior difficulties charge. — There was no reversible error, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b), in the trial court's decision to give a prior difficulties charge to the jury because evidence was presented regarding prior difficulties between the defendant and the victim; thus, the inclusion of a prior difficulties charge did not constitute an impermissible comment on the evidence. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Although a jury was not explicitly instructed that the jury was required to find that a defendant was acting in a danger-

ous manner in order to convict the defendant of felony murder based on theft by receiving, the jury did in fact make such a finding when the jury found the defendant guilty of vehicular homicide by reckless driving because that offense, by definition, created a foreseeable risk of death. Because the proceedings were not affected, there was no plain error. State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Although a defendant failed to object to a jury instruction that the defendant contended allowed the jury to consider an alternative way to convict the defendant for false imprisonment from the facts alleged in the indictment, the court could consider whether the giving of the instruction constituted plain error. Because the trial court gave limiting instructions that the jury was only to consider the crimes as charged in the indictment, the charge was not plain error. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

No plain error in intent instruction. — In a defendant's trial for possession of a firearm during the commission of a crime, the trial court properly instructed the jury that there must have been a joint operation of an act or omission to act and intention, that intent was an essential element of any crime, and that there was no presumption that the defendant acted with criminal intent. Therefore, any omitted language regarding the defendant's knowledge did not contribute to the outcome of the trial. Morrell v. State, 313 Ga. App. 443, 721 S.E.2d 643 (2011), cert. denied, No. S12C0800, 2012 Ga. LEXIS 484 (Ga. 2012).

No plain error in proximate cause instruction. — Trial court did not err in failing to instruct the jury on the law regarding proximate cause and its relationship to felony murder because the omission of additional language concerning proximate cause could not be considered a clear or obvious error under O.C.G.A. § 17-8-58; the jury was instructed that to find the defendant guilty of felony murder while in the commission of felony criminal attempt to possess cocaine, the jury had to find beyond a reasonable doubt that the felony was dangerous per se or, by the attendant circumstances in the case, created a foreseeable risk of death, and the jury was also instructed that for felony murder to be found, the jury had to find that, in the commission of the underlying felony, the defendant caused the death of another human being irrespective of malice. Sapp v. State, 290 Ga. 247, 719 S.E.2d 434 (2011).

No plain error in omission of duty to retreat. — Under a plain error analysis in the defendant's trial for murder, the trial court did not err when the court failed to charge the jury that one acting in defense of self has no duty to retreat because the jury charges given in the case fairly informed the jury as to the law of self-defense and the defendant failed to affirmatively show that the failure to charge on the duty to retreat probably affected the outcome of the trial. Shaw v. State, 292 Ga. 871, 742 S.E.2d 707 (2013).

Failure to charge the jury on accident did not amount to plain error because the evidence did not warrant such a charge; the only evidence of unintentional touching occurred in the context of typical family play wholly unrelated to the incidents for which the defendant was convicted. Haithcock v. State, 320 Ga. App. 886, 740 S.E.2d 806 (2013).

No plain error in instruction on prior consistent statements — Trial counsel's failure to object to a jury instruction on prior consistent statements did not amount to plain error because the instruction did not affect the outcome of the trial since such an instruction does not explicitly direct the jury to place any additional weight on prior consistent statements beyond that which the law already gives them. Gaither v. State, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

No plain error in accident instruction. — Trial court did not commit reversible error by failing to instruct the jury on the defense of accident because, as to the count for child molestation by showing the first victim photos of nude persons and persons performing sexual acts, the defendant claimed that the defendant never committed such an act and, thus, could not claim it was an accident, and as to the other two counts, any error in failing to give such an instruction was not plain because the charge given fairly instructed

Appellate Review (Cont'd)

the jury that the jury had a duty to acquit the defendant if the jury determined the state failed to prove the defendant's guilt beyond a reasonable doubt. Ogletree v. State, 322 Ga. App. 103, 744 S.E.2d 96 (2013).

Trial court did not commit plain error as to the jury charge regarding malice murder and felony murder because the defendant failed to demonstrate that the alleged error in the jury charge likely affected the outcome of the proceedings since the defendant was not convicted of either malice murder or felony murder. Booker v. State, 322 Ga. App. 257, 744 S.E.2d 429 (2013).

No plain error in omission of accomplice corroboration instruction. — Defense counsel was not ineffective for failing to request a charge on accomplice corroboration because the accomplice was not the only witness; thus, there was no plain error in failing to give the accomplice corroboration charge since the state relied on other evidence apart from the accomplice's testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

No plain error in omission of voluntary manslaughter instruction. — In the defendant's trial for murder of another inmate, no evidence warranted instructions on voluntary manslaughter and mutual combat because the defendant testified the defendant acted in self-defense in the fight and did not intend to kill the victim, while eyewitnesses described the defendant as chasing the victim. Ruffin v. State, 296 Ga. 262, 765 S.E.2d 913 (2014).

Trial court's failure to charge on voluntary manslaughter was not plain error because there was no evidence that the other gang members had guns or shot at the appellant, and the only shell casings at the scene were found where appellant was seen firing a gun, plus, even if words were exchanged prior to the event, as a matter of law, angry statements alone ordinarily did not amount to serious provocation within the meaning of a voluntary manslaughter charge. Jones v. State, 296 Ga. 663, 769 S.E.2d 901 (2015), overruled in part by Veal v. State, 298 Ga. 691, 784 S.E.2d 403 (2016).

In a felony murder conviction, the trial court did not err in refusing to instruct the jury on the lesser charge of voluntary manslaughter because no plain error existed as the evidence showed that the defendant had substantial time to cool down after the defendant learned that the victim was not going to procure the cigarettes for the defendant and before the defendant intentionally sought out the victim because the fact that the defendant discussed the matter with a cellmate, procured the shank, and then later went in search of the victim was evidence that the defendant acted in a rational and calculated fashion rather than solely as a result of a sudden, violent, and irresistible passion. Barron v. State, 297 Ga. 706, 777 S.E.2d 435 (2015).

Response to jury question did not create plain error. — Defendant was not entitled to reversal under a plain error analysis because it was not highly probable that any error in the response to a question from the jury about the elements of felony obstruction of an officer affected the outcome of the proceedings. Carlson v. State, 329 Ga. App. 309, 764 S.E.2d 890 (2014).

In an indictment alleging that the defendant committed the offense of aggravated assault by making an assault upon one of the victims by pointing a deadly weapon at that victim, the jury charge improperly placed on the state the extra burden of showing that, in addition to assaulting with a deadly weapon, the defendant also assaulted with the intent to murder, rape, or rob; however, because the defendant was convicted of aggravated assault, the additional burden on the state could not be deemed to have likely affected the outcome, and did not constitute plain error. Staley v. State, 330 Ga. App. 501, 767 S.E.2d 507 (2014).

No plain error in response to jury question. — Defendant's failure to object to the trial court's response to a jury question meant that appellate review was only available if the response constituted plain error and since the initial charges to the jury were correct and the response told the jury they had received all applicable law, the trial court's failure to provide a more specific answer did not affect

the defendant's substantial rights. Aikens v. State, 297 Ga. 229, 773 S.E.2d 229 (2015).

Instruction on affirmative defenses not error. — Giving of an instruction on affirmative defenses and requested by the defendant was not error, clear or obvious. Williams v. State, 297 Ga. 460, 773 S.E.2d 213 (2015).

Instruction on handgun not error. — In light of the overwhelming evidence of the defendant's guilt, any error in the trial court's instruction to the jury that a handgun was a deadly weapon as a matter of law did not seriously affect the fairness, integrity, or public reputation of the proceedings. Howell v. State, 330 Ga. App. 668, 769 S.E.2d 98 (2015).

No error in instruction on use of audio-recorded statement. — Defendant could not demonstrate that any error in the charge relating to the use of the defendant's audio-recorded statement for impeachment purposes had any effect on the outcome at trial as the jury was authorized to consider the defendant's video-recorded, incriminating statements made at the sheriff's office, irrespective of whether the jury found that the prior audio-recorded statement made during the execution of the search warrant was obtained in violation of Miranda; and the jury had before the jury the defendant's initial incriminating statements made to the county investigator in the living room during the execution of the search warrant that were not included on the audio recording made by the Georgia Bureau of Investigation special agent. McCullough v. State, 330 Ga. App. 716, 769 S.E.2d 138 (2015), cert. denied, No. S15C0908, 2015 Ga. LEXIS 330 (Ga. 2015).

Instruction on sexual exploitation of children not plain error. — When the defendant was convicted of five counts of sexual exploitation of children, although it was error for the trial court to charge the jury on the law of deliberate ignorance, the error did not rise to the level of plain error because there was no evidence that the defendant was aware of a high probability of the existence of child pornography on the defendant's laptop and purposefully contrived to avoid learning of that fact to have a defense in the event of criminal prosecution as the conflicting evidence pointed either to the defendant having actual knowledge of the child pornography on the defendant's laptop or no knowledge at all. Furthermore, there was no plain error in the trial court's charge on the law of equal access based on the language in the charge regarding the defendant's knowledge as it would have been clear to the jury that to convict the defendant, the defendant had to knowingly possess the child pornography found on the defendant's laptop. McCullough v. State, 330 Ga. App. 716, 769 S.E.2d 138 (2015), cert. denied, No. S15C0908, 2015 Ga. LEXIS 330 (Ga. 2015).

Instruction on assault not plain error. — Although the trial court erred by instructing the jury on assault, the instruction did not likely affect the outcome of the proceedings nor did it seriously affect the fairness, integrity, or public reputation of the judicial proceedings as the jury was provided with the indictment and the trial court correctly instructed the jury on the language of O.C.G.A. § 16-5-20(a)(2) for assault as charged in the accusation. Driskell v. State, 333 Ga. App. 886, 777 S.E.2d 717 (2015), cert. denied, No. S16C0191, 2016 Ga. LEXIS 115 (Ga. 2016).

Assuming that it was obviously erroneous for the trial court to fail to remind the jury about the "within arm's reach" element when the jury described the offense of unlawful possession of a firearm during the commission of a felony, that failure did not constitute plain error as it had no effect on the outcome of the defendant's trial as that element was properly included in the indictment; the jury was instructed that the state had to prove every material allegation in the indictment beyond a reasonable doubt; whoever used a gun to shoot the victim actually had a firearm within arm's reach at the time of the shooting; and the only issue at trial was whether one of the defendants was the shooter and the others were parties to the crime. Anderson v. State, 299 Ga. 193, 787 S.E.2d 202 (2016).

No plain error in fingerprinting instruction. — Because the fingerprint evidence placed one of the defendant's cohorts at numerous burglary scenes and

Appellate Review (Cont'd)

was relevant to show the progression of law enforcement's investigation into the murder and to show that the incident was not isolated, but rather was part of a larger conspiracy between the defendant and the defendant's two cohorts to commit burglaries in the surrounding community, the trial court was authorized to give the charge on fingerprint evidence, and there was no plain error in giving the charge. Myers v. State, 299 Ga. 409, 788 S.E.2d 451 (2016).

No plain error in aggravated assault instruction. — Trial court did not commit plain error in instructing the jury on the elements of aggravated assault because the court gave the jury the pattern charge for aggravated assault with a deadly weapon, and the defendant did not contend that the defendant was indicted for some other form of aggravated assault; and, even if the trial court had given an overbroad aggravated assault instruction, that defect was cured as the record indicated that the court provided the jury with a copy of the indictment for its deliberations and the court instructed the jury that the burden of proof rested on the state to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. Herrington v. State, 300 Ga. 149, 794 S.E.2d 145 (2016).

Pretermitting whether the trial court erred in failing to instruct the jury sua sponte on the requirement that accomplice testimony be corroborated, there was no likelihood the testimony affected the outcome of the trial in light of the defendant's conversation with the victim while the victim was in jail regarding the defendant's operation. Ferguson v. State, 335 Ga. App. 862, 783 S.E.2d 380 (2016).

In a possession of a firearm during the commission of a felony case, although the trial court did not define aggravated assault as a felony, because the trial court's instructions regarding the possession charge focused the jury's attention on robbery without mentioning aggravated assault or identifying any offense other than robbery as a felony, the defendant did not show either clear error or that the complained of instruction affected the outcome of the proceedings; thus, the trial court did not commit plain error in instructing the jury. Demps v. State, 337 Ga. App. 657, 788 S.E.2d 525 (2016).

Following the defendant's conviction for felony murder stemming from the shooting death of a victim who was in the line of fire during an ongoing argument, the defendant's claim that the trial court committed plain error by instructing the jury on the commission of aggravated assault in a manner not charged in the indictment (putting the victim in fear) was rejected because there was no dispute that the victim died and no likelihood that the jury convicted based on the victim's apprehension of violent injury. Cato v. State, 304 Ga. 496, 820 S.E.2d 41 (2018).

No plain error in serious injury by vehicle instruction. — Jury instruction for serious injury by vehicle as given was not plain error because the charge that the defendant's counsel requested was substantially similar to the charge that the trial court gave; the trial court charged the jury that no person could be convicted of any crime unless and until each element of the crime as charged was proven beyond a reasonable doubt; and a conviction under the serious injury by vehicle statute as charged did not require a conviction under the driving under the influence statute. Fitzpatrick v. State, 339 Ga. App. 135, 793 S.E.2d 446 (2016).

No plain error in instruction on corroboration of confessions. — Failure to give a jury charge regarding the corroboration of confessions did not constitute plain error because the defendant's statements were admissions, not confessions, as the defendant did not confess to the murder or the arson; and, even if the defendant's statements to the witnesses were confessions, the defendant did not show that the error affected the outcome of the proceedings as there was ample corroborating evidence, including a witness's testimony that the defendant was alone with the victim shortly before the murder; testimony that a neighbor saw the defendant flee through the neighbor's yard, and the defendant's request on a recorded tape that two witnesses fabricate an alibi defense for the defendant for the

time of the crime. English v. State, 300 Ga. 471, 796 S.E.2d 258 (2017).

No plain error in failing to instruct on coercion. — Trial court did not plainly err in failing to charge the jury that coercion was not a defense to murder because the defendant contended that the shooter acted independently and without the defendant's knowledge in attacking the victim while the defendant was attempting to recover the defendant's pickup truck from another individual, and a charge on coercion would have had no direct relevance to the defense. Huff v. State, 300 Ga. 807, 796 S.E.2d 688 (2017).

No plain error in omission of corroborating accomplice instruction. — While the trial court's failure to give a corroborating accomplice instruction was clear error, it did not amount to plain error because the defendant failed to establish that omitting the instruction probably affected the outcome of the trial given that there was not merely one alleged accomplice who affirmatively identified the defendant, but also eyewitness testimony identifying the defendant and witness testimony relating the defendant's admission of the murder. Lyman v. State, 301 Ga. 312, 800 S.E.2d 333 (2017).

Failure to correctly read standard charge not plain error. — When the trial court, in the court's oral charge to the jury, apparently forgot to read the final paragraph of the standard charge on malice murder which defined the concept of malice, the trial court's mistake in reading the jury charge did not constitute plain error as it did not affect the defendant's substantial rights in such a manner as to affect the outcome of the trial court proceedings as the jury, during deliberations, had the entire charge to consider as a written copy of charges was sent out with the jury and, in that written copy, the charge on malice murder was complete. Forte v. State, 302 Ga. 726, 808 S.E.2d 658 (2017).

When the defendant was charged with aggravated assault with a deadly weapon, and the other charges of felony murder, feticide, and possession of a firearm during the commission of a felony were predicated on the aggravated assault charge, even if the trial court provided a charge on aggravated assault that included a method not charged in the indictment, any error in the court's instruction was cured because the trial court provided the jury with the indictment and instructed the jury that the state was required to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt; thus, the defendant could not establish reversible error, plain or otherwise. Simpson v. State, 302 Ga. 875, 808 S.E.2d 718 (2017).

Instruction on competence not error. — Trial court's instructions did not constitute plain error as the trial court gave all of the defendant's requested instructions with the exception of an instruction on the form of the verdict in the defendant's separate trial on the issue of mental competency, which was nearly identical to the charge given; the trial court charged the jury that the defendant could not be tried for criminal offenses while in a condition of mental incompetence or insanity; and the charge was not misleading or confusing, and was sufficient to inform the jury as to the question for the jury's determination and the factors comprising the legal test for competence to stand trial. Jones v. State, 303 Ga. 496, 813 S.E.2d 360 (2018).

Trial court's instruction on participation in criminal gang activity was a correct and complete statement of the law and did not constitute plain error because the instruction did not fail to limit the scope of the jury's inquiry to the specific predicate criminal acts alleged in the indictment; and the instruction listed the four elements of the offense. Dixon v. State, 843 S.E.2d 806, No. S20A0857, 2020 Ga. LEXIS 360 (2020).

No plain error in robbery instruction. — In an action for armed robbery, the trial court's failure to give an instruction to the jury on the lesser-included offense of robbery did not amount to plain error because the state presented sufficient evidence to support an armed robbery conviction and the defendant failed to argue during the charging conference that robbery as a lesser included offense was the defendant's sole defense. Powell v. State, 352 Ga. App. 14, 833 S.E.2d 602 (2019).

Appellate Review (Cont'd)

No plain error in instruction on indictment. — Although an instruction that before considering other-act evidence to prove intent, the jury had to find beyond a reasonable doubt that the appellant committed acts alleged in an indictment was not an incorrect statement of law, current Georgia law did not require such instruction be given, so the appellant failed to show plain error. Jackson v. State, 306 Ga. 69, 829 S.E.2d 142 (2019).

No plain error in circumstantial error instruction. — Defendant did not establish plain error in the jury instruction on circumstantial evidence because the instructions the trial court gave adequately advised the jury that if the jury believed that the circumstantial evidence supported an alternative hypothesis, the jury should return a verdict of not guilty, and it was unlikely that the jury would have returned a different verdict had the trial court added the language of the circumstantial evidence statute to the instructions. Weaver v. State, 351 Ga. App. 167, 830 S.E.2d 618 (2019), cert. denied, No. S19C1502, 2020 Ga. LEXIS 113 (Ga. 2020).

No plain error in omission of sudden emergency instruction. — Since the defendant was convicted of felony murder and aggravated assault in connection with the shooting death of the victim, the defendant's brother-in-law, because the evidence showed that the defendant already possessed the pistol before the defendant was confronted with any situation that would require the defendant to act in self-defense, the trial court's refusal to give the defendant's requested instructions on sudden emergency did not constitute plain error as it was not a clear or obvious error. Clark v. State, 306 Ga. 367, 829 S.E.2d 306 (2019), cert. denied, 2020 U.S. LEXIS 1059, 206 L. Ed. 2d 180 (U.S. 2020).

No plain error found in failing to charge on accident defense. — In a child molestation case, the trial court did not plainly err in failing to sua sponte charge the jury on the defense of accident because accident was not the defendant's sole defense to the charge that the defendant molested the second victim by touching the second victim's vaginal area with the defendant's hand as the state presented evidence that the defendant molested the second victim in that manner on several occasions, and the defendant's accident defense addressed only one of those instances; and the defendant did not show that the trial court's failure to charge the jury on accident likely affected the outcome of the proceedings. Pinkston v. State, 353 Ga. App. 88, 834 S.E.2d 571 (2019).

No plain error found in failing to distinguish between statement, admission, and confession. — Trial court did not plainly err in failing to instruct the jury on the legal differences between a "statement," an "admission," and a "confession" because, after the trial court instructed the jury on how to evaluate the credibility of witnesses generally and how to determine whether it was authorized to consider any statement by the defendant, the court instructed the jury to apply the general rules for testing the believability of witnesses and for deciding what weight, if any, to give to all or any part of a statement. Martin v. State, 306 Ga. 538, 832 S.E.2d 402 (2019).

No plain error in jury instruction on statute of limitations. — Trial court's inaccurate jury instruction on the statute of limitation, which failed to tell the jury that the victim's 16th birthday was a potentially relevant date for statute of limitation purposes, did not constitute plain error requiring reversal despite counsel's failure to object because the defendant could not demonstrate that the inaccuracy in the trial court's statute of limitation charge impacted the jury's verdict as the state indicted the defendant within seven years of both the victim's 16th birthday and the victim's outcry to police. Leekomon v. State, 351 Ga. App. 836, 832 S.E.2d 437 (2019), cert. denied, No. S20C0283, 2020 Ga. LEXIS 412 (Ga. 2020).

No plain error in charge on rape and sexual battery. — Sequential charge on rape and sexual battery was not improper and did not constitute plain error as the evidence did not support a sexual-battery conviction; and there was

no language in the challenged instruction on rape and sexual battery suggesting that the jury was required to reach a unanimous verdict as to rape before considering the lesser-included offense of sexual battery. Seals v. State, 350 Ga. App. 787, 830 S.E.2d 315 (2019).

Failure to instruct on involuntary manslaughter not plain error. — Trial court did not plainly err in failing to instruct the jury on involuntary manslaughter based on reckless conduct as a lesser included offense of the murder charges because the defendant's possession of cocaine with intent to distribute, the defendant's aggravated assault of the victims as part of the defendant's effort to regain the drugs, and the defendant's possession of the gun as a convicted felon were themselves felonies, and to support a jury charge on involuntary manslaughter, the unlawful act underlying the unintentional death of the victim had to be an act other than a felony. Hood v. State, 303 Ga. 420, 811 S.E.2d 392 (2018).

No plain error in instruction on deadly force. — Trial court did not commit plain error in charging the jury because the jury was charged that the defendant's use of deadly force in defense of property would be justified if reasonably believed to be necessary to prevent the commission of a forcible felony and that aggravated assault was a forcible felony; thus, the jury had sufficient direction in order to intelligently consider the defense-of-personal-property theory of justification based on the defendant's claim that the victim committed aggravated assault when the victim lunged at the individual holding the gun and attempted to wrestle the gun away from the other individual. Hood v. State, 303 Ga. 420, 811 S.E.2d 392 (2018).

No plain error in instruction on defense of habitation. — Trial court did not plainly err in the court's instruction to the jury on the defense of mistake of fact as the defendant did not show that the outcome of the defendant's trial would have been different absent the alleged error because the jury was properly instructed as to the state's burden of proof on the defendant's actual defense of a habitation, which was intertwined with the defendant's mistake of fact defense, as the trial court fully instructed the jury on defense of a habitation, informed the jury that defense of a habitation was an affirmative defense, and instructed the jury that the state bore the burden of disproving affirmative defenses beyond a reasonable doubt. Winters v. State, 303 Ga. 127, 810 S.E.2d 496 (2018).

Trial court did not plainly err in instructing the jury on the defense of habitation form of justification where the habitation being defended was the victim's and not the defendant's because the court of appeals rejected the argument that the defense was for the use of a defendant, not a victim; further, the supreme court had not ruled on that issue. Beasley v. State, 305 Ga. 231, 824 S.E.2d 311 (2019).

No plain error in not giving voluntary manslaughter instruction. — Trial court did not plainly err as the trial court was not required to charge the jury on the lesser included offense of voluntary manslaughter after each count of felony murder because, in the defendant's case, there was no evidence of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Dent v. State, 303 Ga. 110, 810 S.E.2d 527 (2018).

Alleged errors created no prejudice. — Although the jury was not specifically instructed on the defense of habitation, the jury was, in fact, instructed on self-defense as well as accident, and the jury rejected all of the appellant's conflicting stories and those defenses and in light of compelling evidence of the appellant's guilt, an alleged error did not likely affect the outcome of the trial court proceedings. State v. Newman, 305 Ga. 792, 827 S.E.2d 678 (2019).

Failure to instruct on mistake of fact not plain error. — Failure to give a mistake of fact jury charge did not amount to plain error because the defendant could not show that the trial court's failure to give the charge likely affected the outcome of the proceedings as the evidence established that the defendant fought with the victim, the defendant's father, prior to the victim's death, was holding the gun to the victim's head when the gun fired, fled the scene and failed to call for help after the

Appellate Review (Cont'd)

shooting, admitted to numerous people that the defendant had shot the victim, lied to law enforcement on numerous occasions about the defendant's role in the victim's death, and wrote a letter to the district attorney taking full responsibility for the victim's death. Norris v. State, 843 S.E.2d 837, No. S20A0500, 2020 Ga. LEXIS 359 (2020).

No plain error in sequestration charge. — Trial court did not commit plain error by failing, sua sponte, to give a jury charge on the rule of sequestration as the rule of sequestration did not apply to exclude the sheriff from the courtroom because it was within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either the state or the accused; and the trial court properly allowed the sheriff to be exempted from the rule of sequestration based on the fact that the sheriff was listed as a witness for both the defense and the prosecution, and the security issues in the courtroom on the day of trial. Szorcsik v. State, 303 Ga. 737, 814 S.E.2d 708 (2018).

Omission of circumstantial evidence instruction not plain error. — Because the evidence of the defendant's participation in the first burglary was wholly circumstantial, the clear and longstanding precedent required the trial court to instruct the jury on proof by circumstantial evidence even though the defendant did not request such an instruction; however, the defendant did not meet the burden under the plain error test to show that the omission of the instruction likely affected the jury's verdict as the trial court's charge sufficiently informed the jury of the state's burden of excluding all other reasonable hypotheses except the defendant's guilt with respect to the first burglary, and the defendant never suggested that the defendant's brother committed the first burglary alone. Gadson v. State, 303 Ga. 871, 815 S.E.2d 828 (2018).

No plain error in impeachment instruction. — There was no plain error in the trial court's instructions on impeachment and prior statements and that the evidence included all of the testimony of the witnesses and any exhibits admitted during the trial as the instructions clearly directed the jury to consider as evidence all of the testimony presented in the case, including testimony regarding the witnesses' prior statements. Jackson v. State, No. S18A1598, 2019 Ga. LEXIS 142 (Mar. 4, 2019).

Instruction on circumstantial evidence omitted. — While the denial of the defendant's request that the instruction on circumstantial evidence include the state's burden to exclude reasonable hypotheses other than guilt was erroneous, the defendant's substantial rights were not affected, and it therefore did not amount to plain error because the state's case was not based primarily on circumstantial evidence as, in addition to testifying that the defendant held the second victim at gunpoint, the second victim testified about directly witnessing the defendant shoot the first victim, and the third victim testified that the defendant held the third victim at gunpoint in the bedroom and ordered the third victim to remain on the bed, and because the evidence of the defendant's guilt was strong. Jackson v. State, No. S18A1598, 2019 Ga. LEXIS 142 (Mar. 4, 2019).

No plain error when jury charges tailored to evidence. — In the defendant's trial for murder and other charges, even if defense counsel was deficient for failing to object to the jury charges regarding the defendant's good character and use of prior statements, the defendant failed to demonstrate that the defendant was prejudiced by that failure; the charges were pattern charges and were tailored to the evidence. Jackson v. State, 305 Ga. 614, 825 S.E.2d 188 (2019).

Jury charge regarding character evidence. — Plain error did not occur given that character instruction given by the trial court fully and adequately explained to the jury how the jury ought to consider the defendant's character trait of truthfulness; thus, the defendant failed to show that simply adding a reference to the defendants general character would have likely affected the outcome of the trial court proceedings. Montgomery v. State, 350 Ga. App. 244, 828 S.E.2d 620 (2019).

Omission of oral instruction on elements of sexual battery. — Trial court

erred in granting the defendant's motion for new trial as the jury charge, taken as a whole, adequately informed the jury of the charges and did not constitute plain error because, for purposes of plain-error analysis, the charge included both the oral and written instructions given to the jury; the defendant failed to show that the omission of any oral instructions on the elements of sexual battery likely affected the outcome of the proceedings; the indictment, including the elements of the sexual battery charge, was read to the jury; the jury was instructed that the jury had to find each element in the indictment beyond a reasonable doubt; and the indictment was sent into the jury room. State v. Crist, 341 Ga. App. 411, 801 S.E.2d 545 (2017).

Telling jury it had to reach verdict on each count. — Trial court's answer to a jury question did not amount to plain error because, even assuming the trial court clearly erred in telling the jury it had to reach a verdict on each count, the defendant could not show that the error probably affected the outcome given the strength of the evidence, including four eyewitnesses who knew the defendant well identifying the defendant as the shooter. Hampton v. State, 302 Ga. 166, 805 S.E.2d 902 (2017).

Instruction that it was not necessary to read indictment. — Trial court's instruction essentially telling the jury it was not necessary to read the indictment was particularly harmful given the sheer size and technical nature of the indictment; however, under plain error review, the trial court's charge did not affect the outcome of the proceedings because, upon review of the instructions as a whole, the trial court recited the charges against the defendant and properly instructed the jury on the presumption of innocence and proof beyond a reasonable doubt, that the state bore the burden to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt, and that the burden of proof never shifted to the defendant. Mathis v. State, 343 Ga. App. 206, 807 S.E.2d 4 (2017), cert. dismissed, No. S18C0491, 2018 Ga. LEXIS 316 (Ga. 2018).

Plain error doctrine not applicable. — Defendant was not entitled to plain error review of a colloquy at trial, held outside the jury's presence, between the court and a witness called by the state who was reluctant to testify, because the alleged error did not involve error in the sentencing phase of a trial resulting in the death penalty, in a trial judge's expression of opinion to the jury, or in the jury charge. Solomon v. State, 293 Ga. 605, 748 S.E.2d 865 (2013).

Charge on voluntary intoxication did not constitute plain error under O.C.G.A. § 17-8-58 because the charge on voluntary intoxication stated as a prerequisite to the statute's applicability the fact that the person was legally sane, i.e, that the person's mind was capable of distinguishing right from wrong and of reasoning and acting rationally, when not affected by intoxicants. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Trial court did not plainly err in failing to charge the jury that the state bore the burden of disproving the defendant's alibi defense beyond a reasonable doubt when the trial court completely and correctly instructed the jury on the defendant's presumption of innocence, the state's burden of proof beyond a reasonable doubt that the defendant committed the crimes at issue, and on assessment of the credibility of witnesses. Scott v. State, 290 Ga. 883, 725 S.E.2d 305 (2012).

Giving of disapproved jury charge was plain error. — Jury charge that a DUI defendant's refusal to submit to a blood alcohol test could create an inference that the test would show the presence of alcohol which impaired the driver's driving was plain error, requiring a new trial, because the charge shifted the burden of proof to the defendant, requiring the driver to rebut the inference that the driver was an impaired driver. Wagner v. State, 311 Ga. App. 589, 716 S.E.2d 633 (2011).

Erroneous jury charge not excused. — Defendant's conviction for statutory rape was reversed because the trial court committed plain error by giving an erroneous jury charge, which affected the defendant's substantial right to a charge that provided the jury with the proper guideline for determining the defendant's guilt or innocence, and the court failed to

Appellate Review (Cont'd)

remedy the error. Agan v. State, 319 Ga. App. 560, 737 S.E.2d 347 (2013).

There was no plain error in the trial court's charge to the jury because the trial court gave an appropriate limiting instruction prior to the admission of the similar transaction evidence and because the purposes cited in the trial court's final charge were permissible and relevant to the state's case. Griffin v. State, 327 Ga. App. 751, 761 S.E.2d 146 (2014).

Verdict form constituted plain error. — Preprinted verdict form constituted plain error under O.C.G.A. § 17-8-58(b) because the form affected the defendant's substantial rights by actively removing the presumption of innocence from the defendant's trial; the defendant did not intentionally relinquish the right to have the burden of proof properly stated in the verdict form because the defendant's failure to object was more appropriately described as a forfeiture of the right. Cheddersingh v. State, 290 Ga. 680, 724 S.E.2d 366 (2012).

No failure to distinguish between civil and criminal liability. — Trial court did not commit plain error with regard to the instruction on reckless driving and reckless disregard by purportedly failing to sufficiently distinguish between civil and criminal liability as reviewing both the recharge and the initial charge together the appellate court failed to see how the jury was confused to the extent that the defendant was convicted on a lower level of criminal intent. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

ARTICLE 4

CONDUCT AND ARGUMENT OF COUNSEL

RESEARCH REFERENCES

ALR. — Comment by prosecution on failure of defendant to call character witnesses, 80 A.L.R. 227.

Criticism in judge's charge to jury of argument of defendant's counsel in criminal case, 86 A.L.R. 899.

Attorney's comment on opposing party's refusal to permit introduction of, or to offer, privileged testimony, or to permit privileged witness to testify, 116 A.L.R. 1170.

Comments by prosecuting attorney regarding jury's right or privilege to recommend or fix punishment, 120 A.L.R. 502.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law, 144 A.L.R. 199; 85 A.L.R.2d 1111.

Propriety and effect of attack on opposing counsel during trial of a criminal case, 99 A.L.R.2d 508.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 A.L.R.3d 723.

Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal case, 26 A.L.R.3d 1409.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence, 88 A.L.R.3d 227.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused — modern state cases, 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty, 89 A.L.R.3d 263.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present, 90 A.L.R.3d 646.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty, 90 A.L.R.3d 822.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel — state cases, 18 A.L.R.4th 360.

Attorney's right to appear pro hac vice in state court, 20 A.L.R.4th 855.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as grounds for reversal, new trial, or mistrial, 60 A.L.R.4th 1063.

Prosecutor's appeal to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence, 70 A.L.R.4th 664.

Propriety of trial court order limiting time for opening or closing argument, 71 A.L.R.4th 200.

17-8-70. Number of counsel permitted to argue case.

Not more than two counsel shall be permitted to argue any case for each side, except by express leave of the court. In no case shall more than one counsel for each side be heard in conclusion.

History. — Ga. L. 1924, p. 75, § 1; Code 1933, § 27-2202.

U.S. Code. — Closing arguments, Federal Rules of Criminal Procedure, Rule 29.1.

Law reviews. — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004).

JUDICIAL DECISIONS

Separately represented jointly tried defendants. — O.C.G.A. § 17-8-70 was not intended to act as a limitation on rights of separately represented, jointly tried defendants. Instead, the final portion of that section is a limitation on the number of attorneys who may present closing arguments on behalf of any one defendant tried jointly. McDuffie v. Jones, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Second sentence of this section applies to the party exercising the privilege of the final jury argument chronologically. Limbrick v. State, 152 Ga. App. 615, 263 S.E.2d 502 (1979).

Appellate court improperly overruled Limbrick v. State, 152 Ga. App. 615 (1979) as: (1) O.C.G.A. §§ 9-10-182 and 17-8-70 were to be construed under the substantive law in effect when the 1982 Code was enacted; (2) the statutory limitation of one counsel "heard in conclusion" applied to the party exercising the privilege of the final jury argument chronologically; (3) the construction harmonized all parts of the statutes and gave a sensible and intelligent effect to each part of the statutes; (4) the first parts of §§ 9-10-182 and 17-8-70 provided that two attorneys could present argument on behalf of a party without leave of court; and (5) if the second parts of the statutes were construed as limiting the middle and concluding argument to one attorney, it rendered the first parts of the statutes meaningless. Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27 (2003).

Discretion of court. — Generally, order and extent of argument is entirely within discretion of trial court. Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981).

Closing argument. — Trial court did not err in refusing the defendant's request to allow both of the defendant's retained attorneys to present the defendant's closing argument as the plain language of the statute regarding closing argument, O.C.G.A. § 17-8-70, expressly limited closing argument to one counsel for each side. Sheriff v. State, 258 Ga. App. 423, 574 S.E.2d 449 (2002).

Appellate court erred in affirming the trial court's refusal to permit both of the defendant's attorneys to argue in the middle of the state's opening and concluding

argument under O.C.G.A. § 17-8-70, and the error was not harmless as, although the defendant's right to make a closing argument was not completely abridged since one of the defendant's attorneys was allowed to address the jury, the evidence of the defendant's guilt was not so overwhelming that it rendered any other version of the events virtually without belief, and the convictions were reversed. Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27 (2003).

Cited in Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979); Wells v. State, 177 Ga. App. 419, 339 S.E.2d 392 (1986).

RESEARCH REFERENCES

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 754 et seq.

ALR. — Appearance of additional counsel in civil case after impaneling of jury, 56 A.L.R.2d 971.

Am. Jur. Proof of Facts. — Ineffective Assistance of Appellate Counsel, 183 Am. Jur. POF 3d 161

17-8-71. Order of argument after evidence presented.

After the evidence is closed on both sides, the prosecuting attorney shall open and conclude the argument to the jury. The defendant shall be entitled to make a closing argument prior to the concluding argument of the prosecuting attorney.

History. — Ga. L. 1851-52, p. 242, § 1; Code 1868, § 4551; Code 1873, § 4645; Code 1882, § 4645; Penal Code 1895, § 1029; Penal Code 1910, § 1055; Code 1933, § 27-2201; Ga. L. 2005, p. 20, § 10/HB 170.

Cross references. — Right of district attorney to open and defendant or counsel to conclude argument in presentence hearings, § 17-10-2(a).

Editor's notes. — Ga. L. 2005, p. 20, § 1/HB 170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB 170, not codified by the General Assembly, provides that the 2005 amendment applies to all trials which commence on or after July 1, 2005.

U.S. Code. — Closing arguments, Federal Rules of Criminal Procedure, Rule 29.1.

Law reviews. — For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004).

For comment on Park v. State, 224 Ga. 467, 162 S.E.2d 359 (1968), see 20 Mercer L. Rev. 318 (1969).

JUDICIAL DECISIONS

Analysis

General Consideration
Opening and Closing by Defendant
Waiver of Right to Open and Close
Denial of Right to Open and Close

General Consideration

Prosecution's right to open and close constitutional. — General rule that the right to open and close argument to the jury belongs to the prosecution, contained in O.C.G.A. § 17-8-71, is constitutional. Harper v. State, 166 Ga. App. 797, 305 S.E.2d 488 (1983).

Effect of 2005 amendment. — Because the 2005 amendment to O.C.G.A. § 17-8-71 did nothing to alter the prosecution's rights with respect to closing argument, no error flowed from the state waiving the state's initial closing argument and presenting a full summation after the defendant's closing statement. Lewis v. State, 283 Ga. 191, 657 S.E.2d 854 (2008).

State had right to open and close. — Pursuant to the Bradham precedent, the trial court did not abuse the court's discretion in allowing the state to make a nonsubstantive initial closing argument in the defendant's criminal matter, and to reserve its full presentation for its conclusion, even though the state had the burden of proof and the defendant was required to respond to an argument that the defendant had not heard. Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671 (2006).

Failure to object to order of arguments. — Since the defendant did not have a "constitutional privilege" to both present evidence in the defendant's defense and open and conclude the closing arguments of the guilt/innocence phase of trial, trial counsel was not ineffective for failing to object to the order of closing arguments set forth in O.C.G.A. § 17-8-71. Hammond v. State, 264 Ga. 879, 452 S.E.2d 745, cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

Right granted to defendants who introduce no evidence does not deny equal protection. — Allowance of an accused who has not introduced evidence to have the opening and closing argument is a reasonable exception to the general rule that the right to open and close argument belongs to the prosecution, and not a denial of equal protection of the laws to those who are not benefitted by the rule. Yeomans v. State, 229 Ga. 488, 192 S.E.2d 362 (1972).

Mistrial properly denied based on prosecutor's improper opening statement. — Trial court did not abuse the court's discretion in refusing to grant the defendant's motion for a mistrial after the prosecutor commented during opening statements on what the state anticipated the defense would entail; the trial court gave a curative instruction and instructed the jury after all the evidence was presented as to the presumption of the defendant's innocence, the right to not testify, the state's burden to prove guilt beyond a reasonable doubt, and that the state's opening statement did not constitute evidence. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Procedure in trial on defendant's claim of mental retardation. — Trial of a habeas corpus petitioner's claim of mental retardation should be regarded as a completion of the guilt/innocence phase of the petitioner's original trial and, therefore, the state was entitled under Ga. Unif. Super. Ct. R. 10.2 to make an opening statement before the petitioner. Under O.C.G.A. § 17-8-71, the state was entitled to make an initial closing argument, the petitioner could then make the petitioner's closing argument, and the state was entitled to make a final closing argument. Stripling v. State, 289 Ga. 370, 711 S.E.2d 665 (2011).

Ineffectiveness of counsel. — Defendant's assertion that, under former O.C.G.A. § 17-8-71, defense counsel could have called a witness for impeachment and not lost the right to conclude final arguments was erroneous, and thus defense counsel's strategy was not ineffective; in any event, at trial, the codefendant called a witness, which meant that the defendant, as well as the codefendant, lost the right to make the final closing argument to the jury. Rolland v. State, 280 Ga. 517, 630 S.E.2d 386 (2006).

Defendant's attorney did not provide ineffective assistance in the defendant's child molestation trial by failing to call witnesses for the defense because the attorney's decision was based on a strategic choice to preserve the right to the final closing argument under O.C.G.A. § 17-8-71; in addition, the defendant failed to show prejudice by proffering the

General Consideration (Cont'd)

testimony of any witnesses who would have provided testimony that was favorable to the defendant and would have changed the outcome of the trial. Wheat v. State, 282 Ga. App. 655, 639 S.E.2d 578 (2006).

Because the record showed that trial counsel's decision to not impeach a state's witness with evidence of two prior shoplifting convictions was part of a sound trial strategy to preserve the right to make the final closing argument under O.C.G.A. § 17-8-71, and counsel instead pursued alternative impeachment methods to establish bias, counsel was not ineffective; moreover, given this fact and the state's evidence, it was unlikely that introduction of the shoplifting convictions would have produced a different outcome at trial. Duggan v. State, 285 Ga. App. 273, 645 S.E.2d 733, cert. denied, No. S07C1329, 2007 Ga. LEXIS 662 (Ga. 2007).

Because trial counsel did not provide the defendant with ineffective assistance to the extent that the relevant strategic decisions made would have affected the outcome of the trial, and counsel properly chose not to object to the court's failure to merge a kidnapping and false imprisonment conviction, as those crimes were independent offenses, the defendant's motion for a new trial was properly denied. Snelson v. State, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

Trial counsel's decision not to impeach a witness and to develop that witness as a suspect in the murder for which the defendant was on trial, as part of the strategy to preserve the right to final argument under O.C.G.A. 17-8-71, did not amount to deficient performance. Eason v. State, 283 Ga. 116, 657 S.E.2d 203 (2008).

Defendant did not show that trial counsel was ineffective by failing to request rebuttal time following the State of Georgia's closing statement because the defendant had no right under O.C.G.A. § 17-8-71 to make a rebuttal argument. Cobb v. State, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

Defendant failed to establish ineffective assistance of counsel on the ground that trial counsel called the defendant as the only defense witness because under the version of O.C.G.A. § 17-8-71 in effect at the time of trial, a criminal defendant had the right to make the final closing argument to the jury if the defendant presented no evidence; thus, it was a reasonable trial strategy not to present evidence in order to preserve the right to close and despite that initial strategy being defeated when one of the codefendants introduced documentary evidence, the defendant failed to demonstrate that trial counsel failed to perform effectively once the trial strategy changed mid-trial. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

Cited in Aldredge v. Williams, 188 Ga. 607, 4 S.E.2d 469 (1939); McElwaney v. State, 66 Ga. App. 112, 17 S.E.2d 202 (1941); Lewis v. State, 126 Ga. App. 123, 190 S.E.2d 123 (1972); Dean v. State, 126 Ga. App. 633, 191 S.E.2d 477 (1972); Park v. Huff, 493 F.2d 923 (5th Cir. 1974); Rolland v. State, 235 Ga. 808, 221 S.E.2d 582 (1976); Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976); Phillips v. State, 238 Ga. 497, 233 S.E.2d 758 (1977); Joseph v. State, 149 Ga. App. 296, 254 S.E.2d 383 (1979); Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979); Varnes v. State, 159 Ga. App. 452, 283 S.E.2d 673 (1981); Chambers v. State, 159 Ga. App. 669, 284 S.E.2d 682 (1981); Mitchell v. State, 169 Ga. App. 630, 314 S.E.2d 468 (1984); Campbell v. State, 253 Ga. 11, 315 S.E.2d 902 (1984); Stephens v. State, 170 Ga. App. 267, 316 S.E.2d 847 (1984); Baty v. State, 257 Ga. 371, 359 S.E.2d 655 (1987); Burden v. State, 187 Ga. App. 778, 371 S.E.2d 410 (1988); Williams v. State, 217 Ga. App. 347, 457 S.E.2d 257 (1995); Quintanilla v. State, 273 Ga. 20, 537 S.E.2d 352 (2000); Harrison v. State, 251 Ga. App. 302, 553 S.E.2d 343 (2001); Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27 (2003); English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006); Espinosa v. State, 285 Ga. App. 69, 645 S.E.2d 529 (2007); Madison v. State, 281 Ga. 640, 641 S.E.2d 789 (2007); Parker v. State, 283 Ga. App. 714, 642 S.E.2d 111 (2007); Chandler v. State, 281 Ga. 712, 642 S.E.2d 646 (2007); Lewis v. State, 292 Ga. App. 257, 663 S.E.2d 721 (2008); Stinski v. State, 286

Ga. 839, 691 S.E.2d 854 (2010).

Opening and Closing by Defendant

Purpose in allowing an accused with no defense to have the opening and concluding argument is to allow defense counsel every opportunity to persuade the jury that the state has failed to prove the defendant's guilt. Yeomans v. State, 229 Ga. 488, 192 S.E.2d 362 (1972).

Which party is entitled to open and close is often-times unclear, based on whether or not any admissible testimony or documentary evidence has been introduced by the accused. Scott v. State, 243 Ga. 233, 253 S.E.2d 698 (1979).

Effect of no evidence by defendant and no argument by state. — In the trial of a criminal case, the accused introduced no evidence, and the accused's attorney opened the case to the jury by presenting the law applicable to the facts, consuming less time than the rule of court allowed for argument, and the solicitor (now district attorney), without having previously given any notice of such intention, announced that there would be no argument for the state and that the court might charge the jury, and thereupon the attorney for the defendant stated to the court that the defense attorney had expected the solicitor to argue the case, and had, therefore, reserved for a concluding speech the defense attorney's argument on the facts, and requested the court to allow the defense attorney to present argument on the facts to the jury, within the limits of the rule of court for argument, and this request was refused by the court, it was held that the court was in error. Porter v. State, 6 Ga. App. 770, 65 S.E. 814 (1909). See also Grant v. State, 97 Ga. 789, 25 S.E. 399 (1896).

Right of accused if the accused offers nothing but accused's own testimony. — It is beyond question in this state that when an accused offers no testimony or evidence into the trial of a case, other than the accused's own testimony, the accused has the right to the opening and closing arguments. Scott v. State, 243 Ga. 233, 253 S.E.2d 698 (1979).

Defendant's right to open and conclude closing argument. — When defense counsel, during cross examination, has a witness read portions of a prior written statement by that witness for the purpose of impeachment, the defendant has not lost the right to open and conclude closing argument under the standards set forth in Smith v. State, 272 Ga. 874, 536 S.E.2d 514 (2000). Lane v. State, 274 Ga. 751, 559 S.E.2d 455 (2002).

Because no defendant had a vested right in any rule of evidence or procedure, the trial court did not err when the court enforced the amended version of O.C.G.A. § 17-8-71 and denied the defendants' request for concluding argument at trial. Newman v. State, 286 Ga. App. 353, 649 S.E.2d 349 (2007).

Trial strategy in child sexual abuse cases. — Trial court properly determined that the defendant's counsel rendered effective assistance pursuant to the Sixth Amendment as the decision of counsel not to cross-examine a minor sexual offense victim by using the victim's diary was a matter of trial strategy in that counsel wished to preserve closing argument pursuant to O.C.G.A. § 17-8-71; furthermore, counsel's failure to present evidence of an allegedly previous "false allegation" was a non-issue as the defendant misunderstood that the step-daughter's previous statement was not false, but instead, was supportive of the assertions of abuse, but the step-daughter indicated that she chose not to say anything at the prior time because she wanted to keep her family intact, such that the failure to present evidence on that issue was also a trial strategy by counsel. Lewis v. State, 275 Ga. App. 41, 619 S.E.2d 699 (2005).

Mere offer of testimony rejected by judge. — When in a criminal case the accused introduces no testimony, defense counsel is entitled to open and conclude the argument to the jury. This rule is not varied by reason of the defendant's mere offer of testimony which is rejected by the court. Haywood v. State, 14 Ga. App. 114, 80 S.E. 213 (1913).

Effect of making statement. — Making of a statement by the defendant, when the defendant introduces no other evidence, entitles the defendant to the opening and concluding arguments. Hart v. State, 88 Ga. App. 334, 76 S.E.2d 561 (1953).

Opening and Closing by Defendant (Cont'd)

Making of a statement by the defendant, when the defendant introduces no other evidence, entitles the defendant to conclude the argument in the case. Kelly v. State, 149 Ga. App. 388, 254 S.E.2d 737 (1979).

For illustration of what constitutes an introduction of evidence, see Freeney v. State, 129 Ga. 759, 59 S.E. 788 (1907).

Relationship between introduction of evidence and opening and closing arguments. — Criminal defendant has no burden of proof and no obligation to introduce evidence, and the fact that the defendant has a right to introduce evidence does not allow the defendant both to introduce evidence and to claim a right to open and conclude closing argument; and the particular reason the defendant chooses to invoke the defendant's right to introduce evidence, including the necessity of rebuttal, does not control whether the defendant may open and conclude argument under O.C.G.A. § 17-8-71. Howard v. State, 204 Ga. App. 743, 420 S.E.2d 594 (1992).

Defendant who gives evidence cannot open and conclude argument to jury. — Defendant who, on the trial of a criminal charge against the defendant, introduces in the defendant's defense either oral or documentary evidence has no right to open and conclude the argument before the jury. Hargrove v. State, 117 Ga. 706, 45 S.E. 58 (1903).

In a trial for sodomy and cruelty to children, when, during cross-examination of the defendant's older daughter, counsel marked the daughter's previous sworn statement as an exhibit, and the daughter was questioned about the sworn statement and read excerpts from the statement to the jury, the defendant clearly offered evidence for impeachment purposes and the trial court admitted the evidence for that purpose. Because the defendant introduced evidence into the trial, the trial court properly ruled that the state was entitled to the opening and concluding arguments. Warnock v. State, 195 Ga. App. 537, 394 S.E.2d 382 (1990).

Defendant who displayed a photograph of the alleged crime scene to the jury and gave direct testimony regarding representations in the photograph forfeited the defendant's right to opening and closing arguments by introducing evidence outside the defendant's own testimony. Seavers v. State, 208 Ga. App. 711, 431 S.E.2d 717 (1993).

Although a tape recording of a statement by the defendant's coindictee was not formally tendered by the defendant, presentation of the contents of the tape to the jury was the equivalent of a formal tender divesting the defendant of the right to open and close final arguments. Kennebrew v. State, 267 Ga. 400, 480 S.E.2d 1 (1996).

Right to open and conclude closing argument is the constitutional right of the state and is not a right of the defendant, but is only a privilege, or a compensation, which is given when a defendant chooses not to introduce evidence. The criminal defendant has no burden of proof and no obligation to introduce evidence, and the fact that the defendant has a right to introduce evidence does not allow a defendant both to introduce evidence and to claim a right to open and conclude closing argument; the particular reason a defendant chooses to invoke the right to introduce evidence, including the necessity of rebuttal, does not control whether a defendant may open and conclude argument under O.C.G.A. § 17-8-71. Tanner v. State, 259 Ga. App. 94, 576 S.E.2d 71 (2003).

Because the defendant introduced additional evidence, other than the defendant's own testimony, no right to open and conclude closing argument existed. Simmons v. State, 281 Ga. 437, 637 S.E.2d 709 (2006).

Introduction of prior written inconsistent witness statement did not impact defendant's right to open and close. — Although a trial court erred in requiring a defendant to introduce a prior inconsistent written statement of a witness into evidence before using the statement to impeach the witness, that error did not cause harm to the defendant by causing the defendant to lose the right to open and conclude the argument to the

jury under O.C.G.A. § 17-8-71 because the record showed that the defendant introduced an abundance of other evidence that had the same effect under the statute. Jackson v. State, 292 Ga. App. 312, 665 S.E.2d 20 (2008).

Time for defendant to elect this right is at the conclusion of state's evidence. — Defendant cannot then elect to introduce testimony pertinent and material to the issue, and subsequently, at the end of the entire evidence, withdraw the defendant's evidence and thus regain the defendant's right to open and conclude the argument. Daniels v. State, 8 Ga. App. 469, 69 S.E. 588 (1910). See also Freeney v. State, 129 Ga. 759, 59 S.E. 788 (1907).

Lack of indication in record that defendant has introduced evidence. — When the record contains no indication whatsoever that documents mentioned by a defendant in the defendant's statement were introduced in evidence, the defendant is entitled to the opening and concluding argument. Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968), commented on in 20 Mercer L. Rev. 318 (1969).

Rejection of defense testimony treated as introducing no evidence. — Rule giving the right of opening and closing to the defendant who introduces no evidence (other than the defendant's own testimony) is not varied by the defendant's mere offer of testimony when this testimony is rejected by the court. Hubbard v. State, 167 Ga. App. 32, 305 S.E.2d 849 (1983).

Failure of the defendant to introduce any evidence does not preclude the state from arguing to the jury, but merely grants to the defendant's counsel the right of opening and closing after the testimony on the part of the state is closed. Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688 (1940).

Opening and closing by admitting crime and seeking to prove justification. — If the defendant has introduced evidence on the defendant's own behalf, the fact that the defendant may admit the crime for which the defendant is indicted and seek to prove justification does not entitle the defendant to open and conclude the argument. Cady v. State, 198 Ga. 99, 31 S.E.2d 38, appeal dismissed and cert. denied, 323 U.S. 676, 65 S. Ct. 190, 89 L. Ed. 549 (1944).

Offer to prove justification of homicide. — On a trial for murder, the defendant is not entitled to open and conclude by admitting the homicide and offering to prove the defendant's justification. Mize v. State, 135 Ga. 291, 69 S.E. 173 (1910).

Defendant recalls prosecution witness to stand. — Defendant in a criminal case who, after the testimony of a witness for the prosecution has been concluded, and the witness retired from the stand, calls and examines the witness, is not entitled to open and conclude the argument unless, for some reason addressed to the discretion of the court, the defendant has been granted permission to ask further questions in order to complete the cross-examination of the witness. Dunn v. State, 18 Ga. App. 95, 89 S.E. 170 (1916).

Cross-examination of witnesses. — Defendant whose only evidence was the defendant's own testimony would not have given up the defendant's right to open and to conclude closing argument by subjecting a witness to further cross-examination since mere cross-examination of a witness does not constitute "introduction of evidence" under O.C.G.A. § 17-8-71. Wilson v. State, 227 Ga. App. 59, 488 S.E.2d 121 (1997).

When the defendant, in a cross-examination of state witnesses, asked the witnesses to read highlighted portions of arrest reports which had been marked as the defendant's exhibits, portions of these documents were presented to the jury, and this amounted to the equivalent of a formal tender of evidence, divesting the defendant of the right to open and close final arguments. Aldridge v. State, 237 Ga. App. 209, 515 S.E.2d 397 (1999).

Defendant who examines the witness called by another defendant loses the right to open and close the closing arguments. — When two are tried jointly, and a witness introduced by one is also examined by the other, both should be considered as having introduced evidence, and the state will be entitled to conclude. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980).

Opening and Closing by Defendant (Cont'd)

If one defendant in criminal case introduces evidence in trial of codefendants, the right to make closing argument is lost to all defendants. McDuffie v. Jones, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000); Rogers v. State, 205 Ga. App. 739, 423 S.E.2d 435 (1992); Sullivan v. State, 213 Ga. App. 308, 444 S.E.2d 392 (1994).

If a codefendant called a witness who had before testified in behalf of the state and did not invoke any ruling from the court to permit the codefendant to further cross examine the witness after the state had closed, it was proper to conclude that the codefendant called the witness as the codefendant's own and, thus, the defendant was not entitled to make the opening and concluding argument to the jury. Sullivan v. State, 213 Ga. App. 308, 444 S.E.2d 392 (1994).

If one defendant offers evidence in the trial of the codefendants, the right to make the closing argument is lost to all defendants, even those introducing no evidence. Williams v. State, 236 Ga. App. 351, 511 S.E.2d 910 (1999).

If the codefendant in a trial attempted impeachment of the coindictee during cross-examination by tendering into evidence the entire written statement of that witness, this amounted to the introduction of substantive evidence, and the state thereby retained the right to conclude. Williams v. State, 236 Ga. App. 351, 511 S.E.2d 910 (1999).

Trial court did not err by refusing to allow the defendant to open and close final arguments as the defendant did not timely and properly object to the refusal and, in any event, was not entitled to open and close since the codefendants of the defendant introduced some evidence and, by doing so, divested the defendant of the right to open and close. McFarlin v. State, 259 Ga. App. 838, 578 S.E.2d 546 (2003).

Loss of right to open and close not grounds for severance. — Loss of the right to open and close arguments under O.C.G.A. § 17-8-71 because another defendant presented evidence was held not to be grounds for severance under O.C.G.A. § 17-8-4. Robinson v. State, 164 Ga. App. 652, 297 S.E.2d 751 (1982).

Since codefendants were represented by separate counsel and neither presented any evidence, each defense counsel had the right to open and conclude the closing argument and the trial court erred in only allowing one counsel to open and the other to conclude the closing argument. Givens v. State, 211 Ga. App. 290, 439 S.E.2d 22 (1993), rev'd on other grounds, 264 Ga. 522, 448 S.E.2d 687 (1994).

Defendant may conclude argument in presentence death penalty hearing. — After the evidence is closed on both sides in a presentence hearing in which the death penalty is being considered, the defendant may conclude the argument to the jury even if the defendant presents evidence during the hearing. Beck v. State, 254 Ga. 51, 326 S.E.2d 465, cert. denied, 474 U.S. 872, 106 S. Ct. 195, 88 L. Ed. 2d 164 (1985).

Informing jury as to why defendant has opening and closing arguments. — It is not error for the court to inform the jury that "the defendant would have opening and closing arguments because no evidence had been put up" because this is a correct statement of the law. If the defendant thinks it prejudicial, a proper objection should be made to preserve the issue for review on appeal. Shavers v. State, 244 Ga. 491, 260 S.E.2d 883 (1979).

Waiver of Right to Open and Close

Right to opening statement may be waived. — After the close of the evidence, the trial court, in the court's discretion, may permit the party having the opening and concluding argument to waive the opening statement and make a full presentation regarding the legal and factual facets of the party's case to the jury following the final argument of the adverse party. Bradham v. State, 243 Ga. 638, 256 S.E.2d 331 (1979).

Defendant forfeited the defendant's right to opening and closing arguments after the defendant successfully moved without objection to admit a police report into evidence and crossexamined an officer on the report's contents. Eppinger v.

State, 231 Ga. App. 614, 500 S.E.2d 383 (1998).

Waiver does not deny any rights under O.C.G.A. § 17-8-71. — Right to open and conclude the argument, especially in a criminal case, is a substantial and valuable right, but like every other right, even the right of trial itself, it may be waived. Garrett v. State, 21 Ga. App. 801, 95 S.E. 301 (1918).

Waiver of a party's opening argument, which results in limiting of the closing argument to rebuttal in response to the opposing party's closing argument, does not deny the party any right under this section. Williamson v. State, 142 Ga. App. 177, 235 S.E.2d 643 (1977).

Right to concluding argument under O.C.G.A. § 17-8-71 may be waived by failure to object. McDuffie v. Jones, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Cross-examination of codefendant. — Trial court erred in forcing a defendant to choose between cross-examining a codefendant and opening and concluding the closing argument as the cross-examination of a witness does not constitute the introduction of evidence under O.C.G.A. § 17-8-71. Dasher v. State, 233 Ga. App. 833, 505 S.E.2d 792 (1998).

Use of witnesses' statements during cross-examination. — Record supported the trial court's judgment that defendant's counsel introduced new evidence when counsel used a statement which a witness gave to police to cross-examine the witness, and because counsel introduced new evidence on behalf of the defendant, the trial court did not err when the trial court denied the defendant's request to give the final closing argument to the jury pursuant to O.C.G.A. § 17-8-71. Thompson v. State, 265 Ga. App. 696, 595 S.E.2d 377 (2004).

Improper use of evidence results in forfeiture of right. — Court correctly concluded that the defendant forfeited the defendant's right to open and close by the improper use of evidence; in any case, the issue was unpreserved as was the contention that the trial attorney was ineffective. Allen v. State, 263 Ga. App. 350, 587 S.E.2d 833 (2003).

Waiver by state. — O.C.G.A. § 17-8-71 did not require the state to give an initial closing argument; thus, the trial court permitted the state to waive this argument. Petty v. State, 283 Ga. 268, 658 S.E.2d 599 (2008).

Waiver by defendant's counsel. — As counsel's decision to call a defense witness, thus forfeiting the right to make the final closing argument under O.C.G.A. § 17-8-71, was not patently unreasonable, and as the defendant provided no basis for concluding that the result of the trial would have been different if the defendant had the last closing argument, the defendant did not show counsel was ineffective. McKenzie v. State, 284 Ga. 342, 667 S.E.2d 43 (2008).

Failure to impeach witnesses did not amount to ineffective assistance of counsel. — With regard to the defendant's convictions for malice murder and other crimes, the defendant failed to show that defense counsel was ineffective for failing to impeach four witnesses' testimony by the witnesses' convictions as such impeachment would have caused defense counsel to lose the right to make the final closing argument under O.C.G.A. § 17-8-71. Adams v. State, 283 Ga. 298, 658 S.E.2d 627 (2008).

Denial of Right to Open and Close

Denial of right to open and conclude works a reversal. — Right to open and conclude to the jury is an important right and an improper denial of that right will work a reversal. Hart v. State, 88 Ga. App. 334, 76 S.E.2d 561 (1953).

Trial court commits reversible error when at the close of the evidence for the state, over objection of the defendants, counsel for the state is granted the right to the opening and concluding argument, although the defendants introduced no evidence, but merely made the defendants' statements, during the making of which one of the defendants exhibited to the jury certain clothing which was never introduced in evidence. Hart v. State, 88 Ga. App. 334, 76 S.E.2d 561 (1953).

Right to open and conclude to the jury is an important right and the right's denial will generally cause a reversal of the de-

Denial of Right to Open and Close (Cont'd)

cision of the lower court. Kelly v. State, 149 Ga. App. 388, 254 S.E.2d 737 (1979).

Court's denial of right to the opening and closing arguments constituted reversible error. Hubbard v. State, 167 Ga. App. 32, 305 S.E.2d 849 (1983).

Since defendants were represented by separate counsel and neither defendant presented evidence, each had the right to have defense counsel open and conclude the closing argument to the jury and it was reversible error to deny such right. Givens v. State, 264 Ga. 522, 448 S.E.2d 687 (1994).

Trial court's erroneous ruling that the defendant waived the defendant's right to open and close argument was not harmless as to the defendant's convictions for cocaine possession and abandonment as those convictions rested primarily on the testimony of an officer defendant was attempting to impeach when the trial court found the defendant waived the defendant's right to argument, the evidence of those offenses was not overwhelming, and the jury had to believe the officer's testimony over that of the defendant to convict the defendant. Jones v. State, 260 Ga. App. 487, 580 S.E.2d 278 (2003).

Defendants were improperly denied the right to open and close final argument after defense counsel used a police officer's report to cast doubt on defendant's recollection and credibility, and did not read police and child services agencies' reports into evidence when attempting to implicate other family members; while the evidence was sufficient to support the convictions, the evidence was not overwhelming, so the error was not harmless and the defendants were entitled to a new trial. Thomas v. State, 262 Ga. App. 492, 589 S.E.2d 243 (2003).

Forced to forfeit right to open and close arguments. — Because to pursue attempt at impeaching the witness, the defendant was wrongly required to introduce evidence and forfeit the defendant's right to open and conclude closing argument, the defendant showed presumptive harm. Whitehead v. State, 232 Ga. App. 140, 499 S.E.2d 922 (1998).

It is a substantial procedural right. — Right to open and conclude when the defendant introduces no evidence is a substantial procedural right. Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968), commented on in 20 Mercer L. Rev. 318 (1969).

Party deprived of right to open and close is presumed to be injured by right's denial. Kelly v. State, 149 Ga. App. 388, 254 S.E.2d 737 (1949).

Even if defendant makes statement unless clearly guilty. — In a criminal case, although the defendant introduced no evidence, but made a statement, the defendant was entitled to conclude the argument in the case. This is an important right, and the right's denial will generally cause a reversal of the decision of the lower court. But if the evidence demanded a verdict of guilty, an erroneous ruling will not require a reversal, except when the presiding judge has expressed or intimated an opinion on the facts of the case. Seyden v. State, 78 Ga. 105 (1886).

Effect of deprivation of right to open and conclude. — If the evidence in a criminal case demands a verdict of guilty, the fact that the defendant was improperly deprived of the right to open and conclude the argument will not necessitate a new trial. Scott v. State, 243 Ga. 233, 253 S.E.2d 698 (1979).

After the defendant cross-examined a witness for the state regarding the witness's first offender sentence under the First Offender Act, O.C.G.A. § 42-8-60 et seq., in an effort to show witness bias, the trial court erred in requiring the defendant to introduce into evidence certified copies of the relevant sentencing record and in thus denying the defendant the right to open and conclude closing arguments by forcing the defendant to present evidence. Defendant had a right under the Confrontation Clause of U.S. Const., amend. 6 to cross-examine the witness regarding the witness's first offender probation status to show bias, but the records relevant to that status were not admissible because there was no adjudication of the witness's guilt; however, the error was harmless in light of the overwhelming evidence of the defendant's guilt. Smith v. State, 276 Ga. 263, 577 S.E.2d 548 (2003).

Although the trial court may have erred in allowing the state to open and conclude closing argument in the defendant's cocaine possession case since the defendant did not present any evidence other than the defendant's own testimony, the error was harmless because the defendant's own frank admission to possessing the cocaine and the defendant's attorney's arguments conceding guilt on that charge meant the trial court's alleged error did not contribute to the conviction. Starks v. State, 260 Ga. App. 719, 580 S.E.2d 672 (2003).

Arguments after defendant impeaches codefendant. — Counsel was not deficient for belatedly notifying the state of the counsel's intent to impeach the codefendant with a letter, in which the codefendant took full responsibility for two of the robberies and purportedly exonerated the defendant of those crimes; although the introduction of the letter cost defendant the right to open and close final arguments, the prior inconsistent statements in the letter served to impeach the codefendant's testimony and were used for that purpose by trial counsel after defense counsel discussed the matter with the defendant. Buchanan v. State, 273 Ga. App. 174, 614 S.E.2d 786 (2005).

While the trial court erred by requiring the defendant to introduce a certified copy of the victim's prior conviction or forego questioning the victim about the victim's probationary status, resulting in the loss of the right to open and close final argument to the jury, given the overwhelming evidence against the defendant, it was highly probable that this error did not contribute to the judgment. Johnson v. State, 284 Ga. App. 724, 644 S.E.2d 544, cert. denied, No. S07C1179, 2007 Ga. LEXIS 538 (Ga. 2007).

Defendant may not assert denial of right for first time on appeal. — If the court announces that the state has opening and closing arguments and appellant makes no objection, the appellant cannot during the trial ignore what the appellant thinks to be an injustice, take the appellant's chances on a favorable verdict, and complain later on appeal. Scott v. State, 243 Ga. 233, 253 S.E.2d 698 (1979).

Absent codefendant. — Trial court did not err in allowing the codefendant to present a concluding final argument after the defendant's final argument to the jury, despite the fact that the codefendant was tried in absentia and was later granted a new trial when it was determined that the trial in absentia was error. Manders v. State, 280 Ga. App. 742, 634 S.E.2d 773 (2006).

RESEARCH REFERENCES

ALR. — Time as of which defense counsel in criminal case may make opening statement, 93 A.L.R.2d 951.

Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal case, 26 A.L.R.3d 1409.

Power of trial court to dismiss prosecution or direct acquittal on basis of prosecutor's opening statement, 75 A.L.R.3d 649.

Propriety of trial court order limiting time for opening or closing argument, 71 A.L.R.4th 200.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases, 88 A.L.R.4th 8.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases, 88 A.L.R.4th 209.

17-8-72. Misdemeanors and cases arising from inferior judicatories; time limits on closing argument.

In all misdemeanor cases and cases brought up from inferior judicatories, counsel for either party shall not occupy more than one-half hour

in the whole discussion of the case after the evidence is closed without obtaining special leave of the court before the argument is opened.

History. — Ga. L. 1924, p. 75, § 2; Code 1933, § 27-2203.
U.S. Code. — Closing arguments, Federal Rules of Criminal Procedure, Rule 29.1.

JUDICIAL DECISIONS

Showing required for time extension generally. — It is necessary that counsel make a showing in the manner prescribed, as to the necessity of an extension of time, in order to do justice to the case of their client. If the showing required by this section is not made, it will not be held that there was any abuse of discretion on the part of the trial judge in refusing to extend the time for argument as requested. Bloodworth v. State, 161 Ga. 332, 131 S.E. 80 (1925).

Waiver of error in limiting closing argument time. — In a juvenile proceeding wherein a juvenile was adjudicated delinquent as a result of an assault of a schoolmate on a school bus, the trial court did not err in limiting closing arguments to five minutes since the trial court informed the parties that the parties would each have five minutes to argue and defense counsel did not insist upon the right to the full time, and instead remained silent, thereby waiving the issue on appeal. In the Interest of E.J., 283 Ga. App. 648, 642 S.E.2d 179 (2007).

RESEARCH REFERENCES

C.J.S. — 88 C.J.S., Trial, § 288 et seq.
ALR. — Allowing attorney to exceed allotted time for argument as reversible error, 1 A.L.R. 1257.

Propriety of trial court order limiting time for opening or closing argument in criminal case—state cases, 71 A.L.R.4th 200.

17-8-73. Noncapital and capital felony cases; time limits on closing argument.

In felony cases other than those involving capital felonies, counsel shall be limited in their closing arguments to one hour for each side. In cases involving capital felonies, counsel shall be limited to two hours for each side.

History. — Ga. L. 1924, p. 75, § 3; Code 1933, § 27-2204.
U.S. Code. — Closing arguments, Federal Rules of Criminal Procedure, Rule 29.1.

Law reviews. — For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004).

JUDICIAL DECISIONS

Judge may not reduce time allowed for argument in capital felony. — Counsel in a capital felony case are entitled, as a matter of right, to two hours on a side in which to argue their case, and the trial judge has no right in the judge's discretion in such a case to limit counsel's argument to a shorter period of time. Kittles v. State, 74 Ga. App. 383, 39 S.E.2d 766 (1946).

Murder defendant's closing argument could not be restricted to one hour as a capital felony defendant is entitled to two hours of closing argument. Massey v. State, 270 Ga. 76, 508 S.E.2d 149 (1998).

Trial court erred as a matter of law when the court did not treat the defendant's malice murder trial as one involving a capital felony under O.C.G.A. § 17-8-73 and did not give the defendant the two-hour limit on closing argument to which the defendant was entitled. Monroe v. State, 272 Ga. 201, 528 S.E.2d 504 (2000).

For purposes of O.C.G.A. § 17-8-73, malice murder and felony murder are capital felonies even when the death penalty is not sought. Chapman v. State, 273 Ga. 865, 548 S.E.2d 278 (2001).

Trial court erred by limiting defense counsel to one hour for closing argument at the end of the defendant's trial on charges of malice murder and felony murder, and the state supreme court reversed the defendant's conviction for malice murder and related crimes because the state's case was based in large part on circumstantial evidence, and the error was not harmless. Hendricks v. State, 277 Ga. 61, 586 S.E.2d 317 (2003).

Violation of O.C.G.A. § 17-8-73 ignored. — Even though the trial court illegally infringed upon the right of closing argument by shortening the time permitted to defendant by O.C.G.A. § 17-8-73 and then refusing the defendant the unused time of the codefendants, the presumption of harm was overcome because the evidence of guilt was so compelling. Hayes v. State, 268 Ga. 809, 493 S.E.2d 169 (1997).

Allotted time was sufficient. — Defendant's right to make a closing argument was not completely abridged since the defendant did not deny that the defendant killed the defendant's spouse, the defendant's sole defense was that the killing was voluntary manslaughter, and the defendant's trial counsel specifically did not request additional time for closing argument as part of the defense trial strategy not to lose the jurors' attention. Ricketts v. State, 276 Ga. 466, 579 S.E.2d 205 (2003).

Defendant was properly limited to one hour for the closing argument as the defendant was charged with drug related offenses and was not indicted for a crime that could be punished by death; the defendant was not entitled to two hours for the defendant's closing argument under Ga. Unif. Super. Ct. R. 13.1 and O.C.G.A. § 17-8-73. Miller v. State, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. denied, No. S07C0087, 2007 Ga. LEXIS 106 (Ga. 2007).

Presumption of harm not rebutted. — Although defense counsel was not completely cut off from making a closing argument on the defendant's behalf, the trial court erred in not allowing defense counsel to use the full amount of time that statutory law permitted counsel as the evidence in the case of the shooting death of the defendant's business partner, although strong, was not so overwhelming as to render any other version of events to be completely without belief and, thus, the presumption of harm that arose from shortening defense counsel's closing argument was not rebutted, and required that the defendant receive a new trial. Laster v. State, 276 Ga. 645, 581 S.E.2d 522 (2003).

Reduced time harmless error. — At a trial in which a trial court limited closing arguments in defendant's capital murder trial to one hour per side, and the defendant's counsel acquiesced in the trial court's ruling, the issue of whether the defendant was denied the right to a longer closing argument under O.C.G.A. § 17-8-73 was waived on appeal; nonetheless, any error was harmless, as the defendant's right was not denied completely, and the evidence of guilt was so overwhelming that any other version of events was not credible. Agee v. State, 279 Ga. 774, 621 S.E.2d 434 (2005).

Counsel's plan to deliver 30-minute closing. — Although the trial court erred in limiting closing arguments to one hour's duration, the defendant's right to make a two-hour closing was not abridged by the trial court's misstatement of O.C.G.A. § 17-8-73, since counsel had informed the trial court of counsel's plan to deliver a 30-minute closing argument and since counsel was not interrupted during the delivery of closing argument by the

trial court. Stovall v. State, 287 Ga. 415, 696 S.E.2d 633 (2010).

Trial counsel's acquiescence in limited time waived error. — Although the defendant charged with murder was entitled to two hours in the defendant's closing argument, the defendant's trial counsel acquiesced at trial to the trial court's ruling that closing arguments would be limited to one hour per side, waiving the issue on appeal; therefore, the defendant's appellate counsel was not ineffective for failing to raise this alleged error. Seabolt v. Norris, 298 Ga. 583, 783 S.E.2d 913 (2016).

Brief extension of time not abuse of discretion. — Because a trial court had discretion to grant a short period of additional time for a party to reach the logical conclusion of the party's closing argument, even without a pre-argument request for more time, no abuse of discretion resulted from the trial court's decision to permit a brief extension to the state. Dorsey v. State, 285 Ga. App. 510, 646 S.E.2d 713 (2007).

Using less time than allotted not ineffective assistance. — Existence of the statutory right to make a two-hour closing argument in a murder case does not mean that an attorney acts incompetently whenever the attorney decides to use less than the whole two hours. Brown v. State, 288 Ga. 902, 708 S.E.2d 294 (2011).

Ineffective assistance. — While the defendant met the burden of showing trial counsel's deficient performance based on a misimpression that counsel was entitled to only one hour to make a closing argument, instead of two as permitted by O.C.G.A. § 17-8-73, the defendant failed to show that but for the error, trial counsel could have convinced the jury that the defendant was innocent of the crimes charged. Hardeman v. State, 281 Ga. 220, 635 S.E.2d 698 (2006).

As to the defendant's habeas claim that the defendant's trial counsel was ineffective for failing to use counsel's entire two hours for closing argument as provided in O.C.G.A. § 17-8-73, because kidnapping with bodily injury was a capital offense, but counsel believed counsel only had 30 minutes, there was no showing that trial counsel could have convinced the jury that the client was innocent of the crimes charged. Wilkerson v. Hart, 294 Ga. 605, 755 S.E.2d 192 (2014).

Forfeiture of right to appeal insufficient time. — Although the trial court erred by limiting the defendant's closing arguments in a felony murder trial to one hour, the defendant forfeited the right to raise the issue on appeal by faling to object or ask for more time when the court said time was running out. Lay v. State, 305 Ga. 715, 827 S.E.2d 671 (2019).

Cited in Carter v. State, 263 Ga. 401, 435 S.E.2d 42 (1993).

RESEARCH REFERENCES

C.J.S. — 88 C.J.S., Trial, § 288 et seq.

ALR. — Propriety of trial court order limiting time for opening or closing argument in criminal case — state cases, 71 A.L.R.4th 200.

17-8-74. Allowance of additional time for closing argument.

If, before argument begins, counsel on either side applies to the court for an extension of the time prescribed for argument and states in his place or on oath, in the discretion of the court, that he cannot do the case justice within the time prescribed and that it will require for that purpose additional time, stating how much additional time will be necessary, the court shall grant such extension of time as may seem reasonable and proper, provided that the extension of time granted in misdemeanor cases or cases brought up from inferior judicatories shall not exceed 30 minutes.

History. — Ga. L. 1924, p. 75, § 4; Code 1933, § 27-2205; Ga. L. 1982, p. 3, § 17.

U.S. Code. — Closing arguments, Federal Rules of Criminal Procedure, Rule 29.1.

JUDICIAL DECISIONS

Cited in Hand v. State, 88 Ga. App. 775, 77 S.E.2d 746 (1953).

RESEARCH REFERENCES

ALR. — Allowing attorney to exceed allotted time for argument as reversible error, 1 A.L.R. 1257.

Propriety of trial court order limiting time for opening or closing argument in criminal case — state cases, 71 A.L.R.4th 200.

17-8-75. Improper statements by counsel.

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.

History. — Civil Code 1895, § 4419; Civil Code 1910, § 4957; Code 1933, § 81-1009.

History of Code section. — This Code section is a codification of the rulings contained in Augusta & S.R.R. v. Randall, 85 Ga. 297, 11 S.E. 706 (1890); Metropolitan S.R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49 (1892); Croom v. State, 90 Ga. 430, 17 S.E. 1003 (1893); Farmer v. State, 91 Ga. 720, 18 S.E. 987 (1893).

Cross references. — Corresponding provision relating to civil procedure, § 9-10-185.

Law reviews. — For article, "From O.J. to McVeigh: The Use of Argument in the Opening Statement," see 48 Emory L.J. 107 (1999). For article, "Death Penalty Law," see 53 Mercer L. Rev. 233 (2001).

For note, "Argument of Counsel," see 1 Ga. B.J. 44 (1927).

For comment on Aycock v. State, 180 Ga. 150, 4 S.E.2d 221 (1939), see 2 Ga. B.J. 69 (1940). For comment on Washington v. State, 80 Ga. App. 415, 56 S.E.2d 119 (1949), see 1 Mercer L. Rev. 320 (1950). For comment on Cornett v. State, 218 Ga. 405, 128 S.E.2d 317 (1962), see 25 Ga. B.J. 448 (1963).

JUDICIAL DECISIONS

Analysis

General Consideration
Conduct of Counsel
Requirement that Objection or Motion Be Made
Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court
Discretion of Court

General Consideration

Introduction of facts not in record is what is forbidden. — What the law forbids is the introduction into a case, by way of argument, of facts not in the record, and calculated to prejudice the accused. Brooks v. State, 55 Ga. App. 227, 189 S.E. 852 (1937); Bradley v. State, 135 Ga. App. 865, 219 S.E.2d 451 (1975).

What the law forbids is introduction into case by way of argument of facts which are not in the record and are calculated to prejudice a party and render trial unfair; the language used in argument may be extravagant, but figurative speech is a legitimate weapon in forensic warfare if there are facts admissible in evidence upon which the speech may be founded. Stancil v. State, 158 Ga. App. 147, 279 S.E.2d 457 (1981); Davis v. State, 178 Ga. App. 357, 343 S.E.2d 140 (1986).

Introduction of facts not in record requires application of remedies. — It is the introduction of facts before the jury which are not in evidence that requires the application of remedies such as mistrial or rebuke. Thompson v. State, 150 Ga. App. 567, 258 S.E.2d 180 (1979); Turner v. State, 152 Ga. App. 354, 262 S.E.2d 618 (1979).

Section does not prevent counsel from commenting on and drawing deductions from evidence. — O.C.G.A. § 17-8-75 concerns the introduction of facts not in evidence, but does not prevent counsel from commenting on and drawing deductions from the evidence; a prosecutor's comments in the presence of the jury about the Jackson-Denno hearing were not improper when because the prosecutor did not disclose the Jackson-Denno findings, but merely commented that the prosecutor did not believe there was evidence of threats, harassment, or intimidation when the defendant gave a statement to police, and there was no error since the prosecutor did not introduce new facts into evidence, and the trial court made no comments about the hearing, but later instructed the jury on the jury's duty to decide if the defendant understood the rights and made the statement voluntarily. Elliott v. State, 275 Ga. App. 359, 620 S.E.2d 584 (2005).

Introduction of facts not in record not reasonable and permissible inferences from the evidence already before the jury. Thompson v. State, 150 Ga. App. 567, 258 S.E.2d 180 (1979).

Proper basis for jury verdict. — Verdict of a jury should be based only on legal evidence properly submitted to the jury, not remarks of counsel, which are not in evidence nor drawn from evidence, irrelevant and immaterial to the vital issue, and which are used ostensibly only for the purpose of prejudicing the minds of the jury against the defendant. Hammond v. State, 51 Ga. App. 225, 179 S.E. 841 (1935).

Use of "highly probable test." — Proper standard for a determination as to whether an uncorrected argument of counsel resulted in a miscarriage of justice to the defendant is the "highly probable test"; i.e., that it is highly probable that the error did not contribute to the judgment. Jones v. State, 159 Ga. App. 704, 285 S.E.2d 45 (1981).

When no timely objection is interposed during improper closing argument, the test for reversible error is not simply whether or not the argument was objectionable, or even if the argument might have contributed to the verdict, but whether the improper argument in reasonable probability changed the result of the trial. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

Proper for prosecutor to testify. — If a prosecuting attorney seeks merely to rebut defense testimony regarding something the prosecuting attorney personally is supposed to have heard or observed, it is not an abuse of discretion to allow a prosecuting attorney to testify. Watson v. State, 176 Ga. App. 610, 337 S.E.2d 54 (1985).

Statements prohibited, but not acts. — O.C.G.A. § 17-8-75 prohibits statements of prejudicial matters not in evidence, but does not prohibit acts. Patten v. State, 184 Ga. App. 152, 361 S.E.2d 203 (1987).

Nonprejudicial statements are not grounds for reversal. — If the remark or statement is not such as would be likely to prejudice the defendant's rights in regard to whether the defendant has had a

fair trial, the error will not be reversible. Ingram v. State, 97 Ga. App. 468, 103 S.E.2d 666 (1958); Davis v. State, 178 Ga. App. 357, 343 S.E.2d 140 (1986).

Control of improper statements made by witnesses. — So far as improper statements by witnesses are concerned, there is no statute bearing directly on the subject. Cases must be governed by analogizing the law embodied in this section, and by reference to the fundamental rules of law guaranteeing fair and impartial trials. Felton v. State, 93 Ga. App. 48, 90 S.E.2d 607 (1955).

Because the prosecutor did not deliberately elicit a witness's response relating to the defendant's character and tried to stop the witness even before the defense objected, and because the trial court acted immediately, struck the comments, and gave a curative instruction, the trial court's refusal to grant a mistrial was not error. Ryan v. State, 276 Ga. App. 87, 622 S.E.2d 446 (2005).

Defense counsel's right to argue punishment avoided by state's witnesses. — Trial court erred in preventing defense counsel from arguing the extent of the benefit the state's witnesses received by agreeing to testify against the defendant, and such error was not harmless; the defense had a right to encourage the jury to infer from that evidence that the witnesses had bias and interest in the case that could compromise the witnesses credibility. Palma v. State, 280 Ga. 108, 624 S.E.2d 137 (2005).

Remedy for questions which are inherently improper and prejudicial. — If a question standing alone is inherently improper and prejudicial, the remedy is a motion for a rebuke or for a mistrial. Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Questioning by defense counsel of investigator did not merit mistrial. — Trial court was not required to declare a mistrial under O.C.G.A. § 17-8-75 when defense counsel cross-examined an investigator about similar crimes. Defense counsel had not made an improper argument, but merely attempted to introduce evidence into the record for strategic reasons by questioning a witness. Gary v. State, 291 Ga. App. 757, 662 S.E.2d 742 (2008).

Since the jury had not yet been sworn, mistrial was not a viable remedy since, in response to defense counsel's question whether any of the prospective jurors had ever been the victim of a crime, one person answered that their store or home had been burglarized six times "by some of your best clients." Petty v. State, 179 Ga. App. 767, 347 S.E.2d 663 (1986).

No error in not declaring mistrial for violation of granted motion in limine. — Court did not err in not declaring a mistrial when a state's witness referred to the defendant's actions as "rape" after the court had granted defendant's motion in limine to refrain from the use of that word. Gaines v. State, 179 Ga. App. 623, 347 S.E.2d 673 (1986).

Harmless error. — Trial court's error in allowing the prosecutor to inject evidence of the "buddy syndrome" at the defendant's trial for child molestation was harmless error since the error did not contribute to the judgment. McCann v. State, 200 Ga. App. 256, 407 S.E.2d 482 (1991).

If the record showed that defense counsel was able to argue substantially on a contested issue prior to its objection by the state, the court's error in limiting defense counsel's closing argument was harmless. Prejean v. State, 209 Ga. App. 411, 433 S.E.2d 628 (1993).

In a prosecution for shoplifting, the trial court properly denied the defendant's motion for a mistrial after the state improperly commented on the right to remain silent as the error was harmless given the overwhelming evidence of guilt, eyewitness testimony and videotaped evidence of the crime, and the prosecutor's compliance with an instruction to not make any further comment on the defendant's silence. Ekanger v. State, 279 Ga. App. 421, 631 S.E.2d 459 (2006).

Despite the prosecutor's improper argument during closing, and the trial court's failure to perform the court's duty under O.C.G.A. § 17-8-75, no reversible error resulted from the failure as it was highly improbable that the error contributed to the verdict. Walker v. State, 281 Ga. 521, 640 S.E.2d 274 (2007).

General Consideration (Cont'd)

Although the trial court erred in not fulfilling the court's duty under O.C.G.A. § 17-8-75 when the prosecutor's remark regarding what the defendant had told deputies was a misstatement of the evidence, the error was harmless because it was highly probable that the trial court's error did not contribute to the verdicts; the improper statement, consisting of one sentence, was interrupted by defense counsel's prompt objection, the trial court immediately observed that the jury would remember the evidence, and the trial court charged the jury fully as to what constituted evidence, including instructing the jurors that evidence did not include the attorneys' opening statements or closing arguments. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Prosecutor's argument went slightly beyond the trial testimony by describing a video game as involving the use of "bludgeoning objects to kill somebody," and the trial court erred by failing to rebuke counsel and to instruct the jury to disregard the unauthorized argument, as was required by O.C.G.A. § 17-8-75, but the error was not reversible error because it was highly probable that the prosecutor's minor misstatement of the evidence, particularly in light of the trial court's subsequent statement to the jury that the jury had to determine what evidence was actually presented, did not contribute to the sentencing verdict. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

While the prosecutor's comment that "the next time he does this, he might shoot somebody" was improper, the defendant was not entitled to relief because, even assuming the trial court's response fell short of satisfying O.C.G.A. § 17-8-75, it was highly probable that any error in failing to comply with § 17-8-75 based upon a single comment did not contribute to the verdict. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Trial court's error in failing to remedy the impact of the prejudicial statements by the prosecutor, if any, was harmless. Given the overwhelming evidence of the defendant's guilt, including the defendant's custodial confession, it was highly probable that the trial court's error, if any, did not contribute to the verdict. Geiger v. State, 295 Ga. 190, 758 S.E.2d 808 (2014).

Trial court's failure to rebuke the prosecutor for making statements within the hearing of the jury regarding prejudicial matters not in evidence was harmless because the prosecutor's closing argument indicating that the prosecutor could predict from the outset of the case that the defendant would either assert a claim of self-defense or a claim that someone else committed the act could not have misled the jury as a claim of self-defense was not pursued by the defendant; the jury instructions stated that the closing arguments of the lawyers did not constitute evidence; and it was highly probable that neither the statement by the prosecutor, nor any alleged failure of the trial court to comply with O.C.G.A. § 17-8-75 contributed to the verdict. Ware v. State, 302 Ga. 792, 809 S.E.2d 762 (2018).

When defense counsel objected to the prosecutor's statement in closing argument as an improper comment on the defendant's right to remain silent, presuming that the trial court's response amounted to a ruling on the defendant's objection, any error from the trial court's failure to act pursuant to O.C.G.A. § 17-8-75 was harmless considering the overwhelming evidence of the defendant's guilt; and the trial court's instruction to the jury that the statements of counsel during closing arguments did not constitute evidence. Taylor v. State, 303 Ga. 583, 814 S.E.2d 302 (2018).

Pretermitting whether the defendant's motion for mistrial constituted a proper objection to the state's reference to the defendant's "previous trial," and even assuming that the trial court erred by failing to rebuke counsel, any such assumed error would be harmless as the evidence of the defendant's guilt was strong; and the trial court instructed the jury both before opening statements and after closing arguments that the lawyers' statements were not evidence. Dobbins v. State, 844 S.E.2d 814, No. S20A0402, 2020 Ga. LEXIS 449 (2020).

Double jeopardy did not bar retrial. — Prosecutorial misconduct did not bar a retrial of the defendant under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, when the defendant alleged that the state made many statements of fact outside the record during closing argument in violation of O.C.G.A. § 17-8-75 as the defendant did not allege that the prosecutor intended to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of the prosecutor's misconduct. Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536 (2012).

Comments not prejudicial. — Since the defendant did not answer any of the complained-of questions posed by the prosecutor, and the subject matter of those questions was already in evidence, the questions did not amount to forbidden prejudicial statements within the meaning of O.C.G.A. § 17-8-75. Brockman v. State, 292 Ga. 707, 739 S.E.2d 332 (2013).

Noncompliance did not contribute to verdict. — In light of the substantial evidence against the defendant, as well as the jury instructions given, it was highly probable that neither the statement by the prosecutor in closing argument, nor any alleged failure of the trial court to comply with O.C.G.A. § 17-8-75, contributed to the verdict. Anderson v. State, 302 Ga. 74, 805 S.E.2d 47 (2017).

Cited in Mitchum v. State, 11 Ga. 615 (1852); Sims v. Ferrill, 45 Ga. 585 (1872); Blackman v. State, 78 Ga. 592, 3 S.E. 418 (1887); Johnson v. State, 88 Ga. 606, 15 S.E. 667 (1891); Smalls v. State, 105 Ga. 669, 31 S.E. 571 (1898); Evans v. State, 115 Ga. 229, 41 S.E. 691 (1902); Rawlins v. State, 124 Ga. 31, 52 S.E. 1 (1905); Reese v. State, 3 Ga. App. 610, 60 S.E. 284 (1908); Clary v. State, 8 Ga. App. 92, 68 S.E. 615 (1910); Miller v. State, 8 Ga. App. 540, 69 S.E. 922 (1911); Carswell v. State, 10 Ga. App. 30, 72 S.E. 602 (1911); Hinsman v. State, 14 Ga. App. 481, 81 S.E. 367 (1914); Jones v. State, 14 Ga. App. 568, 81 S.E. 801 (1914); Cofield v. State, 14 Ga. App. 813, 82 S.E. 355 (1914); Gazaway v. State, 15 Ga. App. 467, 83 S.E. 857 (1914); Cason v. State, 16 Ga. App. 820, 86 S.E. 644 (1914); Mays v. State, 18 Ga. App. 241, 89 S.E. 174 (1916); White v. State, 19 Ga. App. 230, 91 S.E. 280 (1917); Garrett v. State, 21 Ga. App. 801, 95 S.E. 301 (1918); Brown v. State, 148 Ga. 264, 96 S.E. 435 (1918); Palmer v. State, 23 Ga. App. 84, 97 S.E. 460 (1918); Mitchell v. State, 24 Ga. App. 135, 99 S.E. 889 (1919); Jones v. State, 24 Ga. App. 129, 99 S.E. 893 (1919); Dixon v. State, 26 Ga. App. 13, 105 S.E. 39 (1920); Lewis v. State, 59 Ga. App. 387, 1 S.E.2d 62 (1939); Hayes v. State, 199 Ga. 251, 34 S.E.2d 97 (1945); Brady v. State, 199 Ga. 566, 34 S.E.2d 849 (1945); Loomis v. State, 78 Ga. App. 336, 51 S.E.2d 13 (1948); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113 (1950); Ralls v. State, 87 Ga. App. 655, 75 S.E.2d 26 (1953); Heard v. State, 210 Ga. 108, 78 S.E.2d 38 (1953); Payne v. State, 89 Ga. App. 568, 80 S.E.2d 93 (1954); Montos v. State, 212 Ga. 764, 95 S.E.2d 792 (1956); McFarlin v. State, 95 Ga. App. 425, 98 S.E.2d 99 (1957); Bailey v. State, 95 Ga. App. 859, 99 S.E.2d 311 (1957); Martin v. State, 98 Ga. App. 136, 105 S.E.2d 250 (1958); Moore v. State, 222 Ga. 748, 152 S.E.2d 570 (1966); Martin v. State, 223 Ga. 649, 157 S.E.2d 458 (1967); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1 (1968); Willingham v. State, 118 Ga. App. 321, 163 S.E.2d 317 (1968); McBride v. State, 119 Ga. App. 418, 167 S.E.2d 374 (1969); Gore v. State, 124 Ga. App. 398, 184 S.E.2d 24 (1971); Spann v. State, 126 Ga. App. 370, 190 S.E.2d 924 (1972); Wingfield v. State, 231 Ga. 92, 200 S.E.2d 708 (1973); Ramsey v. State, 232 Ga. 15, 205 S.E.2d 286 (1974); Culpepper v. State, 132 Ga. App. 733, 209 S.E.2d 18 (1974); Martin v. State, 132 Ga. App. 658, 209 S.E.2d 103 (1974); Reed v. State, 134 Ga. App. 47, 213 S.E.2d 147 (1975); Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975); Crumley v. State, 135 Ga. App. 394, 217 S.E.2d 464 (1975); Westbrooks v. State, 135 Ga. App. 807, 218 S.E.2d 908 (1975); Hughes v. State, 136 Ga. App. 927, 222 S.E.2d 645 (1975); Reid v. State, 137 Ga. App. 495, 224 S.E.2d 482 (1976); Greeson v. State, 138 Ga. App. 572, 226 S.E.2d 769 (1976); Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976); Thurston v. State, 139 Ga. App. 647, 229 S.E.2d 124 (1976); Johnson v. State, 238 Ga. 59, 230 S.E.2d 869 (1976); Gillespie v. State, 140 Ga. App. 408, 231 S.E.2d 154 (1976); Gamble v.

General Consideration (Cont'd)

State, 141 Ga. App. 304, 233 S.E.2d 264 (1977); Ransom v. State, 142 Ga. App. 325, 235 S.E.2d 748 (1977); Sheets v. State, 143 Ga. App. 510, 239 S.E.2d 196 (1977); Eubanks v. State, 240 Ga. 544, 242 S.E.2d 41 (1978); Bethea v. State, 149 Ga. App. 312, 254 S.E.2d 468 (1979); Fleming v. State, 149 Ga. App. 781, 256 S.E.2d 56 (1979); Boatright v. State, 150 Ga. App. 283, 257 S.E.2d 314 (1979); Rivers v. State, 151 Ga. App. 380, 259 S.E.2d 650 (1979); Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868 (1980); Gregoroff v. State, 158 Ga. App. 363, 280 S.E.2d 373 (1981); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Spicer v. State, 159 Ga. App. 826, 285 S.E.2d 258 (1981); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Jones v. State, 159 Ga. App. 845, 285 S.E.2d 584 (1981); Neal v. State, 160 Ga. App. 498, 287 S.E.2d 399 (1981); Ferry v. State, 161 Ga. App. 795, 287 S.E.2d 732 (1982); Garrett v. State, 160 Ga. App. 877, 288 S.E.2d 592 (1982); State v. Abdi, 162 Ga. App. 20, 288 S.E.2d 772 (1982); Bryant v. State, 249 Ga. 242, 290 S.E.2d 75 (1982); Dempsey v. State, 162 Ga. App. 390, 291 S.E.2d 449 (1982); Bramlett v. State, 162 Ga. App. 584, 291 S.E.2d 739 (1982); Phillips v. State, 162 Ga. App. 471, 291 S.E.2d 776 (1982); Ritter v. State, 163 Ga. App. 158, 293 S.E.2d 547 (1982); Luckett v. State, 163 Ga. App. 90, 294 S.E.2d 200 (1982); Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982); Johnson v. State, 164 Ga. App. 501, 297 S.E.2d 38 (1982); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982); Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983); Wilbanks v. State, 165 Ga. App. 876, 303 S.E.2d 144 (1983); Phillips v. State, 167 Ga. App. 260, 305 S.E.2d 918 (1983); Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983); Estes v. State, 169 Ga. App. 685, 314 S.E.2d 700 (1984); Harrell v. State, 253 Ga. 474, 321 S.E.2d 739 (1984); Smith v. State, 172 Ga. App. 6, 321 S.E.2d 771 (1984); Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731 (1985); Milford v. State, 178 Ga. App. 792, 344 S.E.2d 505 (1986); Baker v. State, 179 Ga. App. 802, 348 S.E.2d 128 (1986); Hunt v. State, 180 Ga. App. 103, 348 S.E.2d 467 (1986); Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986); Louis v. State, 185 Ga. App. 472, 364 S.E.2d 607 (1988); Grant v. State, 185 Ga. App. 497, 364 S.E.2d 628 (1988); Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988); Oller v. State, 187 Ga. App. 818, 371 S.E.2d 455 (1988); Polk v. State, 192 Ga. App. 888, 386 S.E.2d 682 (1989); Marshall v. State, 193 Ga. App. 314, 387 S.E.2d 602 (1989); Mantooth v. State, 197 Ga. App. 797, 399 S.E.2d 505 (1990); Hayes v. State, 261 Ga. 439, 405 S.E.2d 660 (1991); Edwards v. State, 200 Ga. App. 580, 408 S.E.2d 802 (1991); Bailey v. State, 200 Ga. App. 621, 409 S.E.2d 230 (1991); Brown v. State, 204 Ga. App. 176, 418 S.E.2d 776 (1992); Medlock v. State, 263 Ga. 246, 430 S.E.2d 754 (1993); Davis v. State, 209 Ga. App. 187, 433 S.E.2d 366 (1993); Remediation Servs., Inc. v. Georgia-Pacific Corp., 209 Ga. App. 427, 433 S.E.2d 631 (1993); Rivers v. State, 265 Ga. 694, 461 S.E.2d 205 (1995); Wilkes v. State, 221 Ga. App. 390, 471 S.E.2d 332 (1996); Pope v. State, 221 Ga. App. 578, 472 S.E.2d 111 (1996); Ortiz v. State, 222 Ga. App. 432, 474 S.E.2d 300 (1996); Wyatt v. State, 267 Ga. 860, 485 S.E.2d 470 (1997); Joseph v. State, 231 Ga. App. 399, 498 S.E.2d 808 (1998); Perry v. State, 232 Ga. App. 484, 500 S.E.2d 923 (1998); Billups v. State, 234 Ga. App. 824, 507 S.E.2d 837 (1998); Brown v. State, 246 Ga. App. 517, 541 S.E.2d 112 (2000); Parker v. State, 276 Ga. 598, 581 S.E.2d 7 (2003); Hernandez v. State, 291 Ga. App. 562, 662 S.E.2d 325 (2008); Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510 (2009); Henderson v. State, 285 Ga. 240, 675 S.E.2d 28 (2009); Stolte v. Fagan, 291 Ga. 477, 731 S.E.2d 653 (2012); Johnson v. State, 293 Ga. 641, 748 S.E.2d 896 (2013).

Conduct of Counsel

No duty of defense counsel to request additional remedies. — Nowhere in O.C.G.A. § 17-8-75 is there a requirement for defense counsel to specifically request additional remedies after interposing an objection to the improper statements made by a prosecutor; to the contrary, the plain language of O.C.G.A. § 17-8-75 refers to the trial court's independent duty, after defense counsel's objection, to rebuke the prosecutor, give an

appropriate curative instruction, or grant a mistrial in the event that the prosecutor has injected into the case prejudicial statements on matters outside of the evidence. O'Neal v. State, 288 Ga. 219, 702 S.E.2d 288 (2010).

Argument should be confined to facts and authorized inferences. — Counsel should confine counsel's argument to the facts and such authorized inferences arising from the facts as are properly before the court and the jury. Brown v. State, 57 Ga. App. 864, 197 S.E. 82 (1938).

Trial court did not abuse the court's discretion in restricting the defendant's closing argument as the defendant attempted to inform the jurors about facts the defendant thought the jurors should know about, but were not in evidence and the law only permitted the defendant to discuss the facts and authorized inferences that flowed from the evidence properly before the jury. Brown v. State, 256 Ga. App. 603, 568 S.E.2d 727 (2002).

Voluntary statement of a witness differs from counsel's statements. — Voluntary statement made by a witness stands on a different basis with reference to a mistrial from that covered by this section, which has reference to the conduct of attorneys, who are officers of the court. Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968).

Mistrial more likely if district attorney directly elicits improper remarks. — Mistrial is more likely to be the solution required in those instances when the solicitor (now district attorney) directly elicits the improper evidence than in those instances where the witness volunteers the testimony. Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968).

Not every remark justifies reversal. — Not every remark of counsel, although the remark strains at the evidence, will justify reversal. Koza v. State, 158 Ga. App. 709, 282 S.E.2d 131 (1981).

Defendant's claim that the defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to evidence that the defendant's parental rights were terminated failed as the record did not reflect that such evidence was ever admitted; the state objected to the defendant's evidence showing that the children had moved from foster home to foster home on relevance grounds, asserting that the jury was not present to decide a parental termination case, and therefore did not violate O.C.G.A. § 17-8-75, which prohibits counsel from making statements of prejudicial matters not in evidence. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

There are two types of improper statements made in argument of counsel, to wit: statements that can be cured by the court's rebuking counsel, or giving needed instructions to the jury, or both, and irrelevant statements so inflammatory and prejudicial that the statement's injurious effect cannot be eradicated from the minds of the jurors by instruction from the court to disregard the statements. Hicks v. State, 196 Ga. 671, 27 S.E.2d 307 (1943); Washington v. State, 80 Ga. App. 415, 56 S.E.2d 119 (1949).

Attorneys should be allowed all reasonable latitude in the argument of cases to the jury, provided the attorneys do not go outside the facts legitimately appearing from the trial, and lug in extraneous matters as if those matters were a part of the case. Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491 (1949).

Considerable latitude in imagery and illustration exists. — Solicitor general (now district attorney) may argue to the jury the necessity for enforcement of the law and may impress on the jury, with considerable latitude in imagery and illustration, the jury's responsibility in this regard. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980); Stancil v. State, 158 Ga. App. 147, 279 S.E.2d 457 (1981); Williams v. State, 159 Ga. App. 772, 285 S.E.2d 232 (1981).

False logic does not call for mistrial or rebuke. — In determining whether an argument is improper, it should be borne in mind that flights of oratory and false logic do not call for mistrials or rebuke. It is the introduction of facts not in evidence that requires the application of such remedies. Hicks v. State, 196 Ga. 671, 27 S.E.2d 307 (1943).

Conduct of Counsel (Cont'd)

All reasonable latitude should be allowed attorneys in their argument to the jury on the facts and on inferences and deductions sustained by the evidence. It is not necessary that they be logical. False logic does not call for objections, rebukes, or mistrials. It is the introduction of facts not in the record which requires the application of such remedies. Cawthon v. State, 71 Ga. App. 497, 31 S.E.2d 64 (1944).

District attorney may draw illogical or unreasonable deductions. — Prosecution in closing argument is permitted to draw deductions from the evidence and these deductions may be illogical, unreasonable, or even absurd so long as there is evidence from which such deductions can be made. Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83 (1976); Adams v. State, 260 Ga. 298, 392 S.E.2d 866 (1990); Rogers v. State, 205 Ga. App. 739, 423 S.E.2d 435 (1992).

It is permissible for the district attorney in argument to draw deductions from the evidence which may be illogical, unreasonable, or even absurd. Sharp v. State, 153 Ga. App. 486, 265 S.E.2d 837 (1980).

It is up to opposing counsel, not the court, to reply to illogical argument. — Fact that the deductions are illogical is a matter for reply by adverse counsel and not for rebuke by the court. Gray v. Cole, 20 Ga. 203 (1856); Taylor v. State, 83 Ga. 647, 10 S.E. 442 (1889); Owens v. State, 120 Ga. 209, 47 S.E. 545 (1904); Frank v. State, 141 Ga. 243, 80 S.E. 1016 (1914).

While counsel should not be permitted in argument to state facts which are not in evidence, it is permissible to draw deductions from the evidence, and the fact that the deductions may be illogical, unreasonable, or even absurd is a matter for reply by adverse counsel and not for rebuke by the court. Bradley v. State, 135 Ga. App. 865, 219 S.E.2d 451 (1975); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Murphy v. State, 203 Ga. App. 152, 416 S.E.2d 376 (1992).

Counsel should not state prejudicial facts not appearing from the evidence or not fairly deducible therefrom. Martin v. State, 10 Ga. App. 798, 74 S.E. 306 (1912); Pelham & H.R.R. v. Elliott, 11 Ga. App. 621, 75 S.E. 1062 (1912).

Portions of counsel's closing argument concerning a matter on which there was no evidence on the record were properly excluded from the jury's consideration upon objection from opposing counsel. Seabrooks v. State, 164 Ga. App. 747, 297 S.E.2d 745 (1982), aff'd, 251 Ga. 564, 308 S.E.2d 160 (1983).

Prosecutorial comment on defendant's failure to testify constitutes reversible error if: (1) there was a manifest intent to comment on the failure to testify; and (2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify. Japhet v. State, 176 Ga. App. 189, 335 S.E.2d 425 (1985).

Reference to defendant's silence. — Prosecutor's reference during the prosecutor's opening statement to the defendant's silence upon arrest did not require mistrial since the trial court admonished the prosecutor to stay away from the subject and otherwise cured the error. Cheney v. State, 233 Ga. App. 66, 503 S.E.2d 327 (1998).

Prosecutor's two improper comments on the defendant's pre-trial silence were not reversible error as the trial court took corrective measures after the first comment and the defendant failed to request a curative instruction or a mistrial after the second comment. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Because a prosecutor's conduct violated one of the most basic rules of prosecutorial procedure, specifically, producing documents in discovery showing that the defendant refused to speak with police and requested a lawyer after being advised of Miranda, and hence intentionally goading the defendant into moving for a mistrial, the trial court erred in denying the defendant's motion for a plea in bar on double jeopardy grounds. Anderson v. State, 285 Ga. App. 166, 645 S.E.2d 647 (2007).

Mistrial was not warranted upon a motion made the day after the prosecutor's prefatory comments concerning the defendant's desire not to be interviewed were made; further, the defendant failed to make a contemporaneous objection to the

prosecutor's comments and the jury was already aware from the officer's response during cross-examination that the defendant declined to make a statement. Tennyson v. State, 282 Ga. 92, 646 S.E.2d 219 (2007).

Reference to defendant's failure to rebut evidence of guilt. — Trial court did not err in refusing the defendant's motion for mistrial after the state started to comment in closing argument that the defendant had not rebutted the cell phone evidence that placed the defendant near decedent's residence on the morning decedent was killed as the state was not commenting on the defendant's right to remain silent, but instead was making reference to the defendant's stipulation as to the cell phone evidence; the comment was not improper since the state had the right to argue that a defendant failed to rebut certain evidence of guilt. Pullin v. State, 258 Ga. App. 37, 572 S.E.2d 722 (2002).

Because a prosecutor's comments were directed at defense counsel's failure to rebut or explain the state's evidence and the prosecutor made a permissible analogy, there was no prosecutorial misconduct; consequently, the trial court did not err in denying the defendant's motion for a new trial. Duffy v. State, 271 Ga. App. 668, 610 S.E.2d 620 (2005).

Prosecutor's comments during closing argument that the defendant's story was not credible and if the defendant was innocent then why did the defendant flee from the police were not comments on the defendant's exercise of the defendant's right to remain silent; a prosecutor's argument that evidence of guilt has not been contradicted or rebutted is permissible and is not a comment on the defendant's failure to testify. McClendon v. State, 287 Ga. App. 238, 651 S.E.2d 165 (2007).

Comment on defendant's "future dangerousness." — Although the statement made by the prosecutor in closing argument could be construed as a mention of the defendant's future dangerousness, and therefore improper, the prosecutor's argument, when taken as a whole, was not addressing that issue but rather seeking to explain the reasons for the victim's recantation at trial; therefore, the comment did not warrant an order granting a mistrial. Hambrick v. State, 278 Ga. App. 768, 629 S.E.2d 442 (2006).

Mistrial may be refused when the argument is merely illogical. Sable v. State, 14 Ga. App. 816, 82 S.E. 379 (1914); Phillips v. State, 149 Ga. 255, 99 S.E. 874 (1919).

Any reasonable inference may be drawn from evidence admitted without restriction as to the evidence's applicability to the issues involved. Smalls v. State, 105 Ga. App. 669, 31 S.E. 571 (1898); Holmes v. State, 7 Ga. App. 570, 67 S.E. 693 (1910); McLeod v. State, 22 Ga. App. 241, 95 S.E. 934 (1918).

If the remarks made by the prosecuting attorney during closing argument were logically inferable from the evidence presented, the presentation of the inferences as if the inferences were coming from the defendant did not amount to an impermissible comment upon the defendant's decision not to testify. George v. State, 260 Ga. 809, 400 S.E.2d 911 (1991).

Counsel is permitted, in the sound discretion of the court, to argue all reasonable inferences and deductions which may be drawn from the evidence. Fowler v. State, 201 Ga. App. 417, 411 S.E.2d 335 (1991).

Legitimacy of an inference is a question for the jury. Ramsey v. State, 92 Ga. 53, 17 S.E. 613 (1893).

Instruction by the court to limit comments strictly to what is in evidence does not improperly restrict the comments of counsel. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405 (1979).

Surreptitious attempts to get facts not proven before the jury. — For counsel to attempt surreptitiously to get before the jury facts by way of supposition, which have not been proven, is highly reprehensible. The practice should be instantly repressed by the court, without waiting to be called upon by the opposite party. Grayhouse v. State, 65 Ga. App. 853, 16 S.E.2d 787 (1941).

State will not permit the prosecuting officer to use any unfair means in the trial to the prejudice of the accused. Grayhouse v. State, 65 Ga. App. 853, 16 S.E.2d 787 (1941).

Conduct of Counsel (Cont'd)

District attorney's duty to refrain from making unauthorized statements. — It is especially the duty of a solicitor (now district attorney) to cautiously refrain from making statements in the solicitor's (now district attorney) argument to the jury which are unauthorized, and which will tend to prejudice the jury against the defendant. Brown v. State, 57 Ga. App. 864, 197 S.E. 82 (1938).

Knowing use of illegal evidence by prosecution. — When a prosecuting attorney knowingly injects into evidence an illegal element to the prejudice of the defendant, a mistrial is often the only complete and satisfactory remedy. Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968); Perry v. State, 154 Ga. App. 559, 269 S.E.2d 63 (1980), overruled on other grounds, Joiner v. State, 231 Ga. App. 61, 497 S.E.2d 642 (1998).

Counsel may not complain of error that counsel procured or aided. — Induced error is impermissible. Counsel cannot complain on appeal of an order or ruling that the counsel's own conduct procured or aided. Mosley v. State, 150 Ga. App. 802, 258 S.E.2d 608 (1979).

Improper remark of one counsel is no excuse for an improper reply thereto, when no objection was made against the latter. Bennett v. State, 86 Ga. 401, 12 S.E. 806, 22 Am. St. R. 465, 12 L.R.A. 449 (1890); Nixon v. State, 14 Ga. App. 261, 80 S.E. 513 (1914).

Remarks as to what is expected to be proved generally. — In making a preliminary statement to the jury of facts which the solicitor (now district attorney) intends or expects to prove, the solicitor (now district attorney) should confine remarks to facts which, under the rules of law governing the admissibility of evidence, the solicitor (now district attorney) will be allowed to prove. Gossett v. State, 6 Ga. App. 439, 65 S.E. 162 (1909).

In opening a case, it is not improper to state what the solicitor (now district attorney) expects to prove by a witness, and to argue reasons for the admission of such testimony. Corbitt v. State, 7 Ga. App. 13, 66 S.E. 152 (1909).

It is not improper to state what one intends to prove and to argue reasons for admission; a prosecutor may state a fact to clarify the circumstances surrounding the introduction of a document to which the defendants object, and may also recite what the prosecutor is trying to establish in response to an objection. Thayer v. State, 189 Ga. App. 321, 376 S.E.2d 199 (1988).

District attorney may not state to the jury the district attorney's personal belief in the defendant's guilt. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Remark that evidence will be introduced which affords inference of guilt. — It is not improper for counsel in opening case to state that counsel will rely in part on proof of conduct affording an inference of guilt. White v. State, 127 Ga. 273, 56 S.E. 425 (1907).

Writing "guilty" on chalkboard. — Trial court did not abuse the court's discretion in allowing the assistant district attorney to write "GUILTY" on the chalkboard during closing argument. Blue v. State, 170 Ga. App. 304, 316 S.E.2d 862 (1984).

Prosecution may discuss and criticize defendant's statement. — Prosecuting attorney has the right to discuss and criticize, within proper bounds, a defendant's statement, although the prosecuting attorney has no right to criticize the defendant's failure to make any statement at all. Fitzgerald v. State, 51 Ga. App. 636, 181 S.E. 186 (1935).

Statement by counsel for the state that counsel believes defendant to be guilty. — Prosecuting attorney, over objection, should not be permitted to express an opinion that the accused is guilty. Broznack v. State, 109 Ga. 514, 35 S.E. 123 (1900); Moore v. State, 10 Ga. App. 805, 74 S.E. 315 (1912).

It is improper for counsel for the state, on the trial of a criminal defendant, to state to the jury counsel's belief that the defendant is guilty. Forster v. State, 60 Ga. App. 598, 4 S.E.2d 498 (1939).

While a district attorney may draw conclusions from facts proven, it is improper for the district attorney to urge the district attorney's personal belief as to the defendant's guilt. Hoerner v. State, 246

Ga. 374, 271 S.E.2d 458 (1980).

Prosecution's statement of belief that defendant is guilty. — If the solicitor (now prosecuting attorney) states in the solicitor's argument that if the solicitor ever expressed an opinion, this case would be one that the solicitor would like to express the solicitor's opinion and that the solicitor thought the defendant was guilty, and the defendant moves for a mistrial on the ground that the solicitor has expressed the solicitor's opinion that the defendant was guilty, but the court merely overrules the motion, and neither rebukes the solicitor nor instructs the jury to disregard such argument, nor in any way expresses the court's disapproval, it is reversible error to refuse a new trial after a verdict of conviction. Forster v. State, 60 Ga. App. 598, 4 S.E.2d 498 (1939).

Defense counsel's statement that counsel believes defendant is innocent. — Court may charge the jury to disregard a statement by counsel for the defendant that defense counsel believes the defendant is innocent. Smith v. State, 95 Ga. 472, 20 S.E. 291 (1894).

Counsel's statement of belief as to witness' veracity is improper. — It is improper for counsel to state to the jury counsel's personal belief as to the veracity of a witness. Shirley v. State, 245 Ga. 616, 266 S.E.2d 218 (1980).

Counsel may urge the jury to deduce a witness's veracity from proven facts. Shirley v. State, 245 Ga. 616, 266 S.E.2d 218, cert. denied, 449 U.S. 879, 101 S. Ct. 227, 66 L. Ed. 2d 102 (1980).

Improbable statement of a witness may be commented upon. Cobb v. State, 27 Ga. 648 (1859).

Interest of a witness in the result of the trial may be commented upon. Moore v. State, 97 Ga. 759, 25 S.E. 362 (1896).

Credibility of a witness may be attacked in the concluding argument, although in the opening argument, counsel has not given notice of an intention to do so. Taffe v. State, 90 Ga. 459, 16 S.E. 204 (1892).

Disagreement between counsel as to testimony of witness. — If a disagreement arose between counsel as to the testimony of a witness, the judge may leave the matter to the recollection of the jury. Fort v. State, 3 Ga. App. 448, 60 S.E. 282 (1908).

Assumption that counsel's own testimony proven when testimony conflicts. — When the testimony is conflicting, counsel may assume that the facts testified to by counsel's witnesses were proven. Hatcher v. State, 18 Ga. 460 (1855).

Purpose and effect of impeaching evidence may be discussed. Memmler v. State, 75 Ga. 576 (1885).

Right of cross-examination is subject to limitations to prevent abuse. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

Control of the cross-examination of a witness is to a great degree within the discretion of the trial court and will not be controlled unless abused. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

Evidence as to silence of the accused at time of arrest. — Evidence as to silence on the part of the defendant at the time of the defendant's arrest should be excluded when objected to, for the defendant is then entitled to remain silent, and the prosecution may not use against the defendant the fact that the defendant stood mute or claimed the privilege. Newton v. State, 154 Ga. App. 98, 267 S.E.2d 641 (1980).

Reference to fact that prisoner did not make a statement. — Mistrial is required if there is a reference to the fact that the prisoner did not make a statement. Barker v. State, 127 Ga. 276, 56 S.E. 419 (1907); Griffin v. State, 3 Ga. App. 476, 60 S.E. 277 (1908).

Omission in the statement of the accused may be commented upon. Tolbert v. State, 12 Ga. App. 685, 78 S.E. 131 (1913).

Failure of the accused to produce witnesses to rebut evidence introduced by the state may be commented upon. Ponder v. State, 18 Ga. App. 727, 90 S.E. 376 (1916).

Argument of inferences to be drawn from defendant's failure to produce witnesses. — Although a pros-

Conduct of Counsel (Cont'd)

ecutor is prohibited from commenting on the defendant's failure to testify, a prosecutor can argue to the jury the inferences to be drawn from the defendant's failure to produce witnesses who are competent to testify and who allegedly would give evidence favorable to the defendant. Shirley v. State, 245 Ga. 616, 266 S.E.2d 218, cert. denied, 449 U.S. 879, 101 S. Ct. 227, 66 L. Ed. 2d 102 (1980).

Mistrial may be refused when deductions from the evidence are admitted. Carraway v. State, 16 Ga. App. 161, 84 S.E. 615 (1915); Swearengen v. State, 18 Ga. App. 763, 90 S.E. 653 (1916).

Effect of prosecutor's inaccurate statement. — If the statement by the prosecutor, although inaccurate, is effectively shown by the defendant's incriminating admissions, the trial court does not err in overruling the motion for mistrial based on prosecutorial misconduct or in failing to rebuke the prosecutor. Barnes v. State, 244 Ga. 302, 260 S.E.2d 40 (1979).

Prosecutor's characterization of evidence as incriminating. — If appellant, convicted of aggravated assault with intent to rape, alleged that the trial court erred by denying the appellant's motion for a mistrial after the prosecutor referred to certain evidence as being incriminating, and the transcript showed the comment was made in the presence of the jury during argument on one of the appellant's objections and after the defense counsel referred to the evidence as being exculpatory, the court did not err in refusing to rely upon O.C.G.A. § 17-8-75 because the evidence in question was admitted in evidence and, further, the comment was a reply to appellant's argument. Hawkins v. State, 195 Ga. App. 739, 395 S.E.2d 251 (1990).

Comment on defendant's plea of guilty to another crime. — Although technically speaking it is error for the solicitor general (now district attorney) to make a statement regarding the defendant's guilty plea to a different crime, it is not sufficient for reversal for the judge to have refused to declare a mistrial when defendant admits on the stand the crime in question. Thornton v. State, 94 Ga. App. 169, 94 S.E.2d 94 (1956).

Closing commentary on defense witnesses' absence proper. — Prosecutor's comment in closing argument concerning the absence of foretold defense witnesses was not an improper character attack as the comment was confined to the written statement properly admitted into evidence by the defense. Alexander v. State, 263 Ga. 474, 435 S.E.2d 187 (1993).

Announcement that witness is to be prosecuted for same offense. — It is improper for a solicitor general (now district attorney) to announce in the hearing of the jury that the solicitor intends to prosecute a witness for the same offense. Lewis v. State, 89 Ga. 396, 15 S.E. 489 (1892).

Placing of defendant's character before jury when case does not involve it. — It is error to allow, over objection of the defendant, prejudicial and irrelevant matter to go before the jury in a trial, which tends to place the defendant's character and conduct before the jury, if the nature of the case does not involve such character. Smith v. State, 118 Ga. App. 464, 164 S.E.2d 238 (1968).

Prosecution's statement that defendant's character may not be discussed unless put in issue. — Whether or not the statement of a solicitor general (now district attorney), made to the jury in the solicitor's argument, that the solicitor is not allowed to discuss the character of the defendant unless the solicitor puts the solicitor's character in issue, when the solicitor has not, is in any respect prejudicial and harmful to the defendant, a prompt instruction by the court that the jury should disregard the argument thus made, and the further clarification by the court of the law on character, would render the statement completely harmless. Harris v. State, 212 Ga. 186, 91 S.E.2d 492 (1956).

Comment on bar against compelling defendant's spouse to testify. — It is erroneous and prejudicial to the defendant to allow state's counsel to state to the jury that if the law of Georgia would permit counsel to call the defendant's spouse as a witness, counsel would do so. Askins v. State, 210 Ga. 532, 81 S.E.2d 471 (1954).

Defendant's manner of dress at trial. — Prosecution's argument as to the conduct of a defendant in the defendant's manner of dress during the defendant's trial is not such improper conduct as to require a reversal of the trial judge in refusing a mistrial, especially when the judge makes a statement to the jury that the solicitor's (now district attorney's) argument is out of order and is not to be considered. Locklear v. State, 52 Ga. App. 87, 182 S.E. 534 (1935).

If district attorney makes improper personal reference to defense counsel, the trial court errs in not taking remedial action. Estep v. State, 129 Ga. App. 909, 201 S.E.2d 809 (1973).

Statement of facts in reply to criticism of opposing counsel. — Counsel, in reply to a criticism by opposing counsel, has no right to state facts by way of explanation of counsel's own conduct disclosed by the evidence. Hodgkins v. State, 89 Ga. 761, 15 S.E. 695 (1892).

Remark that court could have directed a not guilty verdict were it not for state's case. — It is error requiring the grant of a new trial for a trial court to simply overrule, without remedial instructions to the jury, the defendant's objection to the solicitor general's (now district attorney) use of the following language in the solicitor's concluding argument to the jury: "If a case had not been made out against the defendant, then the court could and would have directed a verdict of not guilty." Washington v. State, 80 Ga. App. 415, 56 S.E.2d 119 (1949).

Certified copy of the brief of the evidence may be read. Cribb v. State, 118 Ga. 316, 45 S.E. 396 (1903); Hanley v. State, 128 Ga. 24, 57 S.E. 236 (1907).

Reading from law reports, see Glover v. State, 15 Ga. App. 44, 82 S.E. 602 (1914); Nix v. State, 149 Ga. 304, 100 S.E. 197 (1919).

Counsel may not read briefs of literary or historical matter which perform the office of evidence, and do not merely serve to illustrate the facts. Quattlebaum v. State, 119 Ga. 433, 46 S.E. 677 (1904).

Quotation by district attorney of passages from the Bible. — In the absence of any motion for a mistrial, or the invoking of some ruling or instruction by the court with reference thereto, or even of any objection at the time, there is no merit in the ground of the motion for new trial complaining for the first time of the argument of the solicitor general (now district attorney) quoting passages from the Bible as to the punishment for homicide. Wheat v. State, 187 Ga. 480, 1 S.E.2d 1 (1939).

For case in which prosecution repeatedly asked certain questions of a witness, see Loughridge v. State, 181 Ga. 261, 182 S.E. 12 (1935).

Remarks aimed toward popular prejudice. — Court should not treat remarks aimed toward popular prejudice as a deduction from the evidence, and hence a ground of a motion for new trial failing to aver that remarks of this character are not supported by the evidence would not be defective. Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964).

For remark that conviction would be a lesson to the general public, see Collins v. State, 86 Ga. App. 157, 71 S.E.2d 99 (1952).

Reference to historical figures. — Prosecutor did not err during the defendant's trial on a charge of armed robbery by making reference to the defendant's name and stating that "Jesse James lived up to his name." James v. State, 265 Ga. App. 689, 595 S.E.2d 364 (2004).

Use of crime statistics to argue for strict enforcement of the law. — On the trial of an indictment for murder, it is error to allow the solicitor general (now district attorney), over objections of defendant's counsel, to argue to the jury statistics compiled by "reliable authorities" showing the number of murders committed in Georgia in a year and to argue to the jury in consequence thereof to strictly enforce the law in the case on trial and to impose the capital penalty. Fair v. State, 168 Ga. 409, 148 S.E. 144 (1929).

Comment or prevalence of crime in the county. — Counsel should not in counsel's argument refer to the prevalence of crime in that part of the county where the jury is organized. Thomas v. State, 129 Ga. 419, 59 S.E. 246 (1907).

Arguments dealing with community safety and general crime prevention. — Closing arguments by the district

Conduct of Counsel (Cont'd)

attorney which appeal to the safety of the community and general prevention of crime are proper. Burke v. State, 153 Ga. App. 769, 266 S.E.2d 549 (1980).

Comment by prosecution that "too many pardons have been granted in Georgia." — See Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943).

Counsel's repeated use of a racial epithet, even if counsel meant this line of argument as a trial tactic on the defendant's behalf, should have been stopped with a strong reprimand by the trial court because failure to reprimand or appropriately instruct the jury gave the imprimatur of judicial tolerance to the factor of race being at least subliminally relevant to consideration of guilt or innocence. Kornegay v. State, 174 Ga. App. 279, 329 S.E.2d 601 (1985).

Improper questions also subject to court's control. — O.C.G.A. § 17-8-75 has been applied not only in situations when counsel have made improper statements or prejudicial remarks in the presence of the jury during a trial, but it also has been applied when the remarks are made in the form of a question. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

If irrelevant and prejudicial information inferable from an improper question of the prosecutor was jettisoned, and the jury was immediately instructed that a question does not constitute evidence, the directives of O.C.G.A. § 17-8-75 were obeyed. Gutierrez v. State, 235 Ga. App. 878, 510 S.E.2d 570 (1998).

Argument that death penalty set aside if not warranted. — Prosecutor's argument, over objection, that the jury should impose the death penalty and assume that the death penalty will be set aside if not warranted, absent curative instructions, requires reversal. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Conduct during closing argument involving gun in murder trial. — In a prosecution for murder, the victim's gun was properly in evidence and thus was a proper subject for the prosecutor's final argument, and the prosecutor's conclusion that the victim could hardly have missed the appellant with a pistol shot at such close range was within the considerable latitude in imagery and illustration granted a district attorney in final argument. Williams v. State, 254 Ga. 508, 330 S.E.2d 353 (1985), cert. denied, 488 U.S. 891, 109 S. Ct. 225, 102 L. Ed. 2d 215 (1988).

Asking jury to speculate as to murder victim's wishes. — In a prosecution for murder, a prosecutor's demonstration during closing argument that a small person could easily pull the trigger of the victim's alleged pistol constituted the introduction of new evidence to respond to the appellant's evidence that the trigger was extremely difficult to pull. This was error because the appellant had no chance to rebut the prosecutor's demonstration that could easily have been performed during trial when both sides could have fleshed out the evidence's implications thoroughly. Williams v. State, 254 Ga. 508, 330 S.E.2d 353 (1985), cert. denied, 488 U.S. 891, 109 S. Ct. 225, 102 L. Ed. 2d 215 (1988).

Trial court did not err in sustaining an objection to defense counsel's closing argument in which defense counsel asked the jury to speculate whether the deceased victim would have wanted the victim's friend (defendant) convicted of murder, since there was no evidence that the victim would not have wanted the defendant to be convicted, nor was it a necessary inference from evidence of any friendship. Hawkins v. State, 260 Ga. 138, 390 S.E.2d 836 (1990).

Comment on seating arrangement at defense counsel table not error. — Prosecuting attorney's remark regarding the alleged implications of the seating arrangements at the defense counsel table approaches but is not outside the parameters of the wide latitude accorded counsel for the state and does not impermissibly allude to facts which are not in evidence. Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984).

Prosecutor's remarks on potential future drug victims not error. — Prosecutor's hypothecation to jurors that student observers in the courtroom were po-

tential victims of defendant's drug traffic did not violate O.C.G.A. § 17-8-75. Black v. State, 167 Ga. App. 204, 305 S.E.2d 837 (1983).

Prosecutor's comments on the potential effects of crack cocaine use were reasonable inferences drawn from the evidence and did not violate O.C.G.A. § 17-8-75. Hunt v. State, 219 Ga. App. 741, 466 S.E.2d 894 (1995).

Prosecutor's comment to jurors that the jurors could take part in the war against drug trafficking by convicting the defendant did not violate O.C.G.A. § 17-8-75. Black v. State, 167 Ga. App. 204, 305 S.E.2d 837 (1983).

Reference to purchases made with proceeds of crime. — When there was testimony in evidence that the defendant had purchased a number of items with the proceeds of the crime, the state was entitled to refer to these purchases in the state's closing argument notwithstanding that the items themselves were not admitted in evidence. Lee v. State, 258 Ga. 82, 365 S.E.2d 99, cert. denied, 488 U.S. 879, 109 S. Ct. 195, 102 L. Ed. 2d 165 (1988).

Prosecutor's comments that "you get an attorney." — Prosecutor's comments that in this country, "you get an attorney," were ambiguous as to whether the defendant's counsel was appointed instead of retained, and did not constitute statements of prejudicial matters which were not in evidence as would be precluded by O.C.G.A. § 17-8-75. Ham v. State, 303 Ga. App. 232, 692 S.E.2d 828 (2010), overruled in part by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Argument that prosecutor's office carefully considered death penalty. — If the prosecutor told the jury that the prosecutor's office made a careful decision that this case warranted seeking the death penalty and went on to describe why that decision was made, focusing on the individual characteristics of this crime and this defendant, allowing the jury to assess for itself the appropriateness of a death sentence, the trial judge's corrective instructions were sufficient to counter any unfairness that might have otherwise resulted. Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986), cert. denied, 480 U.S. 911, 107 S. Ct. 1359, 94 L. Ed. 2d 529 (1987).

Prosecutor's closing argument which called the jury's attention to certain notorious cases involving violent criminal acts was within permissible bounds. Bell v. State, 208 Ga. App. 201, 430 S.E.2d 124 (1993).

Prosecutor's statements during closing argument were within the wide leeway granted to counsel to argue all reasonable inferences from the evidence pursuant to O.C.G.A. § 17-8-75(c), including that a former girlfriend whom the defendant forced to purchase a gun was fearful of the surroundings and that another girlfriend was a battered woman, such that there was no cause to grant a new trial. Varner v. State, 285 Ga. 300, 676 S.E.2d 189 (2009).

Prosecutor's comments did not warrant mistrial. — See Jones v. State, 250 Ga. 166, 296 S.E.2d 598 (1982).

Although the prosecuting attorney referred to facts not in evidence during closing argument, the query merely sought to raise possible explanations of the fact that the burglary car was not the defendant's car, and the suggestion that the jury could deduce that the defendant was using a car other than the defendant's own was a fair comment and not improper. Murphy v. State, 203 Ga. App. 152, 416 S.E.2d 376 (1992).

Even if a prosecutor's remarks about the defendant's credibility and statement that if the jury convicted the defendant of a lesser charge the jury "would be letting this defendant off the hook" could be interpreted as improper, the court held it was highly improbable in light of the evidence that the remarks changed the result of the trial, and any error in the prosecutor's argument was therefore harmless. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

Prosecutor did not violate a prior stipulation in making a reasonable inference from the evidence that either the defendant or the defendant's accomplice could have stepped in the victim's blood and left the footprint while they were leaving the victim's house after the murder; the statement did not violate the state's narrow stipulation which merely eliminated a single pair of the defendant's boots as the source of the footprint, and there was no

Conduct of Counsel (Cont'd)

stipulation or evidence that the seized boots were the ones the defendant wore the night the crime was committed. Messick v. State, 276 Ga. 528, 580 S.E.2d 213, cert. denied, 540 U.S. 880, 124 S. Ct. 302, 157 L. Ed. 2d 144 (2003).

Comments about outstanding warrants. — Trial court did not err under O.C.G.A. § 17-8-75 in failing to rebuke the prosecutor and declare a mistrial after the court allowed the prosecutor to, in violation of a previous ruling, elicit testimony about whether there were outstanding warrants against the defendant at the time the defendant was arrested; the cited exchange did not demonstrate the alleged misconduct as the exchange showed the state's careful questioning of the witness in order to avoid disclosing whether there were such warrants. Denny v. State, 281 Ga. 114, 636 S.E.2d 500 (2006).

Trial court did not err in denying the defendant's motion for mistrial on the ground that the state made improper arguments in closing because the challenged comments referred to evidence in the case, which was the defendant's refusal to submit to testing and other manifestations of impairment, and, thus, were not improper under O.C.G.A. § 17-8-75; considering the strength of the state's evidence, it was highly unlikely that the prosecutor's closing argument contributed to the guilty verdict. Crusselle v. State, 303 Ga. App. 879, 694 S.E.2d 707 (2010).

Requiring slides from opening argument be taken down. — Trial court did not deprive the defendant of a fair trial by failing to declare a mistrial sua sponte after the prosecutor showed the jury slides during the prosecutor's opening statement because when the defendant objected, the trial court took immediate corrective action, ordering that the slides be taken down, and the defendant did not seek additional relief in the form of a curative instruction or a mistrial; the trial court did not abuse the court's discretion in concluding that the slides were inappropriately argumentative for opening statement, and the trial court instructed the jury before opening statements and again after the close of the evidence that the prosecutor's opening statements were not evidence. Dolphy v. State, 288 Ga. 705, 707 S.E.2d 56 (2011).

Prosecutor's comments about defendant's obscene gestures. — Trial court discharged the court's duties properly when the court allowed the prosecutor to state, during closing arguments, that the defendant had made an obscene gesture to someone in the courtroom during the course of the trial because the defendant offered no evidence that the gesture was incorrectly attributed to the defendant. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012).

Trial court did not abuse the court's discretion in denying the defendant a mistrial because there was no indication that either the jury or the trial court heard the prosecutor's remark that the defendant was "swaying" during the defendant's horizontal gaze nystagmus test nor was the remark recorded; the trial court explained to the jury, both in the court's preliminary and closing instructions, that evidence consisted only of witness testimony and exhibits and that the jurors were to decide the case for themselves, based solely on the testimony heard from the witness stand and any exhibits admitted into evidence. Travis v. State, 314 Ga. App. 280, 724 S.E.2d 15 (2012).

Improper question to defense witness was harmless error. — Question posed to a defense witness asking whether the witness was aware that the defendant told the defendant's mother "I didn't shoot that man, mama, three times, I only shot him twice" was improper and warranted a rebuke from the trial court; however, the error was harmless in light of the overwhelming evidence of the defendant's guilt. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Requirement that Objection or Motion Be Made

Generally, an objection is necessary. Scarborough v. State, 46 Ga. 26 (1872); Kearney v. State, 101 Ga. 803, 29 S.E. 127, 65 Am. St. R. 344 (1897); O'Dell v. State, 120 Ga. 152, 47 S.E. 577 (1904).

Because no motion for mistrial was made, the court did not err in failing to

direct a mistrial for improper remarks. Beach v. State, 258 Ga. 700, 373 S.E.2d 210 (1988).

In order to secure appellate review of a purported violation of O.C.G.A. § 17-8-75, it is necessary to object in the trial court to the allegedly prejudicial comment at the time the comment is made. Johnson v. State, 198 Ga. App. 316, 401 S.E.2d 331 (1991); Earnest v. State, 262 Ga. 494, 422 S.E.2d 188 (1992); Dix v. State, 246 Ga. App. 338, 540 S.E.2d 294 (2000).

When an improper argument is made, the adversary must act. — Defendant's counsel's failure to object or to move for a mistrial upon the prosecutor's improper, impermissible, and prejudicial use of similar transaction evidence of uncharged crimes was not within the realm of being a reasonable trial tactic as such statements were not only improper, the statements were pervasive and harmful to the defendant's case. Accordingly, counsel was ineffective in failing to request a mistrial. Collier v. State, 266 Ga. App. 345, 596 S.E.2d 795 (2004).

When the defendant said the trial court erred because the court took no corrective action when the prosecuting attorney alluded to facts not in evidence when questioning the victim, the defendant was not entitled to appellate review of this issue as no objection was made in the trial court at the time the allegedly prejudicial comment was made. Jackson v. State, 271 Ga. App. 317, 609 S.E.2d 643 (2004).

Party may not take chance on favorable verdict and complain later. — Party cannot during the trial ignore what the party thinks to be an injustice, take the party's chances on a favorable verdict, and complain later. Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951); Johnson v. State, 226 Ga. 511, 175 S.E.2d 840 (1970).

Waiver of the irregularity will result unless objection or motion is made. Fuller v. State, 10 Ga. App. 34, 72 S.E. 515 (1911); Livingston v. State, 17 Ga. App. 136, 86 S.E. 449 (1915); Nix v. State, 149 Ga. 304, 100 S.E. 197 (1919).

Judge is not required to grant a mistrial on the judge's own motion if defense counsel waives an objection and fails to specify what further form of relief, if any, is desired. Vernon v. State, 152 Ga. App. 616, 263 S.E.2d 503 (1979).

Actions which counsel may take in response to improper argument. — When improper argument is made by counsel, counsel for the opposite party, in order to make the action of the judge in reference to the improper argument the basis for a review, may object to the argument, and rest simply on the objection. If the court fails to take any notice of the objection and allows the argument to proceed, this conduct may be reviewed. Brooks v. State, 55 Ga. App. 227, 189 S.E. 852 (1937); Washington v. State, 80 Ga. App. 415, 56 S.E.2d 119 (1949).

When improper argument to the jury is made by an attorney for one of the parties, it is necessary in order to make the argument a basis for review that opposing counsel should make objection to such argument or invoke some ruling or instruction with reference thereto by the court, but it is not essential that a motion for mistrial should be made. Brooks v. State, 55 Ga. App. 227, 189 S.E. 852 (1937); Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939).

In addition to making an objection, counsel may move for appropriate instructions to the jury, or for a reprimand or rebuke of counsel in order that the jury may be impressed with the grave nature of the impropriety which has taken place, or, if the impropriety is of a very grave character, counsel may move for a mistrial, and upon the refusal of the court to do that which ought to have been done on the motion made, whatever the motion's nature may be, the conduct of the judge will then be a subject for review. Washington v. State, 80 Ga. App. 415, 56 S.E.2d 119 (1949).

When improper argument is made to the jury by an attorney for one of the parties, it is necessary, in order to make the argument a basis for review, that opposing counsel make proper objection to the argument at the time made or invoke some ruling or instruction from the court respecting the argument, either by way of reprimanding counsel, or of instructing the jury to disregard the argument, or of declaring a mistrial. Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951).

Requirement that Objection or Motion Be Made (Cont'd)

Effect of objection to improper argument and of ruling thereon generally. — Simple objection to an improper argument is in effect a request of counsel for the complaining party for the court to require opposing counsel to desist from further improper argument. The effect of a proper ruling by the court on a simple objection also is to inform the jury as to whether or not the argument was improper. When the argument is improper and the court rules in effect that the argument is not, such ruling may be prejudicial. Johns v. State, 79 Ga. App. 429, 54 S.E.2d 142 (1949).

Mere objection to improper argument is insufficient to invoke a ruling. — Mere objection to improper argument of counsel, without more, is not sufficient to invoke a ruling of the court. In the absence of a specific motion either for a mistrial, or that the jury be instructed to disregard the argument, it is not error to fail to grant a mistrial or to instruct the jury. Holt v. State, 147 Ga. App. 186, 248 S.E.2d 223 (1978); Carroll v. State, 147 Ga. App. 332, 248 S.E.2d 702 (1978); Hinton v. State, 233 Ga. App. 213, 504 S.E.2d 49 (1998).

Failure to object to closing argument. — Trial counsel was not ineffective for failing to object to a portion of the state's closing argument because counsel stated that the prosecutor was heard using the newspaper analogy in other cases and counsel strategically decided not to object, choosing instead to comment on the prosecution's theatrics in closing as a way to turn the prosecutor's remarks to the appellant's advantage. Smith v. State, 296 Ga. 731, 770 S.E.2d 610 (2015).

Trial court did not err in failing to give a curative instruction following the state's allegedly improper closing argument because trial counsel did not object to the prosecutor's closing argument as required by O.C.G.A. § 17-8-75; and the record did not support the defendant's contention that the prosecutor improperly implied that the defendant's trial counsel was under the influence of drugs. Clary v. State, 344 Ga. App. 710, 812 S.E.2d 31 (2018).

To the extent that the defendant's appellate brief may be read to challenge the prosecutor's statements, the defendant waived any such claim by failing to object and, regardless, the most natural reading of the statements was that the prosecutor pivoted away from relying on facts not in evidence and instead raised an unobjectionable (if inartful) argument about the illegality of the defendant's and the co-defendant's actions. Riley v. State, No. A20A1376, 2020 Ga. App. LEXIS 431 (July 21, 2020).

Mere objection which is sustained does not constitute a motion for mistrial. Johnson v. State, 158 Ga. App. 398, 280 S.E.2d 419 (1981).

Failure to renew request for admonishment or to challenge curative instruction. — Regarding the prosecutor's statement during closing argument that the defendant had stated that the defendant was a pimp because the defendant did not renew the defendant's request for an admonishment or otherwise challenge the curative instruction given by the court as inadequate, any issue concerning the propriety of the prosecutor's comments was waived; and, if defense counsel believed that the trial court's curative action in sustaining the objection was insufficient, defense counsel should have sought additional relief. Mackey v. State, 342 Ga. App. 791, 805 S.E.2d 596 (2017).

Improper remarks must be properly excepted to in order to warrant new trial. — If defendant fails to properly except to allegedly improper remarks of judge and solicitor general (now district attorney) during examination of witnesses by a motion for mistrial, the allegedly improper remarks are insufficient to support a motion for new trial. Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1936).

If no objection is made to solicitor's (now district attorney's) comment on defendant's failure to testify, the grant of a new trial is not required. Lunsford v. State, 60 Ga. App. 537, 4 S.E.2d 112 (1939).

Unless the court's attention is called to improper arguments and a ruling invoked upon the trial, the point may not be raised in a motion for new trial. Such a motion presents nothing for decision by the Su-

preme Court when no objection is shown to have been made at the trial. Morris v. State, 200 Ga. 471, 37 S.E.2d 345 (1946); Hudson v. State, 250 Ga. 479, 299 S.E.2d 531 (1983).

If the trial judge's attention is not called to improper argument during the trial, it will not constitute a good ground of a motion for new trial. Morris v. State, 200 Ga. 471, 37 S.E.2d 345 (1946).

New trial is not required on account of improper argument unless a ruling thereon be invoked by timely objection. Dix v. State, 153 Ga. App. 868, 267 S.E.2d 293 (1980).

Defendant's motion for mistrial was properly denied since in the trial court no motion for mistrial was made specifically based upon ground which is asserted on appeal to have been violative of O.C.G.A. § 17-8-75. Whatley v. State, 165 Ga. App. 13, 299 S.E.2d 87 (1983).

Trial court did not err by allowing the state to make improper and prejudicial comments during the defendant's trial on drug-related offenses as defense counsel only objected to the prosecutor's statement recounting defendant's previous conviction and did not object to the two questions posed by the prosecutor, which questions implied that the prosecutor personally believed that the defendant was guilty of the charged offense. Thus, the issue of whether those two questions constituted improper remarks was waived on appeal. Heard v. State, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

Because the defendant either failed to object or had an objection sustained as to questions or statements made by the prosecutor, there was no ruling by the trial court that was adverse to the defendant for the court of appeals to review; the court of appeals will not reverse a conviction based on alleged prosecutorial misconduct when the defendant did not take proper exception or when the defendant received a favorable ruling on any objection or requested corrective action. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Defendant's argument that the trial court erred in finding that the court did not have a sua sponte duty to intervene and prevent the prosecutor's statement regarding the codefendants' pleas of guilty was waived because no objection was made during trial. Tucker v. State, 313 Ga. App. 537, 722 S.E.2d 139 (2012).

Defendant waived the argument that the trial court erred in allowing the prosecutor to state, during closing arguments, that the defendant had made an obscene gesture to someone in the courtroom during the course of the trial because there was no contemporaneous objection to the argument. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012).

Necessary allegations in motion for new trial. — Motion for a new trial based upon a remark, alleged to be improper and prejudicial to the rights of the defendant, which was made by the solicitor (now district attorney) in the solicitor's argument to the jury should allege that the movant made a motion for a mistrial before the verdict was rendered, or that the court refused to grant a mistrial, or that it is probable that the injury was not eradicated by the instructions to the jury to disregard the remarks. Meadow v. State, 45 Ga. App. 240, 163 S.E. 915 (1932).

Special ground for new trial complaining of an alleged improper and prejudicial statement made by the solicitor (now district attorney) during the trial and in the presence of the jury which fails to show or allege that a motion to declare a mistrial was made, or that any objection whatsoever to the statement was made to the court at the time, or subsequently, during the trial fails to show any error of commission or omission by the court. Dukes v. State, 57 Ga. App. 835, 197 S.E. 69 (1938).

Improper remarks to be considered on appeal must be properly excepted to. — Alleged improper statements made by the solicitor general (now district attorney) in the presence of the jury, and testimony of a witness, neither of which is objected to upon the trial, will not be considered by the Supreme Court. Aycock v. State, 188 Ga. 551, 4 S.E.2d 221 (1939).

To enforce by review the performance of the duty imposed by this section upon the trial judge, the law in the form of a rule of procedure requiring an objection during the trial must be observed. Morris v. State, 200 Ga. 471, 37 S.E.2d 345 (1946).

Requirement that Objection or Motion Be Made (Cont'd)

Contentions may not be raised for the first time on appeal. Mayfield v. State, 153 Ga. App. 459, 265 S.E.2d 366 (1980).

Defendant failed to object to any statements made by the prosecution that allegedly commented on matters not admitted into evidence in the defendant's child molestation and sexual battery trial; therefore, the defendant waived the right to argue about those statements pursuant to O.C.G.A. § 17-8-75 on appeal. Carson v. State, 259 Ga. App. 21, 576 S.E.2d 12 (2002), overruled on other grounds, Watson v. State, 297 Ga. 718, 777 S.E.2d 677 (2015).

Because the overwhelming evidence presented against the defendant supported the convictions, and the defendant failed to assert a timely and contemporaneous objection to the prosecutor's opening statement comments, the trial court did not err in denying the defendant's motions for a new trial and a mistrial. Brooks v. State, 284 Ga. App. 762, 644 S.E.2d 891 (2007).

Improper remarks must be subject of motion for reprimand. — Appellate court will not reverse the judgment of the trial court overruling a motion for mistrial on the ground that the court in overruling the motion failed to reprimand the solicitor (now district attorney) for an improper question since no request was made that the solicitor be reprimanded and the objectionable query was never answered by the witness. Nelson v. State, 92 Ga. App. 746, 90 S.E.2d 91 (1955).

Improper remarks are not ground for reversal if court's attention not called thereto. — If the solicitor (now district attorney) in the course of argument uses certain language which is calculated to excite prejudice against the defendant, but it does not appear that the attention of the court was called thereto or any ruling was invoked on the subject, either by way of reprimanding counsel, or of instructing the jury, or of declaring a mistrial, such impropriety in argument will not furnish a ground for a reversal by the Supreme Court. Benton v. State, 185 Ga. 254, 194 S.E. 166 (1937).

No duty to reprimand counsel absent motion. — When the defendant's objection to a question by the prosecution was sustained but there was no motion for mistrial or rebuke of counsel, it was not the court's duty to reprimand counsel without such a motion. Phillips v. State, 230 Ga. 444, 197 S.E.2d 720 (1973).

Trial court was not required sua sponte to prevent the state from making improper remarks during the state's closing argument because the defendant did not object to the closing argument; O.C.G.A. § 17-8-75 only requires the judge to act when counsel makes a timely objection. Tidwell v. State, 306 Ga. App. 307, 701 S.E.2d 920 (2010), overruled on other grounds, White v. State, 305 Ga. 111, 823 S.E.2d 794, 2019 Ga. LEXIS 66 (2019).

Failure to object to reference to confession which is not in evidence. — See Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939).

Error in failing to do more than caution prosecutor deemed waived. — Because the defendant did not move for a mistrial or curative instructions at any point in the trial, the contention that the trial court erred in failing to do more than caution the assistant district attorney to comply with the court's ruling was deemed waived. Tennyson v. State, 282 Ga. 92, 646 S.E.2d 219 (2007).

Defendant must renew objection or motion for mistrial if court's action unsatisfactory to request further jury instructions. — If the defendant's counsel deems the instruction or admonition to the jury, plus the reprimand or the rebuke of offending counsel, inadequate to remove the harmful effect, it is incumbent on the defendant to request further instructions or renew the defendant's motion for a mistrial in order to preserve a basis for appeal. Pitts v. State, 141 Ga. App. 845, 234 S.E.2d 682 (1977).

If the defendant is not satisfied with the court's action in response to the improper question or remark of prosecuting counsel, it is incumbent upon the defendant to renew an objection and motion for mistrial. The defendant's failure to do so precludes complaint on appeal. Delaney v. State, 154 Ga. App. 772, 270 S.E.2d 48

(1980); Barksdale v. State, 161 Ga. App. 155, 291 S.E.2d 18 (1982).

Failure to renew objections and motion for mistrial after corrective instructions makes the denial of the motion for mistrial not subject to review. Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436 (1980).

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court

Duty of judge to prevent improper argument generally. — It is only when prejudicial matters which are not in evidence are stated in the argument that it becomes the duty of the court to interpose and prevent, or to hear objections and rebuke counsel, or to instruct the jury, or to declare a mistrial. Hicks v. State, 196 Ga. 671, 27 S.E.2d 307 (1943).

This section forbids improper arguments and imposes a duty upon the trial judge to interpose and prevent such arguments. Morris v. State, 200 Ga. 471, 37 S.E.2d 345 (1946).

It is the duty of the court, with or without objection, to interpose, prevent, and rebuke improper argument, and to endeavor by proper instructions to remove from the minds of the jury improper impressions made by unfair argument. Josey v. State, 89 Ga. App. 215, 79 S.E.2d 64 (1953).

This section places an affirmative duty upon the trial judge to prevent on the judge's own motion argument by counsel calculated to invoke prejudice against the adverse party. Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964).

Trial court has a duty, even without a motion therefor, to see that the trial is fairly conducted, and when improper remarks are made in the presence of the jury, it is the absolute duty of the judge to intervene and stop it and by all needful instructions remove the improper impressions which the state's counsel has sought to create in the minds of the jurors. Winget v. State, 138 Ga. App. 433, 226 S.E.2d 608, overruled on other grounds, Quick v. State, 139 Ga. App. 440, 228 S.E.2d 592 (1976).

O.C.G.A. § 17-8-75 requires that when statements of prejudicial matters not in evidence are made the court must interpose, and the court shall also rebuke counsel and give such instructions as will remove the improper impression, or, if necessary, grant a mistrial if the plaintiff's attorney is the offender. Morris v. State, 160 Ga. App. 505, 287 S.E.2d 405 (1981).

If counsel makes improper remarks, the court has a duty to rebuke counsel so as to remove the improper impression or give adequate instructions to the jury so as to remove the prejudicial effect of the remark. However, the remark must both have been heard by the jury and not go to matters in evidence. Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983).

Questions and responses alluding to prior arrests impermissibly placed a defendant's character in issue, and since the trial court failed to take any corrective action in fulfillment of the court's duty defendant was denied a fair trial. Richardson v. State, 199 Ga. App. 10, 403 S.E.2d 877 (1991).

Trial court erred by failing to fulfill the court's duty under O.C.G.A. § 17-8-75 to rebuke the prosecutor and instruct the jury in order to remove any improper impression that could have been left in the jury's' minds, and the court of appeals erred in concluding that the defendant waived review of the defendant's claim that the trial court erred by failing to give a curative instruction after the defendant objected to the state's closing argument by failing to obtain a ruling on the defendant's request for a curative instruction; the plain language of O.C.G.A. § 17-8-75 speaks in terms of the trial court's duty to give a curative instruction when a proper objection is made to the state's introduction of improper argument on matters that are not in evidence, and a mere objection is sufficient to preserve the issue for appellate review. O'Neal v. State, 288 Ga. 219, 702 S.E.2d 288 (2010).

Statement by counsel that counsel expects to prove patently inadmissible matters. — While technically this section applies to argument by counsel on matters not in evidence, the same harm results if counsel makes the statement that counsel expects to prove patently inadmissible matters before the introduction of evidence, and it is as much the duty

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court (Cont'd)

of the court upon objection made to rebuke counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds, or to grant a motion for mistrial. Pilcher v. State, 91 Ga. App. 428, 85 S.E.2d 618 (1955).

Improper comment on irrelevant evidence. — Since the defendant was accused of child molestation under O.C.G.A. § 16-6-4, the trial court did not err under O.C.G.A. § 17-8-75 in admonishing the defense counsel not to suggest that the defendant's penetration of the victim and the resulting injury had been insignificant; the evidence was irrelevant as § 16-6-4 did not distinguish between degrees of vaginal injury. Pickett v. State, 277 Ga. App. 316, 626 S.E.2d 508 (2006).

Duty of court upon motion for mistrial being made. — If unwarranted and prejudicial remarks not referring to any matter in evidence in the case are made, and a motion for mistrial is based on such remarks, the court has the duty of eradicating the effect of the remarks from the jury's mind by ruling the remarks out, reprimanding counsel, and instructing the jury to disregard the remarks. Ordinarily, this cures the error. Emerson v. State, 90 Ga. App. 323, 82 S.E.2d 882 (1954).

No duty after objection sustained. — After an objection to an improper question or statement is sustained, the court has no duty to rebuke counsel or give curative instructions absent a further request from the complaining party. Garner v. State, 199 Ga. App. 468, 405 S.E.2d 299 (1991).

Defendant was not entitled to curative instructions or a mistrial by virtue of the prosecution's question of the defendant as to whether his ex-wife was "ex-wife number five or six" since the defendant's objection to the question was sustained and the defendant made no further motion. Woodham v. State, 263 Ga. 580, 439 S.E.2d 471 (1993).

Merely "ruling out" a statement is insufficient. Collins Park & B.R.R. v. Ware, 112 Ga. 663, 37 S.E. 975 (1901); Holmes v. State, 21 Ga. App. 150, 94 S.E. 69 (1917).

Because the court did not hear a remark by the district attorney and did not believe that the jury had done so, the court did not abuse the court's discretion in denying the motion for mistrial. Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983).

Limitations on judge's duty. — When prejudicial matters not in evidence are made in the hearing of the jury, on objection the court shall rebuke counsel or, among other measures, order a mistrial if the prosecuting attorney is the offender. However, it is not within the court's discretion to dismiss the indictment, nor is it the court's duty to interpret the stated objection and speculate that the defendant intended to move for a mistrial. Redmond v. State, 252 Ga. 142, 312 S.E.2d 315 (1984).

No duty to rebuke prosecutor. — Even assuming that the prosecutor's argument that one of the jailhouse informants might have appeared nervous based on the saying that "snitches get stitches" was improper under O.C.G.A. § 17-8-75 because the trial court sustained the defendant's objection, and the defendant did not request a rebuke or any other corrective action after the defendant's objection was sustained, the trial court had no duty to rebuke the prosecuting attorney. Cheley v. State, 299 Ga. 88, 786 S.E.2d 642 (2016).

Provision for rebuke of counsel and instructing jury is mandatory. — Provision that the court shall rebuke counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from the jury's minds is mandatory. Ingram v. State, 97 Ga. App. 468, 103 S.E.2d 666 (1958).

Court's discretion. — Extent of a rebuke and instruction is within the discretion of the court. Benefield v. State, 140 Ga. App. 727, 232 S.E.2d 89 (1976); Brooks v. State, 169 Ga. App. 543, 314 S.E.2d 115 (1984); O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985).

Whether to grant a mistrial after taking precautionary measures is within the court's discretion. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other

grounds, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738, vacated in part on other grounds, 244 Ga. 27, 257 S.E.2d 543 (1979).

Extent of a rebuke and instructions is within the discretion of the court, and when the improper remark is cured by timely corrective action calculated to preserve the defendant's right to a fair trial, then the court does not abuse the court's discretion in refusing to grant a mistrial. High v. State, 153 Ga. App. 729, 266 S.E.2d 364 (1980).

Abuse of discretion not shown. — Trial court employed language appropriate to the situation and evidenced no abuse of discretion after trial counsel made a disparaging remark about the assistant district attorney. Cammon v. State, 269 Ga. 470, 500 S.E.2d 329 (1998).

Trial court did not abuse the court's discretion by not declaring a mistrial as the court issued a curative instruction after the prosecutor made improper remarks during closing argument by twice referring to the defendant's possession of marijuana as a misdemeanor, rather than the charged offense of possession of marijuana less than an ounce. Dix v. State, 307 Ga. App. 684, 705 S.E.2d 903 (2011).

In the defendants' trial for robbery and murder, even if the prosecutor's question to a bereaved witness as to whether the witness had observed the defendants laughing while the jury was not present was improper, the trial court fully complied with O.C.G.A. § 17-8-75 and did not abuse the court's discretion in refusing to grant a mistrial. Dixon v. State, 302 Ga. 691, 808 S.E.2d 696 (2017).

Even if defendant's character is placed in issue. — Ordinarily, when illegal testimony is placed in evidence, it is not an abuse of discretion to refuse to grant a mistrial when sufficient corrective instructions are given in ruling out the testimony. This is true even when the illegal testimony has the effect of placing the defendant's character in issue, especially if the testimony is volunteered by the witness and not directly elicited by the solicitor (now district attorney). Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968).

Court must be presumed to be listening to argument. — It must be presumed that the court in performing the court's duty to interpose and prevent prejudicial argument is listening to the argument and has heard the remarks. Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964).

Overruling motion for mistrial overruled without hearing argument complained of. — When a motion for mistrial is made based on improper argument reasonably calculated to appeal to or evoke racial prejudice, and the trial court has not heard the argument, but overrules the motion without inquiring to ascertain what the improper argument was, and therefore without knowing the facts upon which the motion was based and without determining whether corrective action is needed, one fails to perform the duty imposed and exercise the discretion contemplated by the statute. Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964).

What action by the court is sufficient depends on circumstances of the case. — In some cases of misconduct by a solicitor (now district attorney) the injurious effect may be averted by appropriate action and instructions from the court, but what would be sufficient in any case would depend on the character of the misconduct, the nature of the case, and the action or instructions from the court relied on to counteract the injurious effect of the misconduct. These may differ in each case. Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968).

Motion for mistrial raises question of what less drastic action would be sufficient. — Motion for mistrial raises the question of what ameliorative action less than summarily cutting off the trial is obligatory on the judge under the circumstances. Gore v. State, 110 Ga. App. 344, 138 S.E.2d 471 (1964).

Cautionary instructions are usually sufficient. — Usually, cautionary instructions to the jury by the judge, when matters of procedure must be left to the judge's sound discretion, will suffice to cure irregularity and remove prejudice. Grayhouse v. State, 65 Ga. App. 853, 16 S.E.2d 787 (1941).

Curative instruction may in effect amount to rebuke of counsel. — If the instruction by the court to the jury to

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court (Cont'd)

disregard the remarks is full, the instruction in effect amounts to a rebuke of counsel. London v. State, 142 Ga. App. 426, 236 S.E.2d 158 (1977); Crawford v. State, 203 Ga. App. 215, 416 S.E.2d 820 (1992).

Improper remark of prosecutor not cured by instruction. — General curative instruction given by the trial court after the prosecutor made an improper statement about the defendant's link to an earlier gang-related shooting during closing arguments was an inadequate curative measure and did not serve to remove the improper impression from the jurors' minds as required by O.C.G.A. § 17-8-75. Jones v. State, 292 Ga. 656, 740 S.E.2d 590 (2013).

Prejudice may be such that neither instruction nor rebuke will suffice. — There are instances when the character of the prejudice, precipitated by the injection into the trial of extrinsic matters with no evidentiary basis, is such that cautionary instructions to the jury and rebuke of counsel, either or both, fail to remove the harm done, when, in the interest of fair and impartial trials, mistrials must result. Grayhouse v. State, 65 Ga. App. 853, 16 S.E.2d 787 (1941).

Instruction to the jury to disregard improper remarks amounts to a rebuke of counsel. Martin v. State, 196 Ga. App. 145, 395 S.E.2d 391 (1990).

Objection without motion not grounds for mistrial. — Sustained objection to an improper question, answer, or remark by opposing counsel without a motion for mistrial will not constitute grounds for reversal, especially if the improper matter has been stricken with curative instructions. Williams v. State, 151 Ga. App. 765, 261 S.E.2d 487 (1979).

Certainty that no injury to the accused would result. — It is not erroneous to refuse to grant a mistrial on account of misconduct of the solicitor (now district attorney) if it is certain that no injury could have resulted therefrom to the accused. Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968).

Grant of mistrial may be the only effective remedy in some cases. — Mistrial should be declared if the remarks are injurious to the defendant, and cannot be cured by instructions. Wallace v. State, 126 Ga. 749, 55 S.E. 1042 (1906); Hunter v. State, 133 Ga. 78, 65 S.E. 154 (1909); Manning v. State, 13 Ga. App. 709, 79 S.E. 905 (1913); Morrow v. State, 18 Ga. App. 12, 88 S.E. 911 (1916).

Misconduct of counsel may be such that its effect cannot be overcome, and misconduct so prejudicial that the verdict of the jury must have been influenced thereby, and is not cured by an admonition to the jury, or by sustaining an objection thereto, or by rebuke or admonition of counsel, or by withdrawal by counsel. In such cases, the court should grant a mistrial. Emerson v. State, 90 Ga. App. 323, 82 S.E.2d 882 (1954).

If judge takes curative action, no new trial or mistrial granted unless such action fails. — It is improper for counsel to remark upon the force or effect of evidence while it is being submitted to the jury, but when the remark is not prejudicial or inflammatory, is withdrawn by counsel, and the court gives proper instructions to the jury, a mistrial is not required. Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944).

If the trial judge acts immediately, and in the exercise of the judge's discretion takes such action as in the judge's judgment prevents harm to the accused as a result of improper statements by the prosecution, a new trial will not be granted unless it is clear that such action failed to eliminate from the consideration of the jury such improper statements. Moore v. State, 228 Ga. 662, 187 S.E.2d 277 (1972); Pullen v. State, 146 Ga. App. 665, 247 S.E.2d 128 (1978); Vernon v. State, 152 Ga. App. 616, 263 S.E.2d 503 (1979).

In passing on a motion for mistrial because of an improper statement of the prosecutor, the trial judge may take such action as in the judge's judgment will prevent harm to the defendant, and a new trial will not be granted unless it is clear that such action failed to eliminate the statement from consideration by the jury. Hoerner v. State, 246 Ga. 374, 271 S.E.2d 458 (1980).

After the trial court rebuked offending counsel and instructed the jury appropriately, a new trial will not be granted unless it is clear that the court's action failed to eliminate from the consideration of the jury such improper remark. White v. State, 159 Ga. App. 545, 284 S.E.2d 76 (1981); Jordan v. State, 159 Ga. App. 716, 285 S.E.2d 71 (1981).

Although the prosecutor, during closing argument, remarked to the jury that the grand jury had found sufficient evidence to bring the case to trial, the judge's prompt and corrective measures in admonishing counsel and instructing the jury were sufficient to eliminate the necessity of declaring a mistrial. Stoker v. State, 177 Ga. App. 94, 338 S.E.2d 525 (1985).

Trial court did not err by denying the defendant's motion for mistrial, after the prosecution's statement possibly left the jury with the false impression that defense counsel's opening statement was improper, although the trial court gave curative instructions only, an additional statement rebuking the prosecutor was not necessary. Crawford v. State, 203 Ga. App. 215, 416 S.E.2d 820 (1992).

Trial court three times instructed the jury to disregard the prosecutor's remarks regarding money in the defendant's prosecution for drug offenses. Since an instruction to the jury to disregard improper remarks amounts to a rebuke of counsel and in light of the curative instruction and the inadvertent nature of the prosecutor's remark, there was no abuse of discretion in the trial court's denial of the motion for mistrial. Myers v. State, 268 Ga. App. 607, 602 S.E.2d 327 (2004).

Trial court properly issued a curative instruction after an inadvertent reference to the defendant's status on bond, avoiding a mistrial as to this issue; the defendant's request for a curative instruction was granted after a reference to the "drug problem" the defendant and the defendant's ex-spouse shared waived any error in the trial court's failure to grant a mistrial as to this issue. Hill v. State, 285 Ga. App. 503, 646 S.E.2d 718 (2007).

Jury must be instructed to remove improper impressions. — When a motion for a mistrial is made, the court may grant the mistrial or take other corrective measures less than granting of a mistrial if the latter are sufficient for the purpose, but the court should by all needful and proper instruction to the jury endeavor to remove the improper impression from the jury's minds. Stanley v. State, 94 Ga. App. 737, 96 S.E.2d 195 (1956).

Curative instructions are not mandatory under O.C.G.A. § 17-8-75 when a motion for mistrial is denied. Foshee v. State, 256 Ga. 555, 350 S.E.2d 416 (1986).

Improper remark of prosecutor cured by instruction. — When the trial court under O.C.G.A. § 17-8-75 instructed the jury to disregard a statement by state's counsel relative to the fact that some of the witnesses would say the same thing as the witnesses that are called, and the court rebuked state's counsel for making that statement, even if the remark by the state's counsel was improper, the error was cured by the trial court's instruction. Hilburn v. State, 166 Ga. App. 357, 304 S.E.2d 480 (1983).

Trial court does not err in denying a mistrial after the prosecuting attorney asks the defendant why the defendant did not bring any witnesses in the courtroom to back up the defendant's explanation of the criminal episode, when the trial court correctly and fully cures any misimpression that the defendant bears the burden of proving the defendant's innocence, by instructing the jury that the defendant may or may not bring in witnesses, as the defendant chooses, but regardless of whether the defendant brings in witnesses, the burden is always on the state to prove the guilt of the defendant beyond a reasonable doubt. Brown v. State, 166 Ga. App. 765, 305 S.E.2d 386 (1983).

Trial court's instruction to the jury to disregard remarks amounting to a misstatement of evidence was complete and, in effect, amounted to a rebuke of the prosecuting attorney, and the minimal impact of the statement did not require reversal of a murder conviction. Ward v. State, 252 Ga. 85, 311 S.E.2d 449 (1984).

Because the prosecutor's misstatement regarding blood on the porch was arguably no more than an overstatement (most of the blood had been washed off the

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court (Cont'd)

porch) of the evidence, the mistaken attribution of testimony was insignificant in light of the fact that several witnesses had given similar testimony regarding the defendant's statements of anger toward the victim, defendant's mother. The trial court told the jury in preliminary jury instructions and the prosecuting attorney reminded the jury in closing argument that the argument of counsel was not evidence; therefore, it was highly probable that the trial court's error in failing to sustain the defendant's objections to improper argument by the prosecution and to perform the jury's duty under O.C.G.A. § 17-8-75 to instruct the jury regarding improper statements by counsel did not contribute to the verdict; thus, the defendant's conviction for murder was affirmed. Fincher v. State, 276 Ga. 480, 578 S.E.2d 102 (2003).

Denial of a motion for a mistrial was proper given the trial court's prompt, detailed curative instruction to the jury; it was unlikely that the defendant was prejudiced by the prosecutor's improper comment on the defendant's silence. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

In a joint prosecution, a second defendant was not entitled to a mistrial based on the prosecutor's improper comments during closing argument to the jury as the trial judge was authorized to admonish the prosecutor and instruct the jurors that the prosecutor's comments were inappropriate, were not proper for their consideration, and were to be disregarded. Jones v. State, 285 Ga. App. 121, 645 S.E.2d 608 (2007).

While the trial court did not necessarily rebuke the prosecutor, because the court did give curative instructions informing the jury that a cell phone used in the state's closing argument was not evidence, the demonstration was not to be considered, and the demonstration was completely irrelevant to the case, the defendant was not entitled to a mistrial as a result; further, the appeals court agreed with the trial judge that the improper demonstration did not prejudice the defendant because enough other evidence existed for the jury to come to the jury's conclusion without relying on the improper demonstration. Cook v. State, 287 Ga. App. 81, 650 S.E.2d 757 (2007), cert. denied, No. S07C1874, 2008 Ga. LEXIS 127 (Ga. 2008).

Prosecutor's improper comment on a defendant's failure to explain the presence of a gun and cash in the defendant's car immediately following a robbery was cured by the trial court rebuking the prosecutor at length and giving the jury curative instructions. Brown v. State, 307 Ga. App. 797, 706 S.E.2d 170 (2011).

Prosecutor's remark not improper. — In defendant's trial for sexual assault of a victim who was a stripper, the prosecutor's statement during closing that the jury could all hypothesize that the defendant didn't tell the defendant's family about where the defendant was that night (at a strip club), was simply a proper argument to urge the jury not to discount the victim's credibility; the statement did not improperly place the defendant's character in issue, and a mistrial was properly denied. Savage v. State, 264 Ga. App. 709, 592 S.E.2d 188 (2003).

Considering the nature of the state's improper reference, the other evidence in the case, and the trial court's and counsel's actions in dealing with the impropriety, the trial court did not abuse the court's discretion by denying the defendant's motion for a mistrial; O.C.G.A. § 17-8-75 did not apply because the state did not state prejudicial facts that were not in evidence and did not inject into the case illegal elements but simply made an inadvertent reference to the nature of a hearing at which the victim's statement differed from the victim's testimony at trial. Lewis v. State, 317 Ga. App. 218, 735 S.E.2d 1 (2012).

Instruction pursuant to O.C.G.A. § 17-8-75 was not required as the state's references in closing argument were to the psychologist's forensic findings and the inferences thereto, not to any opinion as to the veracity of the victim. Thompson v. State, 321 Ga. App. 756, 743 S.E.2d 446 (2013).

Mistrial may be refused if remark withdrawn and jury instructed. — It

is not error to refuse to grant a mistrial on account of the improper remark of the solicitor general (now district attorney) in the solicitor's argument to the jury, after the solicitor expressly withdraws the remark and the court instructs the jury not to consider the remark. Goodman v. State, 122 Ga. 111, 49 S.E. 922 (1905).

Withdrawal of remark and apology may be insufficient. — Mere apology and withdrawal of the improper remarks by counsel, if there is no reprimand by the court, will not be sufficient to prevent a mistrial if it appears that the remarks were such as to prejudice a fair trial. Smith v. State, 118 Ga. App. 464, 164 S.E.2d 238 (1968).

Case in which judge's statement insufficient to remove solicitor's (now district attorney's) remarks from consideration. — See Duncan v. State, 51 Ga. App. 97, 179 S.E. 638 (1935).

Instruction on improper remarks as to self-incrimination. — Although no person can be compelled to self-incriminate, an improper comment thereon may be cured by an instruction to the jury. Alcorn v. State, 21 Ga. App. 148, 94 S.E. 46 (1917).

Failure to rebuke for question that was not crucial. — There was no error in either the trial court's denial of the defendant's motion for a mistrial or in not rebuking the prosecutor for asking an allegedly improper question, particularly when the trial judge found that the question was not of a crucial nature. Martin v. State, 196 Ga. App. 145, 395 S.E.2d 391 (1990).

When new trial required. — When a motion for mistrial is made because of counsel's improper statement and there is no rebuke of counsel by the court and no charge to the jury to disregard such statement, the grant of a new trial is required. Hammond v. State, 51 Ga. App. 225, 179 S.E. 841 (1935).

When argument of counsel is manifestly improper and prejudicial to the defendant, and the trial court neither grants a mistrial, nor rebukes counsel, nor by needful and proper instructions to the jury endeavors to remove the improper impressions from the jurors' minds, and the verdict later reached by the jury is adverse to the defendant and is not demanded by evidence, a new trial is required. Baggett v. State, 77 Ga. App. 24, 47 S.E.2d 769 (1948); Brown v. State, 77 Ga. App. 245, 48 S.E.2d 565 (1948).

When the court after objection fails to rebuke counsel and endeavor by needful instructions to remove the prejudicial effect of the remarks from the minds of the jury or to order a mistrial, a new trial is required. Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964); Smith v. State, 118 Ga. App. 464, 164 S.E.2d 238 (1968).

With regard to the defendant's trial and conviction for possession of methamphetamine and giving a false name to a law enforcement officer, although the prosecutor's argument was improper and the trial court erred by failing to rebuke the prosecutor as required by O.C.G.A. § 17-8-75, the error was harmless since the improper argument consisted only of one comment not directly related to the defendant's case, the trial court twice told the jurors that the arguments of counsel were not evidence, and there was ample evidence of the defendant's guilt. As such, the trial court's failure to perform the court's duty under § 17-8-75 did not contribute to the verdict. Griffin v. State, 291 Ga. App. 657, 662 S.E.2d 767 (2008).

Failure to give curative instruction harmless error. — Trial court's error in failing to give a curative instruction in compliance with O.C.G.A. § 17-7-85 was harmless because it was highly probable that the trial court's error did not contribute to the verdict; the trial court specifically instructed the jury that the closing arguments of counsel did not constitute evidence, and despite the overwhelming evidence of the defendant's guilt, the jury was unable to reach a verdict on two of the counts against the defendant that were later dead docketed. O'Neal v. State, 288 Ga. 219, 702 S.E.2d 288 (2010).

In two defendants' trials for murder, even if the trial court erred under O.C.G.A. § 17-8-75 by failing to give, sua sponte, a curative instruction when the prosecutor referred to an absent witness who had been intimidated, any error was harmless because numerous witnesses had testified regarding threats made against the witnesses by the defendants

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court (Cont'd)

as well as the general disregard in the community for "snitches." Stephens v. State, 307 Ga. 731, 838 S.E.2d 275 (2020).

Prosecutor's statements were outside of the evidence because the slides the prosecutor introduced were shown during opening statement before either side had put on any evidence; however, it was highly probable that the trial court's alleged error in failing to comply with O.C.G.A. § 17-8-75 by not rebuking counsel or specifically instructing the jury to disregard the slides did not contribute to the guilty verdicts because it was doubtful that the slides qualified as prejudicial within the meaning of O.C.G.A. § 17-8-75 since the slides reflected evidence that the prosecutor expected to and, ultimately did, get admitted during the trial and argument that would be, and ultimately was, properly made during closing argument, so the same information later reached the jury appropriately. Dolphy v. State, 288 Ga. 705, 707 S.E.2d 56 (2011).

Defendant waived the right to complain about an assistant district attorney's remarks on appeal because the trial court's alleged error in failing to comply with O.C.G.A. § 17-8-75 did not contribute to the verdicts, and the assistant district attorney's closing comments did not entreat the jury to place themselves in the victim's shoes. Gomez v. State, 315 Ga. App. 898, 728 S.E.2d 691 (2012).

It was error to refuse to rebuke the assistant district attorney for asking an allegedly improper question during cross-examination of the defendant when it was not "a statement of prejudicial [matter]." Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

Aggravated child molestation conviction was reversed after a prosecutor elicited improper testimony that the defendant had been molested as a child, and the trial court failed to rebuke the prosecutor or give a curative instruction; since the evidence of guilt was far from overwhelming, this error was not harmless. Tyler v. State, 266 Ga. App. 221, 596 S.E.2d 651 (2004).

Prosecutorial conduct harmless even if not waived on appeal. — As the defendant sought no additional relief for the prosecutor's improper argument following the last curative instructions, the defendant waived the argument on appeal; moreover, the strength of the eyewitness evidence against the defendant, coupled with the contemporaneous curative instructions, rendered any prosecutorial misconduct harmless. Garcia v. State, 271 Ga. App. 794, 611 S.E.2d 92 (2005), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Trial court's actions in rebuking defense counsel out of the presence of the jury after counsel misstated the evidence during closing argument, and then informing the jury that counsel had been rebuked, were appropriate; the trial court's actions did not amount to an erroneous comment on the evidence. Lassic v. State, 278 Ga. 701, 606 S.E.2d 266 (2004).

Comments by trial judge during defense counsel's closing argument. — Defendant was not entitled to a new trial because the trial judge's comments were limited in scope, were for the purpose of controlling the trial conduct and ensuring a fair trial, did not involve the issue of defendant's guilt or innocence, and did not express an opinion on the evidence as to what was proved or not; comments by the trial judge during defense counsel's closing arguments were for the purpose of preventing misstatements to the jury concerning matters not in evidence and were not improper under O.C.G.A. § 17-8-75. Mathis v. State, 276 Ga. App. 205, 622 S.E.2d 857 (2005).

Harmless error. — Trial court specifically instructed the jury that the closing arguments of counsel were not evidence. Given the evidence, along with the trial court's instruction to the jury, it was highly probable that the trial court's error in failing to perform the court's duty under O.C.G.A. § 17-8-75 did not contribute to the verdict. Holsey v. State, 316 Ga. App. 801, 729 S.E.2d 465 (2012).

Discretion of Court

Grant of mistrial is in court's discretion. — Whether mistrial should be granted for improper argument of oppos-

ing counsel is largely discretionary. Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491 (1949).

This section leaves to the discretion of the trial court the decision to grant a mistrial. Johnson v. State, 142 Ga. App. 526, 236 S.E.2d 493 (1977).

Trial court did not err in denying the defendant's motion for a mistrial after the state alluded to the defendant's father testifying at a probation revocation hearing as considering the evidence introduced at trial, the nature of the character evidence about which the defendant complained, and the trial court's immediate curative instruction, the appellate court could not say that the trial court abused the court's discretion in denying the defendant's motion for a mistrial. King v. State, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Trial court did not abuse the court's discretion by failing to rebuke the state's prosecutor for presenting a slide that hospital records showed the defendant's history of alcohol abuse or by failing to declare a mistrial because the defendant did not object after the court provided the curative instruction. Samuels v. State, 335 Ga. App. 819, 783 S.E.2d 344 (2016).

Inadvertent information that defendant seeing psychiatrist did not warrant mistrial. — Because the state did not intentionally elicit information from a witness that the defendant was seeing a psychiatrist, and such information did not necessarily inject one's character into evidence, the defendant was not entitled to a mistrial; moreover, even assuming the comment did improperly put the defendant's character into evidence, the trial court's curative instruction was sufficient. Morita v. State, 270 Ga. App. 372, 606 S.E.2d 595 (2004).

In response to the defendant's attempt to make various pronouncements and address the victim's spouse, prompting the prosecutor to object, and the court to admonish the defendant in the presence of the jury, the actions did not warrant a mistrial as the actions properly took issue with the defendant's statements and conduct in a fair and objective manner and the trial court did not employ any measure which could be said to have compromised the jury's ability to remain impartial. Taylor v. State, 282 Ga. 44, 644 S.E.2d 850, cert. denied, 552 U.S. 950, 128 S. Ct. 384, 169 L. Ed. 2d 263 (2007).

Issue of mistrial waived on appeal. — Because the record showed that the defendant acquiesced in the trial court's decision to give curative instructions regarding testimony given by a state's witness which the defendant claimed reflected prior criminal conduct that improperly placed the defendant's character in issue, and did not again move for a mistrial after the instructions were given, the defendant waived the issue for purposes of appeal. Northern v. State, 285 Ga. App. 303, 645 S.E.2d 701 (2007).

Abuse of discretion generally. — In passing upon a motion for a mistrial on account of alleged improper argument or remarks to the jury, the trial judge is vested with broad and sound discretion, and the trial judge's ruling will not be controlled unless manifestly abused. Grayhouse v. State, 65 Ga. App. 853, 16 S.E.2d 787 (1941); Smith v. State, 204 Ga. 184, 48 S.E.2d 860 (1948); Parks v. State, 208 Ga. 508, 67 S.E.2d 716 (1951); Domingo v. State, 213 Ga. 24, 96 S.E.2d 896 (1957); James v. State, 215 Ga. 213, 109 S.E.2d 735 (1959); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

If improper statements have been made by counsel in the presence of the jury, it is the duty of the judge to endeavor to remove from the minds of the jury improper impressions made by unfair arguments. In determining the proper method, the judge is vested with sound discretion, and the judge's rulings thereon will not require a new trial, unless it manifestly appears that the judge's discretion was abused. Hicks v. State, 196 Ga. 671, 27 S.E.2d 307 (1943).

Grant or refusal of motions for mistrial is largely within the discretion of the trial court, and this discretion will not be interfered with unless manifestly abused. If the trial court immediately upon the happening of an irregularity gives cautionary instructions to the jury, the appellate court will not disturb the trial court's judgment refusing a motion for mistrial.

Discretion of Court (Cont'd)

Cox v. State, 109 Ga. App. 797, 137 S.E.2d 516 (1964).

Matter of granting a mistrial is largely within the discretion of the trial court and unless it is apparent that a mistrial was essential to preservation of the right of fair trial, that discretion will not be controlled. Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968); Cochran v. State, 144 Ga. App. 820, 242 S.E.2d 735 (1978).

If, during oral argument, an assistant district attorney makes statements deemed by the defendant to be improper and upon a motion for mistrial being made the trial court immediately instructs the jury not to consider such argument, no harmful error appears in the overruling of the motion for mistrial unless it is manifest that an abuse of the trial court's discretion has occurred. White v. State, 159 Ga. App. 545, 284 S.E.2d 76 (1981).

O.C.G.A. § 17-8-75 commits to the judge's discretion the decision to order a mistrial when counsel has made statements of prejudicial matters not in evidence before the jury. This discretion will not be interfered with on appeal unless manifestly abused. Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983).

Trial court did not run afoul of O.C.G.A. § 17-8-75 in permitting the state to explain the absence of the testimony of the other accomplice, which, during the state's opening statement, the state had told the jury to expect as: (1) the state informed the trial court, outside the hearing of the jury and before making a statement to the jury, that the state's witness had changed the witness's mind about testifying and that the state wanted to let the jury know why the witness would not be testifying; (2) the state made the statement as a statement of fact, without any attempt to argue the evidence or prejudice the case; (3) the appellate court found no case in which § 17-8-75 has been applied in a situation in which a party informed the trial court of the content of a statement it intended to make and received the consent of the trial court to make such a statement; (4) the state did not act with an improper motive, bad faith, or with intent to subvert the defendant's constitutional rights; and (5) the truthful statement was not harmful under the facts of this case. Clemons v. State, 265 Ga. App. 825, 595 S.E.2d 530 (2004).

Discretion not abused in denying mistrial if counsel rebuked and jury instructed. — When the court immediately rebukes counsel and instructs the jury to ignore the improper comments, the denial of the motion for mistrial is not an abuse of discretion. Johnson v. State, 142 Ga. App. 526, 236 S.E.2d 493 (1977).

If counsel has made statements regarding prejudicial matters not in evidence before the jury, the trial court has the discretion to order a mistrial. The trial court's refusal to do so, however, coupled with appropriate curative instructions and admonishment of state's counsel, absent manifest abuse, will not be reversed. Schirato v. State, 260 Ga. 170, 391 S.E.2d 116 (1990); Willingham v. State, 212 Ga. App. 457, 442 S.E.2d 4 (1994); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

Trial court did not abuse the court's discretion in declining to grant a mistrial after an improper statement by the prosecutor as the court immediately sustained the defendant's objection, rebuked the prosecutor, and instructed the jury not to consider the statement. Campbell v. State, 329 Ga. App. 317, 764 S.E.2d 895 (2014).

Remark that witnesses were credible because the witnesses had not been impeached. — Trial judge did not abuse the judge's discretion in refusing to grant a mistrial based on the prosecutor's argument that two of the state's witnesses were credible because the witnesses had not been impeached with prior inconsistent statements. Forney v. State, 255 Ga. 316, 338 S.E.2d 252 (1986).

Defendant's plan to comment on specific cases of mistaken identity. — Trial court properly disallowed defense counsel's plan to comment on specific cases of mistaken identity which defense counsel personally knew about from experience or had read about, presumably from newspaper articles, and limited the argument to experiences common to everyone since the evidence would have been totally irrelevant if offered during

the trial because the comments were not related to this case, and since the facts may well have been in dispute. Watson v. State, 180 Ga. App. 82, 348 S.E.2d 557 (1986).

Denial of mistrial after offer of curative instructions declined. — If counsel for a codefendant improperly placed a defendant's character in evidence and the defendant's counsel declined the trial court's offer to give curative instructions to the jury, the court did not abuse the court's discretion in denying the defendant's motion for a mistrial. Daily v. State, 195 Ga. App. 4, 392 S.E.2d 554 (1990).

Counsel not ineffective for failing to request mistrial. — Counsel was not ineffective for failing to move for a mistrial because the evidence of guilt was overwhelming and it was highly probable that any improper argument did not contribute to the verdicts. Lloyd v. State, 280 Ga. 187, 625 S.E.2d 771 (2006).

Trial court ruling prohibiting comment on spouse's plea agreement. — With regard to a defendant's drug conviction, the trial court did not err in prohibiting further comment by defense counsel about the terms of the plea agreement of the defendant's spouse as the state had objected and the terms of the plea agreement had not been admitted into evidence. Dingler v. State, 293 Ga. App. 27, 666 S.E.2d 441 (2008).

RESEARCH REFERENCES

C.J.S. — 88 C.J.S., Trial, § 193 et seq.

ALR. — Statement by prosecuting attorney in presence of jury implying that defendant had made incriminating statements to him not in evidence, as ground of reversal or new trial, 52 A.L.R. 1022.

Counsel's appeal to racial, religious, social, or political prejudices or prejudice against corporations as ground for a new trial or reversal, 78 A.L.R. 1438.

Prosecuting attorney urging jury against compromising upon verdict carrying a lesser penalty than that incident to offense or degree of offense of which defendant is shown to have been guilty, 95 A.L.R. 566.

Motion for mistrial, or other similar motion, as condition of reviewing improper argument of counsel, 108 A.L.R. 756.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 A.L.R. 1089.

Comments by prosecuting attorney regarding jury's right or privilege to recommend or fix punishment, 120 A.L.R. 502.

Statements, comments, or conduct of court or counsel regarding perjury, as ground for new trial or reversal in civil action or criminal prosecution other than for perjury, 127 A.L.R. 1385.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 A.L.R.2d 996.

Prejudicial effect of admission of evidence as to communist or other subversive affiliation or association of accused, 30 A.L.R.2d 589.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 46 A.L.R.2d 1423.

Prejudicial effect of prosecuting attorney's remarks, in opening statement to jury, that another defendant has been convicted or has pleaded guilty, 48 A.L.R.2d 1004.

Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 A.L.R.2d 166.

Prejudicial effect of prosecutor's comment on character or reputation of accused, where accused has presented character witnesses, 70 A.L.R.2d 559.

Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction, 85 A.L.R.2d 1132.

Propriety and effect of attack on opposing counsel during trial of a criminal case, 99 A.L.R.2d 508.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 A.L.R.3d 723.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole, 16 A.L.R.3d 1137.

Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal, 36 A.L.R.3d 839.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case, 38 A.L.R.3d 1012.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 A.L.R.3d 8.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused — modern state cases, 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty, 89 A.L.R.3d 263.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present, 90 A.L.R.3d 646.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty, 90 A.L.R.3d 822.

Double jeopardy as bar to retrial after grant of defendant's motion of mistrial, 98 A.L.R.3d 997.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 A.L.R.4th 810.

Propriety of attorney's communication with jurors after trial, 19 A.L.R.4th 1209.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error — modern cases, 32 A.L.R.4th 774.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-Parker cases, 35 A.L.R.4th 890.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 A.L.R.4th 410.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness — state cases, 45 A.L.R.4th 602.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 A.L.R.4th 1063.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence — modern cases, 70 A.L.R.4th 664.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases, 88 A.L.R.4th 8.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases, 88 A.L.R.4th 209.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors, 31 A.L.R.5th 572.

17-8-76. Argument to or in front of jury as to possibility of clemency.

(a) No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency of any nature may be granted by the Governor, the State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency.

(b) If counsel for either side in a criminal case argues to or in the presence of the jury as provided in subsection (a) of this Code section, opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error.

(c) This Code section shall be construed as setting forth requirements in addition to other requirements of law.

History. — Ga. L. 1955, p. 191, §§ 1-3.

U.S. Code. — Closing arguments, Federal Rules of Criminal Procedure, Rule 29.1.

Law reviews. — For note, "Can't Do the Time, Don't Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia," see 22 Ga. St. U.L. Rev. 519 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration
Clemency
Probation and Parole
Death Penalty
Mistrial

General Consideration

Constitutionality. — Ability or inability to obtain early release does not relate to the defendant's character, the defendant's prior record, or circumstances of the defendant's offense; thus, policy forbidding argument about such matters does not run afoul of either U.S. Const., amend. 8 or 14, and the trial court did not err in refusing to allow such argument. Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Construction with § 17-10-31.1. — Provision of former O.C.G.A. § 17-10-31.1 expressly authorizing argument to the jury on the issue of parole in the sentencing phase of death penalty trials conflicted with O.C.G.A. § 17-8-76 which imposed an absolute bar on such argument; however, former § 17-10-31.1 prevailed since it was the more recent enactment. Jenkins v. State, 265 Ga. 539, 458 S.E.2d 477 (1995).

O.C.G.A. § 17-8-76 has not been implicitly repealed. Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987).

Purpose of O.C.G.A. § 17-8-76 is to prevent prosecutors from arguing that jury should give more severe sentence to compensate for possible pardon, parole, or other clemency. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Policy underlying O.C.G.A. § 17-8-76. — This section establishes the policy of the law that the jury should not be influenced in a criminal case in the rendition of their verdict by a consideration of the fact that the penalty imposed by the jury might be commuted by the State Board of Pardons and Paroles. McGruder v. State, 213 Ga. 259, 98 S.E.2d 564 (1957); Cash v. State, 231 Ga. 285, 201 S.E.2d 625 (1973).

If the state simply reminds the jury that the jurors are not concerned with punishment and not that the defendant might not be required to suffer the full penalty of the law imposed by the court because of pardon, parole, or clemency, the prosecutor's comments do not violate this section. Berrian v. State, 139 Ga. App. 571, 228 S.E.2d 737 (1976); Freeman v. State, 245 Ga. App. 384, 537 S.E.2d 776 (2000).

General Consideration (Cont'd)

Test for reversible error. — When no timely objection is interposed during improper closing argument, the test for reversible error is not simply whether or not the argument was objectionable, or even if the argument might have contributed to the verdict, but whether the improper argument in reasonable probability changed the result of the trial. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

Discussion of defendant's future being in jeopardy. — When the prosecutor in closing argument stated that the defendant's life was not in jeopardy, only the defendant's immediate future, although the Supreme Court disapproved of the prosecutor's comment, it did not violate O.C.G.A. § 17-8-76 because it did not specifically refer to pardon, parole, or other clemency, and under the circumstances, the trial court's curative instructions were sufficient. Jones v. State, 258 Ga. 249, 368 S.E.2d 313 (1988).

Prosecutorial comment not violation. — Prosecutor's comment to the jury during final argument that "if [the defendant] is ever on the street again in his whole life, there is no doubt but that he'll commit crimes like this again" did not violate subsection (a) of O.C.G.A. § 17-8-76. Finney v. State, 253 Ga. 346, 320 S.E.2d 147 (1984), cert. denied, 470 U.S. 1088, 105 S. Ct. 1854, 85 L. Ed. 2d 151 (1985).

Viewed in context, the prosecutor's statements during closing argument merely served to remind the jury that the jurors were to be concerned with the defendant's guilt only, not the defendant's punishment, and thus, did not violate O.C.G.A. § 17-8-76. Joyce v. State, 235 Ga. App. 167, 509 S.E.2d 85 (1998).

Prosecutor may request jury not to consider possible penalties. — Closing argument by the state's attorney informing the jury that the jury should not take into consideration any possible penalty should the jury convict is not in violation of O.C.G.A. § 17-8-76. Mitchell v. State, 167 Ga. App. 306, 306 S.E.2d 322 (1983).

Ineffective assistance of counsel claim procedurally barred. — Defendant's claim that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument that life did not mean life was procedurally barred because the defendant did not raise it in the motion for new trial and did not obtain a ruling on the motion by the trial court. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

Harmless error. — Even if a prosecutor's remarks about the defendant's credibility and statement that if the jury convicted the defendant of a lesser charge the jury "would be letting this defendant off the hook," could be interpreted as improper, the court held it was highly improbable in light of the evidence that the remarks changed the result of the trial, and any error in the prosecutor's argument was therefore harmless. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

Prosecutorial comment improper, but harmless. — Although harmless in view of the overwhelming evidence of the defendant's guilt, the prosecutor's remark that the defendant had served only 14 of 20 years for a prior conviction was highly improper. Moore v. State, 242 Ga. App. 249, 529 S.E.2d 381 (2000).

Reference to drug rehabilitation not violation of section. — Trial court was not required to declare a mistrial when the prosecutor asked the jurors if the jurors believed that the defendant would be rehabilitated rather than go back to drugs if the defendant were released from jail since the prosecutor did not specifically refer to pardon, parole, or other clemency. Romine v. State, 256 Ga. 521, 350 S.E.2d 446 (1986), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Attack on witness not violation. — State counsel's contested closing argument attacking the credibility of testimony that had been given by the defendant's psychiatric expert did not work a violation of O.C.G.A. § 17-8-76 as no reference was made to the possibilities of pardon, parole, or other clemency. McGill v. State, 263 Ga. 81, 428 S.E.2d 341 (1993).

O.C.G.A. § 17-8-76 prohibits only the argument that a defendant not serve the

full amount of the defendant's sentence; the statute does not prohibit even making an argument in this regard concerning a witness. Thus, the defendant was entitled to cross examine the witness on the deal made with the prosecution to secure the witness's testimony in an effort to ascertain the witness's motive to testify, bias, or any interest in cooperating with the prosecution. Hernandez v. State, 244 Ga. App. 874, 537 S.E.2d 149 (2000).

Objection and motion for mistrial after prosecutor's argument ended was untimely. — Defendant's objection and motion for mistrial, made after the prosecutor's improper closing argument that life did not mean life ended, were not timely and were not preserved for appeal. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

Cited in Wilson v. State, 212 Ga. 157, 91 S.E.2d 16 (1956); McKuhen v. State, 216 Ga. 172, 115 S.E.2d 330 (1960); Terhune v. State, 117 Ga. App. 59, 159 S.E.2d 291 (1967); Hunt v. State, 133 Ga. App. 548, 211 S.E.2d 601 (1974); Willingham v. State, 134 Ga. App. 144, 213 S.E.2d 516 (1975); Biddy v. State, 138 Ga. App. 4, 225 S.E.2d 448 (1976); Smith v. State, 146 Ga. App. 428, 246 S.E.2d 442 (1978); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979); Washington v. State, 245 Ga. 117, 263 S.E.2d 152 (1980); Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984); Jackson v. State, 173 Ga. App. 851, 328 S.E.2d 741 (1985); Willis v. Kemp, 838 F.2d 1510 (11th Cir. 1988); Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920 (1989); Pitts v. State, 259 Ga. 745, 386 S.E.2d 351 (1989); Saunders v. State, 198 Ga. App. 666, 402 S.E.2d 542 (1991); Ross v. State, 231 Ga. App. 793, 499 S.E.2d 642 (1998); Bentley v. State, 262 Ga. App. 541, 586 S.E.2d 32 (2003); Daniel v. State, 292 Ga. App. 560, 665 S.E.2d 696 (2008).

Clemency

Grants of clemency. — Statute is not limited to clemency granted by the State Board of Pardons and Paroles or the Governor, but clemency that may be granted by any authority authorized by law including clemency granted by the trial court in permitting the service of the sentence on probation. Cash v. State, 231 Ga. 285, 201 S.E.2d 625 (1973).

This section applies to those statements concerning clemency by the State Board of Pardons and Paroles or other executive officers. Henderson v. State, 234 Ga. 893, 218 S.E.2d 622 (1975).

Probation and Parole

Trial court's flat refusal to answer a question about parole is not improperly suggestive and is not error. Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 250 (1980).

O.C.G.A. § 17-8-76 covers parole in misdemeanor cases. — While this section makes argument by counsel before the jury that the defendant may be paroled or the defendant's sentence reduced a mandatory ground for mistrial, the terms of the section are broad enough to cover the action of the trial court in paroling a defendant in a misdemeanor case. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966).

Sending of blank probation sentence to jury room together with blank misdemeanor sentence. — To send a blank probation sentence out to the jury room along with the blank misdemeanor sentence and as a part of it is indubitably a clear indication to the jury that it is at least possible, if not probable, that the defendant will not be sentenced to imprisonment, and is a fact which the jury might well take into illegal account in determining whether the defendant was guilty or innocent. This is the very thing which it was the intention of the General Assembly to prevent. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966).

Defendant is not permitted to refer to the possibility of parole in arguing to the jury, and later obtain a new trial based upon such argument, after an unfavorable verdict. Tamplin v. State, 235 Ga. 20, 218 S.E.2d 779, vacated in part on other grounds, 235 Ga. 774, 221 S.E.2d 455 (1975).

While O.C.G.A. § 17-8-76 benefits defendants in many cases, the statute's prohibition is not limited to cases where the prosecutor would argue parole in order to obtain a more severe sentence. Instead, the statute proscribes all use of parole in

Probation and Parole (Cont'd)

argument. Davis v. State, 255 Ga. 598, 340 S.E.2d 869, cert. denied, 479 U.S. 871, 107 S. Ct. 245, 93 L. Ed. 2d 170 (1986).

Defendant's parole eligibility is not, and ought not be, an issue considered by the jury in the sentencing phase of a death penalty case, and the jury should not be encouraged to add stipulations, conditions, or recommendations of no parole to the jury's verdict, nor should the jury be instructed, implicitly or explicitly, that a defendant's release on parole is a matter governed solely by the illimitable discretion of the Board of Pardons and Parole. Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987).

Failure to object and reference to parole as precluding defendant from obtaining new trial. — Defendant is not permitted to introduce evidence of a prior parole, fail to object to the state's argument to the jury of the possibility of parole, argue a reference to parole and later obtain a new trial based upon such argument after an unfavorable verdict. Tucker v. State, 245 Ga. 68, 263 S.E.2d 109, cert. denied, 449 U.S. 891, 101 S. Ct. 253, 66 L. Ed. 2d 119 (1980).

Argument of rules and regulations regarding time to be served before parole may be applied for. — Court does not err in refusing to allow the defense attorney to argue to the jury the rules and regulations of the State Board of Pardons and Paroles regarding time served by the accused before the accused can make application for parole. Golden v. State, 213 Ga. 481, 99 S.E.2d 882 (1957).

Jury charge that probation sentence may be invoked for misdemeanor punishment. — If the trial court charges that there could be a probation sentence invoked for misdemeanor punishment, there is no reversible error if the trial court later recharges the jury to disregard this instruction. Fraley v. State, 120 Ga. App. 427, 170 S.E.2d 729 (1969).

Instruction regarding revocation of parole. — After the jury asks the court whether a prisoner who commits another felony after serving the minimum term fixed by the sentence and being paroled would be returned to serve the remainder of the sentence, and after the court tells the jury that the court cannot give the jury any instructions regarding a parole, but then proceeds to instruct the jury that the prison authorities have certain rules and regulations which the authorities have formulated and under which the authorities release a prisoner after the prisoner has served a minimum sentence provided the prisoner complies with certain conditions, and that the prison is thereafter permitted to serve the difference between the minimum and maximum sentence outside the confines of the prison, the latter portion of the instructions violates this section. Berry v. State, 107 Ga. App. 643, 131 S.E.2d 115 (1963).

Comments about possible probation. — After the district attorney commented during closing argument: "Of course, he [Defendant] doesn't want to get up on the stand and say, 'Well, a little of these drugs were mine.' What he wants to admit to is that the misdemeanor—the probationary amount of marijuana was his because he figures, 'I'll get something . . .,'" it was held that although probation is a judicial, rather than an executive function, it is not a matter for the jury, and the trial court properly instructed the jury to disregard the offending remarks and directed the district attorney not to comment further in this regard, and that it could not be said as a matter of law that the defendant was harmed in any way by the trial court's denial of a mistrial. Steele v. State, 181 Ga. App. 695, 353 S.E.2d 612 (1987).

Commenting on inability, as well as ability, to make parole. — Policy of not allowing argument or charge on matters concerning parole forbids comment with regard to the defendant's inability to make parole, as well as the defendant's ability to do so. Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Meaning of life without parole. — Trial court may charge the jury on the meaning of life without parole but is not required to charge the jury that life without parole "means what it says" or to discourage the jury from considering parole eligibility. McClain v. State, 267 Ga.

378, 477 S.E.2d 814 (1996), cert. denied, 521 U.S. 1106, 118 S. Ct. 2485, 138 L. Ed. 2d 993 (1997).

Prospect of parole in burglary prosecution. — In burglary prosecution, motion for mistrial was properly denied after the prosecuting attorney commented on the policy of the State Board of Pardons and Paroles regarding early release of prisoners because sentences in noncapital felony cases are imposed by the trial judge and not the jury. Cave v. State, 171 Ga. App. 22, 318 S.E.2d 689 (1984).

Questions from jury about parole. — If, and only if, the jury asks to be instructed about the possibility of parole, the court should mention the issue only to the extent of telling the jury in no uncertain terms that such matters are not proper for the jury's consideration. Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987).

Violation of section not defective representation. — Violation of O.C.G.A. § 17-8-76 by raising the issue of the possibility of parole, by itself, does not constitute deficient representation by defense counsel. Parker v. Turpin, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), aff'd sub nom. Parker v. Head, 244 F.3d 831 (11th Cir. 2001).

Death Penalty

O.C.G.A. § 17-8-76 does not apply to cases of waiver of the death penalty by the prosecution. Henderson v. State, 234 Ga. 893, 218 S.E.2d 622 (1975).

Remarks that death penalty, rather than life sentence, should be imposed. — When in a resentencing trial the remarks to the jury by the district attorney made no reference to parole of any nature, but were simply an attempt to convince the jury that the only appropriate punishment in the case was a sentence of death since, if a life sentence were imposed, the defendant would have another chance to do harm, even if in prison, such remarks were not improper. Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Comment that case was not death penalty case. — Prosecutor's comment to the jury venire that the defendant's case was not a death penalty case did not violate O.C.G.A. § 17-8-76; the comment did not reflect upon the guilt or innocence of the defendant, and the defendant did not demonstrate harm from the statement. Stokes v. State, 281 Ga. 875, 644 S.E.2d 116 (2007).

Discussion of past parole in capital sentencing hearing not error. — In the sentencing phase of a capital murder trial, the prosecutor's discussion of the defendant's past parole did not violate O.C.G.A. § 17-8-76. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985), cert. denied, 478 U.S. 1022, 106 S. Ct. 3340, 92 L. Ed. 2d 743 (1986).

Mistrial

Upon objection to argument which contravenes O.C.G.A. § 17-8-76, mistrial is mandatory; however, prosecutors must make explicit reference to pardon, parole, or other clemency. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Guilty plea exchange offer admissible at sentencing. — After a mistrial was granted at the behest of the defendant, a retrial was not barred by principles of double jeopardy because the government had not intended to goad the defendant into moving for a mistrial by the inadvertent mistestimony of the state's private investigator. Mobley v. State, 262 Ga. 808, 426 S.E.2d 150, cert. denied, 510 U.S. 870, 114 S. Ct. 198, 126 L. Ed. 2d 156 (1993).

Failure to move for mistrial. — After the defendant objected to improper argument and asked the court to instruct the jury to disregard the argument, but did not move for a mistrial, the trial court did not err by merely sustaining the objection and giving curative instructions. Hammond v. State, 260 Ga. 591, 398 S.E.2d 168 (1990).

O.C.G.A. § 17-8-76 does not require that a mistrial be declared even without a request. Hammond v. State, 260 Ga. 591, 398 S.E.2d 168 (1990).

When the defendant's counsel objected to an improper argument by the prosecutor based on O.C.G.A. § 17-8-76 and the trial court sustained the objection and

Mistrial (Cont'd)

instructed the jury accordingly, counsel's failure to move for a mistrial did not constitute ineffective assistance since the defendant was not deprived of a fair sentencing trial. Hammond v. State, 264 Ga. 879, 452 S.E.2d 745, cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

Denial of motion for mistrial appropriate. — Testimony to which the defendant objected came from the defendant's wife, who stated that during hostage negotiations the defendant mentioned a parole officer; such testimony did not address the possibility of pardon, parole, or other clemency for the instant charges and thus did not violate O.C.G.A. § 17-8-76. Freeman v. State, 252 Ga. App. 217, 555 S.E.2d 879 (2001).

Prosecutor did not make a specific reference to pardon, parole, or other clemency in the prosecutor's closing arguments to the jury in the defendant's trial for felony murder and malice murder; thus, there was no violation of O.C.G.A. § 17-8-76 that required a mistrial because the trial court gave a sufficient curative instruction. Curles v. State, 276 Ga. 237, 575 S.E.2d 891 (2003).

RESEARCH REFERENCES

C.J.S. — 16 C.J.S., Constitutional Law, § 326. 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2419. 67A C.J.S., Pardon and Parole, § 1 et seq.

ALR. — Prejudicial effect of statement or instruction of court as to possibility of parole or pardon, 12 A.L.R.3d 832.

Double jeopardy as bar to retrial after grant of defendant's motion of mistrial, 98 A.L.R.3d 997.

CHAPTER 9

VERDICT AND JUDGMENT GENERALLY

Article 1

General Provisions

Sec.

17-9-1. When direction of verdict of acquittal authorized; when motion for directed verdict of acquittal allowed; effect of motion upon defendant's right to present evidence and right to jury trial; assent of jury not required.

17-9-2. Jury to judge law and facts and give general verdict; imposition of sentence; form and construction of verdicts.

17-9-3. Recommendations for mercy in capital cases other than those of homicide; effect of no recommendation for mercy in capital cases generally and where defendant under age of 17 at time of commission of offense.

17-9-4. Validity of judgment rendered by court having no jurisdiction of person or subject matter.

Article 2

Rendition and Receipt of Verdict

17-9-20. Action by juror on private knowledge as to facts, witnesses, or parties.

17-9-21. Receipt of verdicts.

17-9-22. Expression of approval or disapproval of verdict of jury by judge.

17-9-23. Commending or complimenting of jury by judge.

Article 3

Amendment and Impeachment of Verdict

17-9-40. Amendment of verdict after dispersion of jury.

17-9-41. Use of affidavits of jurors relating to verdict [Repealed].

Article 4

Motions in Arrest

17-9-60. Jurisdiction of motion; notification of opposing party.

17-9-61. Time and grounds for motion generally.

17-9-62. Defects in pleadings or record aided by verdict or amendable not subject to motion.

17-9-63. Motion not relating to merits of offense charged not to be granted.

Cross references. — Amount of mental conviction required, § 24-14-3.

RESEARCH REFERENCES

ALR. — Interrogation or poll of jurors, during criminal trial, as to whether they were exposed to media publicity pertaining to alleged crime or trial, 55 A.L.R.6th 157.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Default judgments in state court cases, Uniform State Court Rules, Rule 15.

RESEARCH REFERENCES

ALR. — Verdict as affected by agreement in advance among jurors to abide by less than unanimous vote, 73 A.L.R. 93.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 A.L.R.3d 1149.

Lesser-related state offense instructions: modern status, 50 A.L.R.4th 1081.

17-9-1. When direction of verdict of acquittal authorized; when motion for directed verdict of acquittal allowed; effect of motion upon defendant's right to present evidence and right to jury trial; assent of jury not required.

(a) Where there is no conflict in the evidence and the evidence introduced with all reasonable deductions and inferences therefrom shall demand a verdict of acquittal or "not guilty" as to the entire offense or to some particular count or offense, the court may direct the verdict of acquittal to which the defendant is entitled under the evidence and may allow the trial to proceed only as to the counts or offenses remaining, if any.

(b) The defendant shall be entitled to move for a directed verdict at the close of the evidence offered by the prosecuting attorney or at the close of the case, even if he fails to introduce any evidence at the trial. A defendant who moves for a directed verdict at the close of the evidence offered by the prosecuting attorney may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted shall not be deemed to be a waiver of the right to trial by jury. The order of the court granting a motion for a directed verdict of acquittal is effective without any assent of the jury.

History. — Code 1933, § 27-1802, enacted by Ga. L. 1971, p. 460, § 1; Ga. L. 1982, p. 3, § 17.

U.S. Code. — Verdicts, Federal Rules of Criminal Procedure, Rule 31.

Law reviews. — For article discussing the effect of United States v. Bell, 678 F.2d 547 (5th Cir. 1982), on the directed verdict in criminal cases, see 35 Mercer L. Rev. 1209 (1984).

JUDICIAL DECISIONS

Analysis

General Consideration
Evidence
Application
Practice and Procedure

General Consideration

Section is permissive, not mandatory. — Ga. L. 1971, p. 460, § 1 (see O.C.G.A. § 17-9-1), which provides that the trial judge "may" direct a verdict of acquittal, is simply permissive, not mandatory, and the act is cumulative of the existing law as such right already inhered in the trial judge. Feldschneider v. State, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

Construction of § 17-9-1 imposes duty, not merely authority, on trial judge. — While the wording of the statute appeared merely to authorize a verdict of acquittal under the circumstances mentioned therein, the entire language must be construed in light of the Appellate Practice Act authorizing an enumeration of error on the refusal of the trial court to direct a verdict of not guilty in a criminal case. When there is no conflict in the evidence and the evidence clearly demands a verdict of acquittal as a matter of law, there is a duty upon the trial judge to grant a motion for a directed verdict of acquittal. The judge's failure to do so will constitute reversible error on appeal. Merino v. State, 230 Ga. 604, 198 S.E.2d 311 (1973); Rhodes v. State, 200 Ga. App. 193, 407 S.E.2d 442 (1991).

Constitutionality of statute on which indictment based. — Even though a criminal defendant may challenge the constitutionality of the statute alleged in the indictment before trial by demurrer, motion to quash, or plea in bar, by properly raising the constitutional objection, it is not too late to challenge the statute on which an indictment is based on motion for directed verdict. Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

Motion for directed verdict cannot be made before trial. State v. Cooperman, 147 Ga. App. 556, 249 S.E.2d 358 (1978).

If the defendant moves for a directed verdict before any evidence is presented, the trial court does not err in denying the motion. Mann v. State, 167 Ga. App. 829, 308 S.E.2d 12 (1983).

No statutory authority existed for directed verdict. — Since at the time a case was tried there was no statutory authority for the direction of a verdict in a criminal case, it was not error for the trial court to refuse to direct a verdict. Allen v. State, 228 Ga. 859, 188 S.E.2d 793 (1972).

Review of directed verdict was not provided for in former Code 1933, § 27-1802 (see O.C.G.A. § 17-9-1). Stynchcombe v. Hardy, 228 Ga. 130, 184 S.E.2d 356 (1971).

No provision for motion for judgment of not guilty notwithstanding verdict of guilty. — There is no provision of law for a court in the trial of a criminal case to entertain a motion for a judgment of not guilty notwithstanding a verdict of guilty. Austin v. State, 104 Ga. App. 795, 122 S.E.2d 926 (1961).

Trial court did not err in denying the defendant's motion for judgment notwithstanding the verdict (JNOV) after the defendant was convicted of driving under the influence to the extent that the defendant was a less-safe driver in violation of O.C.G.A. § 40-6-391(a)(1) because JNOV was not a remedy available in a criminal case. Masood v. State, 313 Ga. App. 549, 722 S.E.2d 149 (2012).

No provision for motion for directed verdict of acquittal notwithstanding mistrial. — Georgia law provides for neither a motion for judgment of acquittal notwithstanding the verdict nor a motion for judgment of acquittal notwithstanding mistrial. Wilson v. State, 233 Ga. App. 327, 503 S.E.2d 924 (1998).

Opposition to directed verdict by codefendant. — O.C.G.A. § 17-9-1 sets out the circumstances in which a defendant may request and receive a directed verdict of acquittal, but is silent with regard to opposition by a codefendant. Broomfield v. State, 264 Ga. 145, 442 S.E.2d 242 (1994).

Motion addresses sufficiency of evidence. — Motion for directed verdict of acquittal under O.C.G.A. § 17-9-1 addresses the sufficiency of the evidence, not the sufficiency of the underlying accusation. Echols v. State, 187 Ga. App. 870, 371 S.E.2d 682 (1988).

Since the state's evidence authorizes conviction, the evidence cannot be found to demand a verdict of acquittal. Milner v. State, 159 Ga. App. 887, 285 S.E.2d 602 (1981).

General Consideration (Cont'd)

Directed verdict proper only if acquittal is only finding possible. — Motion for a judgment notwithstanding the verdict may be made only after a proper and timely motion for a directed verdict has been made. However, the trial judge in a criminal case may direct a verdict only if, after all the state's evidence is in, a verdict of acquittal is the only legal finding possible. Summers v. State, 99 Ga. App. 183, 108 S.E.2d 140 (1959).

It is only when evidence demands verdict of not guilty that it is error for trial court to refuse motion for directed verdict of acquittal. Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981).

Motion for directed verdict should be granted only if there is no conflict in evidence and the evidence demands a verdict of acquittal as a matter of law. Zuber v. State, 248 Ga. 314, 282 S.E.2d 900 (1981); Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888, cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1988); Grier v. State, 198 Ga. App. 840, 403 S.E.2d 857 (1991); Storey v. State, 205 Ga. App. 610, 422 S.E.2d 879, cert. denied, 205 Ga. App. 901, 422 S.E.2d 879 (1992).

If there is no conflict in the evidence and a verdict of acquittal is demanded as a matter of law, it is error for the trial court to refuse to direct a verdict of acquittal. Poole v. State, 159 Ga. App. 792, 285 S.E.2d 205 (1981).

Trial court is authorized to take the case from the jury and direct a verdict of acquittal if the state clearly fails to meet the state's burden. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54 (1983).

Directed verdict of acquittal is authorized only if there is no evidence to support a verdict to the contrary. Lane v. State, 177 Ga. App. 553, 340 S.E.2d 228 (1986).

Directed verdict of acquittal is authorized only if there is no evidence. Bradley v. State, 180 Ga. App. 386, 349 S.E.2d 263 (1986).

Directed verdict of acquittal will lie only if there is no evidence to support a contrary verdict. Hamm v. State, 187 Ga. App. 318, 370 S.E.2d 158, cert. denied, 187 Ga. App. 907, 370 S.E.2d 158 (1988).

Directed verdict of acquittal is authorized only if there is no evidence to support a verdict to the contrary. Mathis v. State, 204 Ga. App. 896, 420 S.E.2d 788, cert. denied, 204 Ga. App. 922, 420 S.E.2d 788 (1992); Gude v. State, 213 Ga. App. 573, 445 S.E.2d 355 (1994).

Directed verdict was moot. — Because the jury acquitted the defendant of murder but rendered convictions on the lesser included offenses of aggravated assault and kidnapping, a directed verdict on the murder counts was moot. Reagan v. State, 281 Ga. App. 708, 637 S.E.2d 113 (2006).

Any error in the trial court's failure to grant a defendant's motion for a directed verdict was harmless because an acquittal rendered the motion moot; pretermitting whether the trial court erred in denying the defendant's motion for a directed verdict, the jury found the defendant not guilty. Brown v. State, 299 Ga. App. 782, 683 S.E.2d 874 (2009).

Because the defendant was not convicted on the statutory-rape charge but was, instead, found guilty of attempted statutory rape as a lesser-included offense, the issue of whether the trial court erred in denying the defendant's motion for directed verdict of acquittal as to the statutory-rape charge was moot. Judice v. State, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

Defendant's complaint that the trial court erred in denying the defendant's motion for a directed verdict of acquittal as to the offense of forcible rape was rendered moot because the defendant was not found guilty of that offense. Beaudoin v. State, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Directed verdict unwarranted in bench trial. — In a bench trial, a trial court cannot direct a verdict of acquittal because there is no verdict in a bench trial. Sistrunk v. State, 287 Ga. App. 39, 651 S.E.2d 350 (2007).

Contesting sufficiency of indictment. — Motion for directed verdict of acquittal is not a proper way to contest the sufficiency of an indictment. Williams v. State, 162 Ga. App. 350, 291 S.E.2d 425 (1982); Tibbs v. State, 211 Ga. App. 250, 438 S.E.2d 706 (1993).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient evidence that the crimes for which the defendant was charged, aggravated assault, making terroristic threats, and cruelty to children in the third degree, were committed on the date alleged in the indictment because there was sufficient evidence to support the allegations of the indictment; the exact date of the crimes was not a material allegation of the indictment because the exact date was not an essential element with respect to any of the charged offenses, and the date of the crimes proved at trial was prior to the return of the indictment and within the limitation periods for the crimes. Coats v. State, 303 Ga. App. 818, 695 S.E.2d 285 (2010), overruled on other grounds by McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

Variance in indictment insufficient. — In a prosecution for burglary, because the variance between the indictment and the proof presented at trial did not misinform or mislead the defendant in any manner that resulted in surprise or impaired a defense, and the defendant could not be subjected to another prosecution for the same offense, the alleged variance was not fatal; as a result, the trial court did not err in denying the defendant's motion for a directed verdict. Chambers v. State, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

Denial of directed verdict as to one charge after defendant convicted on another. — After the defendant is convicted of theft by taking only, and the evidence is sufficient to support the conviction, there is no harm in the trial court's denial of the defendant's motion for directed verdict on an armed robbery charge since a prosecution for theft by taking would still be permissible. Dickerson v. State, 151 Ga. App. 429, 260 S.E.2d 535 (1979).

Reasons for mistrial did not require acquittal on double jeopardy grounds. — After a mistrial was declared due to the prosecutor's improper comments during closing, the trial court properly denied the defendant's motion for acquittal and discharge pursuant to O.C.G.A. § 17-9-1 as the prosecutor did not intend to subvert the protections afforded by the Double Jeopardy Clause, at Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5 by referring to the defendant's financial status due to discussions that occurred on that issue, although the prosecutor later realized that such discussions were held outside of the presence of the jury; the defendant failed to make the requisite showing of a purposeful subversion of double jeopardy, nor did the defendant show an improper motive, a benefit to the state to retry the case, or conduct that gave rise to a presumption of unlawful intent. Mathis v. State, 276 Ga. App. 587, 623 S.E.2d 674 (2005).

Non-prejudicial Brady violation did not require directed verdict. — Trial court did not err in denying a motion for a directed verdict pursuant to O.C.G.A. § 17-9-1 when the state's failure to turn over an audiotape of a controlled undercover drug transaction that the defendant was involved in, due to the mistaken destruction of the tape, was not shown to have caused the defendant the kind of prejudice that undermined confidence in the outcome of the trial or that created a reasonable doubt of guilt which did not otherwise exist. Blackwood v. State, 277 Ga. App. 870, 627 S.E.2d 907 (2006).

Cited in Carter v. State, 227 Ga. 788, 183 S.E.2d 392 (1971); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971); McKenzey v. State, 125 Ga. App. 508, 188 S.E.2d 116 (1972); Chambers v. State, 127 Ga. App. 196, 192 S.E.2d 916 (1972); Slocum v. State, 230 Ga. 762, 199 S.E.2d 202 (1973); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973); Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); Willingham v. State, 131 Ga. App. 851, 207 S.E.2d 249 (1974); Carlile v. State, 132 Ga. App. 787, 209 S.E.2d 241 (1974); Phillips v. State, 133 Ga. App. 461, 211 S.E.2d 411 (1974); Murray v. State, 135 Ga. App. 264, 217 S.E.2d 293 (1975); Cunningham v. State, 235 Ga. 126, 218 S.E.2d 854 (1975); Welch v. State, 235 Ga. 243, 219 S.E.2d 151 (1975); Johnson v. State, 235 Ga. 486, 220 S.E.2d 448 (1975); Kennedy v. State, 136 Ga. App. 305, 220 S.E.2d 788 (1975); Campbell v. State, 136

General Consideration (Cont'd)

Ga. App. 338, 221 S.E.2d 212 (1975); Bennett v. State, 136 Ga. App. 806, 222 S.E.2d 207 (1975); Van Voltenburg v. State, 138 Ga. App. 628, 227 S.E.2d 451 (1976); Birks v. State, 237 Ga. 861, 230 S.E.2d 294 (1976); Selph v. State, 142 Ga. App. 26, 234 S.E.2d 831 (1977); Phillips v. State, 238 Ga. 632, 235 S.E.2d 12 (1977); Glass v. State, 239 Ga. 78, 235 S.E.2d 513 (1977); Williamson v. State, 142 Ga. App. 177, 235 S.E.2d 643 (1977); Rutledge v. State, 142 Ga. App. 399, 236 S.E.2d 143 (1977); Bowen v. State, 239 Ga. 517, 238 S.E.2d 62 (1977); Hall v. State, 143 Ga. App. 706, 240 S.E.2d 125 (1977); Taylor v. State, 144 Ga. App. 534, 241 S.E.2d 590 (1978); Bowler v. State, 145 Ga. App. 633, 244 S.E.2d 142 (1978); Collins v. State, 146 Ga. App. 857, 247 S.E.2d 602 (1978); McCane v. State, 147 Ga. App. 730, 250 S.E.2d 181 (1978); Sleister v. State, 148 Ga. App. 296, 251 S.E.2d 152 (1978); Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978); Long v. State, 150 Ga. App. 796, 258 S.E.2d 603 (1979); Hood v. State, 157 Ga. App. 282, 277 S.E.2d 261 (1981); Heath v. State, 159 Ga. App. 17, 282 S.E.2d 673 (1981); Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981); Felchlin v. State, 159 Ga. App. 120, 282 S.E.2d 743 (1981); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Jones v. State, 159 Ga. App. 704, 285 S.E.2d 45 (1981); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Baxter v. State, 160 Ga. App. 181, 286 S.E.2d 460 (1981); Nelson v. State, 160 Ga. App. 168, 286 S.E.2d 504 (1981); Jones v. State, 160 Ga. App. 209, 286 S.E.2d 764 (1981); Whitehead v. State, 160 Ga. App. 644, 287 S.E.2d 648 (1981); Gaither v. State, 160 Ga. App. 705, 288 S.E.2d 18 (1981); Allums v. State, 161 Ga. App. 842, 288 S.E.2d 783 (1982); Ingram v. State, 161 Ga. App. 5, 288 S.E.2d 842 (1982); Brown v. State, 161 Ga. App. 55, 289 S.E.2d 9 (1982); Paulk v. State, 161 Ga. App. 89, 289 S.E.2d 257 (1982); Biggers v. State, 162 Ga. App. 163, 290 S.E.2d 159 (1982); Griner v. State, 162 Ga. App. 207, 291 S.E.2d 76 (1982); Henderson v. State, 162 Ga. App. 320, 292 S.E.2d 77 (1982); James v. State, 162 Ga. App. 490, 292 S.E.2d 91 (1982); Lingold v. State, 162 Ga. App. 486, 292 S.E.2d 193 (1982); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982); Storey v. State, 162 Ga. App. 763, 292 S.E.2d 483 (1982); Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360 (1982); Morris v. State, 163 Ga. App. 118, 293 S.E.2d 866 (1982); Sherrell v. State, 163 Ga. App. 345, 294 S.E.2d 559 (1982); Salter v. State, 163 Ga. App. 655, 294 S.E.2d 612 (1982); Bernard v. State, 163 Ga. App. 570, 295 S.E.2d 546 (1982); Slocumb v. State, 164 Ga. App. 114, 296 S.E.2d 409 (1982); Collins v. State, 164 Ga. App. 482, 297 S.E.2d 503 (1982); Williams v. State, 164 Ga. App. 562, 298 S.E.2d 282 (1982); Hill v. State, 164 Ga. App. 564, 298 S.E.2d 286 (1982); Graham v. State, 250 Ga. 473, 298 S.E.2d 499 (1983); Davenport v. State, 165 Ga. App. 299, 300 S.E.2d 549 (1983); Mease v. State, 165 Ga. App. 746, 302 S.E.2d 429 (1983); Wilbanks v. State, 165 Ga. App. 876, 303 S.E.2d 144 (1983); Pitts v. State, 166 Ga. App. 60, 303 S.E.2d 151 (1983); Estes v. State, 251 Ga. 347, 305 S.E.2d 778 (1983); Hubbard v. State, 167 Ga. App. 32, 305 S.E.2d 849 (1983); LaPan v. State, 167 Ga. App. 250, 305 S.E.2d 858 (1983); LaPann v. State, 167 Ga. App. 288, 306 S.E.2d 373 (1983); Keenan v. State, 168 Ga. App. 51, 308 S.E.2d 26 (1983); Lush v. State, 168 Ga. App. 740, 310 S.E.2d 287 (1983); Chester v. State, 169 Ga. App. 854, 315 S.E.2d 56 (1984); Padgett v. State, 170 Ga. App. 98, 316 S.E.2d 523 (1984); Moore v. State, 170 Ga. App. 698, 318 S.E.2d 172 (1984); H.R.G. v. State, 170 Ga. App. 776, 318 S.E.2d 210 (1984); Christmas v. State, 171 Ga. App. 4, 318 S.E.2d 682 (1984); Weems v. State, 172 Ga. App. 401, 323 S.E.2d 272 (1984); Mullinax v. State, 172 Ga. App. 601, 323 S.E.2d 897 (1984); State v. Williams, 172 Ga. App. 708, 324 S.E.2d 557 (1984); Houck v. State, 173 Ga. App. 388, 326 S.E.2d 567 (1985); Hamby v. State, 173 Ga. App. 750, 328 S.E.2d 224 (1985); Anderson v. State, 254 Ga. 470, 330 S.E.2d 592 (1985); Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731 (1985); Jones v. State, 174 Ga. App. 783, 331 S.E.2d 633 (1985); Green v. State, 175 Ga. App. 92, 332 S.E.2d 385 (1985); Thompson v. State, 175 Ga. App. 645, 334 S.E.2d 312 (1985); Collins v. State, 176 Ga. App. 634, 337 S.E.2d 415 (1985);

Smith v. State, 178 Ga. App. 300, 342 S.E.2d 769 (1986); Battle v. State, 178 Ga. App. 655, 344 S.E.2d 477 (1986); Hamilton v. State, 179 Ga. App. 434, 346 S.E.2d 881 (1986); Williams v. State, 181 Ga. App. 49, 351 S.E.2d 207 (1986); Russell v. State, 181 Ga. App. 665, 353 S.E.2d 565 (1987); Noeske v. State, 181 Ga. App. 778, 353 S.E.2d 635 (1987); Payne v. State, 184 Ga. App. 366, 361 S.E.2d 666 (1987); Johnson v. State, 185 Ga. App. 167, 363 S.E.2d 773 (1987); Arnold v. State, 191 Ga. App. 436, 382 S.E.2d 174 (1989); Jenkins v. State, 191 Ga. App. 546, 382 S.E.2d 389 (1989); Oglesby v. State, 192 Ga. App. 165, 384 S.E.2d 192 (1989); Hood v. State, 193 Ga. App. 701, 389 S.E.2d 264 (1989); Ross v. State, 194 Ga. App. 285, 390 S.E.2d 429 (1990); Williams v. State, 195 Ga. App. 422, 394 S.E.2d 112 (1990); Anderson v. State, 195 Ga. App. 673, 394 S.E.2d 607 (1990); Kilgore v. State, 195 Ga. App. 884, 395 S.E.2d 337 (1990); Irby v. State, 260 Ga. 401, 396 S.E.2d 210 (1990); Clark v. State, 197 Ga. App. 318, 398 S.E.2d 377 (1990); Randolph v. State, 198 Ga. App. 291, 401 S.E.2d 310 (1991); Ranson v. State, 198 Ga. App. 659, 402 S.E.2d 740; Tyler v. State, 198 Ga. App. 685, 402 S.E.2d 780 (1991); Nelson v. State, 199 Ga. App. 487, 405 S.E.2d 310 (1991); Marshall v. State, 199 Ga. App. 678, 405 S.E.2d 893 (1991); Jones v. State, 201 Ga. App. 102, 410 S.E.2d 199 (1991); Wright v. State, 205 Ga. App. 149, 421 S.E.2d 331 (1992); White v. State, 263 Ga. 94, 428 S.E.2d 789 (1993); Tucker v. State, 208 Ga. App. 224, 430 S.E.2d 84 (1993); White v. State, 208 Ga. App. 885, 432 S.E.2d 562 (1993); Moss v. State, 209 Ga. App. 59, 432 S.E.2d 825 (1993); Harden v. State, 210 Ga. App. 673, 436 S.E.2d 756 (1993); Riden v. State, 213 Ga. App. 17, 443 S.E.2d 865 (1994); Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997); Pittman v. State, 230 Ga. App. 799, 498 S.E.2d 309 (1998); Anderson v. State, 231 Ga. App. 807, 499 S.E.2d 717 (1998); Oliver v. State, 232 Ga. App. 816, 503 S.E.2d 28 (1998); Johnson v. State, 234 Ga. App. 218, 507 S.E.2d 13 (1998); Morrow v. State, 272 Ga. 691, 532 S.E.2d 78 (2000); Watson v. State, 243 Ga. App. 636, 534 S.E.2d 93 (2000); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000); Jackson v. State, 247 Ga. App. 273, 543 S.E.2d 770 (2000); Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001); Ginn v. State, 251 Ga. App. 159, 553 S.E.2d 839 (2001); Nel v. State, 252 Ga. App. 761, 557 S.E.2d 44 (2001); Weston v. State, 276 Ga. 680, 580 S.E.2d 204 (2003); Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533; Lee v. State, 281 Ga. App. 479, 636 S.E.2d 547 (2006); Lyons v. State, 282 Ga. 588, 652 S.E.2d 525 (2007); Christian v. State, 297 Ga. App. 596, 677 S.E.2d 767 (2009); Williamson v. State, 308 Ga. App. 473, 708 S.E.2d 57 (2011); Boyd v. State, 306 Ga. 204, 830 S.E.2d 160 (2019).

Evidence

Circumstantial evidence sufficient to convict. — Since the evidence introduced during the trial was sufficient to convict the appellant on circumstantial evidence and did not demand a verdict of acquittal, the trial judge properly overruled the motion for directed verdict at the end of the state's case. Sutton v. State, 237 Ga. 418, 228 S.E.2d 815 (1976); Connell v. State, 163 Ga. App. 53, 293 S.E.2d 367 (1982).

In a trial for aggravated assault, although there were certain discrepancies in the evidence and a portion of the evidence was circumstantial rather than direct and there was direct evidence pointing to the same conclusion as the circumstantial evidence, the quantum of evidence in the defendant's favor fell far short of that necessary to "demand" a verdict of acquittal. Cobb v. State, 195 Ga. App. 429, 393 S.E.2d 723 (1990).

Trial court properly denied a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a) since there was ample circumstantial evidence under former O.C.G.A. § 24-4-6 (see O.C.G.A. § 24-14-6) for the jury to have found that the defendant was guilty of aggravated battery, in violation of O.C.G.A. § 16-5-24(a); the defendant's claim that the defendant tripped and fell while carrying the infant son was contradicted by expert testimony that the injury to the infant's brain was caused by Shaken Baby Syndrome. Lindo v. State, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Given that the state's evidence showed

Evidence (Cont'd)

that the defendant essentially admitted to being drunk to an investigating officer, as a result of an attempt to drive the car which was lodged on a curb, and the officer found an open beer container inside the car, although circumstantial, that evidence was sufficient to support a finding that the defendant was driving the car while intoxicated; hence, the defendant was not entitled to a directed verdict of acquittal. Moore v. State, 281 Ga. App. 141, 635 S.E.2d 408 (2006).

Jury decides if circumstantial evidence sufficient. — Upon motion for directed verdicts of acquittal if there is any evidence of guilt, it is for the jury to decide whether that evidence, circumstantial though it may be, is sufficient to warrant a conviction. Castillo v. State, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

No conflict in evidence. — Defendant is entitled to a directed verdict only if there is no conflict in the evidence, and the evidence introduced, with all reasonable deductions and inferences therefrom, demands a verdict of not guilty. Benjein v. State, 158 Ga. App. 794, 282 S.E.2d 391 (1981); Howard v. State, 165 Ga. App. 555, 301 S.E.2d 910 (1983); Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

Only if there is no conflict in the evidence and a verdict of acquittal is demanded as a matter of law is it error for the trial court to refuse to direct a verdict of acquittal. Wisecup v. State, 157 Ga. App. 853, 278 S.E.2d 682 (1981).

Conflicts in evidence. — If there are significant conflicts in the evidence regarding material issues, it cannot be said as a matter of law that the evidence, together with reasonable inferences and deductions therefrom, "demands" a verdict of acquittal. Elzey v. State, 168 Ga. App. 633, 309 S.E.2d 906 (1983).

Because a conflict existed in the evidence presented at the defendants' cruelty to children trial arising from the testimony of one pediatrician who testified that the defendants' child's nutritional deprivation could have resulted from a reflux condition, and another pediatrician testified that the child's reflux condition could not possibly have caused the victim's malnutrition, a directed verdict was inappropriate. Allen v. State, 278 Ga. App. 292, 628 S.E.2d 717 (2006).

Because sufficient evidence was presented that a juvenile was a party to the crime of entering an automobile with the intent to commit a theft or felony, and the evidence was corroborated by a police officer who questioned the juvenile's cohort, an adjudication based on the juvenile's commission of the act was upheld on appeal; thus, given that the resolution of conflicts in the evidence and credibility of the witnesses fell within the province of the trial court, the juvenile's motion for a directed verdict was properly denied. In the Interest of B.D., 287 Ga. App. 185, 651 S.E.2d 129 (2007).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient corroboration of an accomplice's testimony because there was no violation of former O.C.G.A. § 24-4-8 (see O.C.G.A. § 24-14-8); the testimony of the victim's fiancée and the accomplice's friend was sufficient to corroborate the accomplice's testimony directly identifying the defendant as the shooter, the physical description of the shooter that the fiancée provided to the police fit the defendant, and the fiancée's description of the shooter's clothes was consistent with the accomplice's trial testimony about what the defendant was wearing on the day of the incident. Johnson v. State, 288 Ga. 803, 708 S.E.2d 331 (2011).

Directed verdict in juvenile delinquency hearing. — Trial court erred in denying the defendant juvenile's motion for directed verdict as to aggravated assault and aggravated battery on the ground that the evidence established that the defendant was acting in self-defense because the evidence was sufficient for the juvenile court to find that the defendant exceeded any reasonable self-defense when the juvenile followed the victim out of a train and struck the victim. In the Interest of J. W., 306 Ga. App. 339, 702 S.E.2d 649 (2010).

Inconsistencies in evidence insufficient for direct verdict of acquittal. — Because sufficient evidence was supplied via the testimony from the child victim,

and the witnesses who corroborated the child's testimony, to support the defendant's aggravated sexual battery and child molestation convictions, despite any alleged inconsistencies, the convictions were upheld as was the denial of the defendant's motions for an acquittal and a new trial. Lilly v. State, 285 Ga. App. 427, 646 S.E.2d 512 (2007).

Issues which are jury questions. — Whether a defendant impeded an officer in carrying out the officer's lawful duties is usually a jury question, except if there is no conflict in the evidence and all reasonable deductions and inferences therefrom demand a verdict of acquittal. Wagner v. State, 206 Ga. App. 180, 424 S.E.2d 861 (1992).

In a joint prosecution, the trial court did not err in denying the first defendant's motion for a directed verdict of acquittal because of deficiencies in the victims' identifications and inconsistencies in the state's evidence, as it was within the jury's province to weigh the evidence and determine witness credibility; moreover, even if there were inconsistencies in the evidence, the jury as the trier of fact was authorized to find those identifications to be credible. Jones v. State, 285 Ga. App. 121, 645 S.E.2d 608 (2007).

Trial court did not err in denying the defendant's motion for an acquittal as the question of whether or not the defendant had the requisite intent to steal was for the jury to decide. Dudley v. State, 287 Ga. App. 794, 652 S.E.2d 840 (2007), cert. denied, No. S08C0319, 2008 Ga. LEXIS 168 (Ga. 2008).

Jury's role to assess conflicting evidence. — Defendant's motion for a directed verdict of acquittal in a trial for theft by taking a motor vehicle was properly denied because the jury properly assessed the evidence, although conflicting, and found each fact necessary to make out the state's case; trial counsel failed to preserve error regarding exclusion of a portion of the victim's videotaped interview; and a photographic lineup included people of the same general age and race as the defendant and was not impermissibly suggestive. Sherls v. State, 272 Ga. App. 152, 611 S.E.2d 780 (2005).

Because contradictions and uncertainties in the testimony did not render the evidence against the defendant insufficient but were ultimately for the jury to decide, and the victim's testimony that the gun used to commit the crime was not actually pointed at the victim did not mean that the intruders, including the defendant, did not commit an armed robbery since the evidence presented authorized the jury to find that the defendant participated in the committed crimes and was sufficient to support the defendant's armed robbery, false imprisonment, and possession of a firearm during the commission of a felony convictions; thus, the trial court did not err in denying the defendant a motion for a directed verdict of acquittal. Sheely v. State, 287 Ga. App. 92, 650 S.E.2d 762 (2007).

Initial chain of custody discrepancy did not authorize directed verdict. — Trial court did not abuse the court's discretion in denying the defendant's motion for a directed verdict and in denying the defendant's motion for a new trial after the trial court questioned the state's forensic scientist as to the scientist's findings and permitted the state to reopen the evidence to establish the chain of custody of the drugs to the crime laboratory; the trial court did not communicate an opinion as to the witness or the evidence, and defense counsel identified the failure to establish a chain of custody in the defendant's motion for a directed verdict, although the trial court identified what was missing from the chain of custody. Bramblett v. State, 259 Ga. App. 427, 577 S.E.2d 100 (2003).

Because the state met the state's burden in establishing a chain of custody by sufficiently demonstrating that the evidence seized was the same as that which was admitted at trial, the defendant was not entitled to a directed verdict on this ground. Cook v. State, 287 Ga. App. 81, 650 S.E.2d 757 (2007), cert. denied, No. S07C1874, 2008 Ga. LEXIS 127 (Ga. 2008).

Directed verdict not warranted if evidence on mental ability in dispute. — Defendant was not entitled to a directed verdict on the issue of the defendant's mental retardation since the evidence regarding the defendant's mental

Evidence (Cont'd)

ability was disputed and conflicting. Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502, cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

Distinction between evidence requiring charge as to entrapment and evidence requiring directed verdict. — Distinction must be made between evidence which raises a defense of entrapment and which would require that the jury be charged as to the law of entrapment and the burden of proof thereon, and evidence which under the standards set out in O.C.G.A. § 17-9-1 would demand a finding of entrapment and, therefore, a directed verdict of acquittal. Childs v. State, 158 Ga. App. 376, 280 S.E.2d 401 (1981); McNorton v. State, 159 Ga. App. 604, 284 S.E.2d 107 (1981); Parker v. State, 190 Ga. App. 35, 378 S.E.2d 157 (1989).

Conflict on noncontrolling point insufficient for denial of motion. — Fact that there may be some conflict in evidence on a noncontrolling point is not a sufficient conflict to justify the denial of the defendant's motion for a directed verdict of acquittal in cases when the evidence is insufficient as a matter of law to authorize a conviction. Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686 (1975).

Evidence insufficient to require directed verdict based on self-defense. — Defendant claimed to have acted in self-defense after the victim fired at the defendant, but there was a conflict in the evidence as to the point in time in which the danger posed by the deceased passed; thus, the evidence did not demand a verdict of acquittal. Murff v. State, 165 Ga. App. 808, 302 S.E.2d 697, rev'd on other grounds, 251 Ga. 478, 306 S.E.2d 267 (1983).

When defendant's testimony as to entrapment will support directed verdict. — Defendant's testimony as to entrapment, even if unrebutted by any other witness to the alleged misconduct, will not entitle the defendant to a directed verdict of acquittal unless that unrebutted testimony, together with all reasonable deductions and inferences therefrom, demands a finding that entrapment occurred. McNorton v. State, 159 Ga. App. 604, 284 S.E.2d 107 (1981); Caithaml v. State, 163 Ga. App. 429, 294 S.E.2d 674 (1982); Worley v. State, 185 Ga. App. 528, 364 S.E.2d 897 (1988); Newt v. State, 200 Ga. App. 262, 407 S.E.2d 487 (1991).

Rule that the state's failure to produce a confidential informant to rebut a defendant's entrapment testimony requires a directed verdict of acquittal did not apply after an undercover investigator testified that the informant had nothing to do with setting up the sale of the pound of cocaine, and in fact did not know the sale was going on. Armand v. State, 164 Ga. App. 350, 296 S.E.2d 734 (1982).

Since the evidence did not demand a finding of entrapment, the trial court properly denied the defendant's motion for a directed verdict of acquittal. Rapier v. State, 245 Ga. App. 211, 535 S.E.2d 860 (2000).

Evidence insufficient to require directed verdict based on entrapment. — Evidence did not authorize the granting of a directed verdict since, other than the defendant's own uncorroborated testimony, the defendant offered no evidence whatsoever in refutation of that presented by the prosecution and the entrapment defense which the defendant attempted to raise was likewise unsupported by any evidence other than the defendant's own testimony that the informant had a reputation for violence, that the informant had uttered a threat during appellant's negotiations with the Georgia Bureau of Investigation agent, and that the defendant had assumed that a bulge the defendant allegedly observed beneath the agent's clothing was a gun, and, the testimony of the agent, who was present during all stages of the transaction, was sufficient to rebut the defense of entrapment and to create an issue of fact for the jury. Meade v. State, 165 Ga. App. 556, 301 S.E.2d 912 (1983).

Trial court did not err in convicting the defendant of the sale of cocaine and in denying the defendant's motion for a directed verdict of acquittal because the jury was authorized to find that the state's evidence rebutted the defendant's case of entrapment beyond a reasonable doubt since the uncontroverted testimony of the

informant and the surveillance recording showed that the defendant had the previously established ability to purchase cocaine from the drug dealer and that the defendant willingly participated in the drug deal; there is no entrapment when the informant merely furnishes an opportunity to a defendant who is ready to commit the offense. Jackson v. State, 305 Ga. App. 591, 699 S.E.2d 884 (2010).

Defendant must show prejudice from trial delay to prevail on directed verdict motion. — After weighing the factors considered in determining whether the defendant's right to a speedy trial was violated, the appeals court upheld the denial of the defendant's plea in bar and demand for an acquittal as the defendant failed to show that any prejudice resulted from the delay in bringing the case to trial. Lackey v. State, 283 Ga. App. 139, 640 S.E.2d 717 (2006).

Three year and two month delay was fatal. — Trial court abused the court's discretion by denying the defendant's motions for discharge and acquittal because nothing in the trial court's order showed that the court considered whether the delay before trial was uncommonly long given the circumstances of the case, the pretrial delay of three years and two months greatly exceeded the amount of time necessary to establish a presumption of prejudice, the trial court erred in failing to assign blame for the delay, and the prejudice to the defendant was legally significant; the trial court's finding that the defendant's anxiety was the same as every other defendant awaiting trial was not supported by the evidence because the defendant's anxiety included losing custody of a small child and having the state threaten to take a different child away from the defendant at the time of that child's birth. Teasley v. State, 307 Ga. App. 153, 704 S.E.2d 248 (2010).

No fatal variance in evidence and accusations. — Trial court correctly denied the defendant's motion for a directed verdict of acquittal based on a variance between the allegations and proof as to the date of the offense. Frymyer v. State, 179 Ga. App. 391, 346 S.E.2d 573 (1986).

For construction purposes, the state's act of merely tracking the language of O.C.G.A. § 16-10-24(a), which used the masculine pronoun "his" to include the feminine gender, did not result in a fatal variance between the evidence at trial and the allegations of the accusation in a case involving a female officer, entitling both defendants to a directed verdict. Curtis v. State, 285 Ga. App. 298, 645 S.E.2d 705 (2007), overruled on other grounds by McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

Trial court did not err in denying a defendant's motion for directed verdict of acquittal, which alleged that the evidence fatally varied from the allegations in the accusation as: (1) the defendant failed to raise a challenge to the sufficiency of an indictment through a special demurrer; and (2) the defendant admitted to possessing, endorsing, and uttering a check belonging to the victim. Tucker v. State, 283 Ga. App. 428, 641 S.E.2d 653 (2007).

Evidence did not demand verdict of acquittal. See Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984); Spence v. State, 252 Ga. 338, 313 S.E.2d 475 (1984); Brooks v. State, 169 Ga. App. 543, 314 S.E.2d 115 (1984); Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987); Rose v. State, 195 Ga. App. 399, 393 S.E.2d 459 (1990); Funderburk v. State, 195 Ga. App. 441, 393 S.E.2d 727 (1990); Gray v. State, 207 Ga. App. 648, 428 S.E.2d 663 (1993); Felder v. State, 264 Ga. App. 583, 591 S.E.2d 471 (2003).

When a conviction is upheld on appeal because the evidence is such that a rational trier of fact could find appellant's guilt beyond a reasonable doubt, it cannot possibly be said the evidence demanded a verdict of acquittal. Miller v. State, 201 Ga. App. 108, 410 S.E.2d 328 (1991).

Given evidence that the defendant (1) knowingly provided the officer with a false name and date of birth, (2) failed to provide written identification when asked to do so, and (3) refused to respond when the police repeatedly knocked and telephoned, all of elements of an obstruction charge were shown, thus supporting the denial of a motion for a directed verdict of acquittal. Williams v. State, 289 Ga. App. 402, 657 S.E.2d 556 (2008).

Trial court did not err in denying a

Evidence (Cont'd)

defendant's motion for a directed verdict of acquittal on a charge of attempted burglary in violation of O.C.G.A. §§ 16-4-1 and 16-7-1(a) because the evidence was sufficient to authorize the jury to conclude that the defendant took a substantial step toward entering an owner's apartment to commit a felony; the defendant's inculpatory statement that the defendant intended to enter the owner's apartment to get money was direct evidence of the defendant's guilt, and this statement, combined with a witness's testimony that the witness heard the defendant and the defendant's brother discuss entering the owner's apartment through the window, saw them on the owner's porch, and then heard the window breaking, provided ample evidence to support the defendant's conviction of attempted burglary beyond a reasonable doubt. Durham v. State, 295 Ga. App. 734, 673 S.E.2d 80 (2009).

There was sufficient evidence to support a defendant's convictions on two counts of armed robbery, and the trial court did not err by failing to grant the defendant's motion for a directed verdict, based on both victims' identification of the defendant; the defendant being found in a nearby location to the truck stop where the attacks occurred walking rapidly away; and the defendant being found with exactly the amount of cash taken from one victim. Burden v. State, 296 Ga. App. 441, 674 S.E.2d 668 (2009).

Trial court did not err in denying a defendant's motion for a new trial or the defendant's motion for a directed verdict because the evidence was sufficient for the trial court to find the defendant guilty of burglary in violation of O.C.G.A. § 16-7-1(a) beyond a reasonable doubt when the back window of a home was broken and police found the defendant hiding in a closet under a pile of clothing. Williams v. State, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal because the evidence was sufficient to authorize the defendant's convictions for attempted armed robbery, O.C.G.A. § 16-4-1, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), given the victim's eyewitness testimony that the defendant approached the eyewitness with a handgun while attempting to obtain money from the cash register of a store. Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 (see O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed the crimes for which the defendant was convicted; the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the coconspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Because there was sufficient evidence to support the jury's verdict that the defendant was guilty of criminal damage to property in the second degree, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal; the owner of the truck the defendant damaged testified that the owner paid to have the broken windows repaired and that the owner paid the amount shown on the repair bill, and the bill and photographs of the damages to the vehicle were introduced into evidence. Elsasser v. State, 313 Ga. App. 661, 722 S.E.2d 327 (2011), cert. denied, No. S12C0949, 2012 Ga. LEXIS 555 (Ga. 2012).

Trial court did not abuse the court's discretion by denying the defendant's motion for a directed verdict on the ground that there was no competent evidence to corroborate the codefendant's testimony because the codefendant's testimony was corroborated in the wealth of similar transaction evidence presented to the jury. Alatise v. State, 291 Ga. 428, 728 S.E.2d 592 (2012).

Because the evidence was sufficient to sustain the defendant's convictions and to establish venue, there was no merit to the

defendant's claim that trial counsel was ineffective for failing to move for a directed verdict of acquittal on those issues. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

While the co-murderer's statement to police did make up a significant portion of the testimony connecting the defendant to the murders, it was not the only evidence against the defendant as cell phone evidence indicated the defendant was near the victims' home near the time the crimes took place and direct testimony established that the defendant recruited at least one participant in the robbery scheme that resulted in the murders. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899 (2017).

Cited in Klausen v. State, 294 Ga. App. 463, 669 S.E.2d 460 (2008).

Application

Mere presence where the crime is being committed is insufficient for conviction. — Mere presence of one where a crime is being committed without any evidence to further show participation in the crime, directly or indirectly, is insufficient upon which to base a conviction. Therefore, in such case a defense motion for directed verdict should be granted. Simmons v. State, 149 Ga. App. 589, 254 S.E.2d 907 (1979).

Directed verdict not required if sufficient evidence of lesser included offense. — Trial court did not err in denying the defendant's motion for a directed verdict since sufficient evidence was adduced to convict the defendant for the lesser included offense of voluntary manslaughter. Pierce v. State, 209 Ga. App. 366, 433 S.E.2d 641 (1993).

Distinction between legally insufficient evidence and verdict against weight of evidence. — Trial court's review of the evidence under O.C.G.A. § 5-5-21 differs from the court's review of the evidence on a motion for a directed verdict under O.C.G.A. § 17-9-1. In the latter case, the trial court has a duty to grant a directed verdict of acquittal when there is no conflict in the evidence and it clearly demands a verdict of acquittal as a matter of law. Lavertu v. State, 325 Ga. App. 709, 754 S.E.2d 663 (2014).

Directed verdict in assault cases. — Trial court properly denied the defendant's motion for acquittal as a matter of law, pursuant to O.C.G.A. § 17-9-1, as the evidence was sufficient to support the defendant's conviction on four counts of assault, in violation of O.C.G.A. §§ 16-5-20 and 16-5-21(a)(2), as the defendant and the codefendant committed two home invasions, whereupon the victims therein were fearful, some were harmed, and during the incidents, the defendant held a night stick and instructed the victims to cooperate with the codefendant, who brandished a handgun. Moyer v. State, 275 Ga. App. 366, 620 S.E.2d 837 (2005), overruled on other grounds, Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Directed verdict in aggravated assault cases. — Trial court did not err in denying the defendant's motion for directed verdict of acquittal as direct evidence that the defendant fired at the victim and the defendant's own admission that the defendant fired at the victim was sufficient to submit the question of whether the defendant was guilty of aggravated assault to the jury; no error occurred pursuant to former O.C.G.A. § 24-4-6 (see O.C.G.A. § 24-14-6), involving a conviction based solely on circumstantial evidence, as the state offered more than circumstantial evidence to support the state's case against the defendant. Cobb v. State, 268 Ga. App. 66, 601 S.E.2d 443 (2004).

Trial court did not err in denying a codefendant's motion for a directed verdict of acquittal as to two aggravated assault charges given that sufficient evidence was presented that: (1) both the defendant and the codefendant, while armed, attempted to rob the victims; (2) off-duty police officers working as security officers identified the defendants; (3) an assault rifle and a sawed-off shotgun were fired at the police as both the defendants were pursued; and (4) the weapons were recovered after both the defendants were apprehended. Walker v. State, 281 Ga. App. 163, 635 S.E.2d 422 (2006).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal because there was ample evidence of the defendant's guilt of aggra-

Application (Cont'd)

vated assault in violation of O.C.G.A. § 16-5-21(a)(1) based on the defendant's act of firing two shots in the victim's direction, wounding the victim in the chest and leg. Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated assault with a deadly weapon against a bus driver, O.C.G.A. § 16-5-21(a)(2), because the bus driver testified that the driver did not feel free to drive away since the driver felt the driver's life was in danger; the driver testified that the driver chose not to drive away for fear that the defendant would shoot. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Directed verdict in aggravated assault and reckless conduct case. — Trial court properly denied the defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support the convictions for aggravated assault and reckless conduct, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-60(b), respectively; the defendant and the codefendants were involved in a physical altercation with two restaurant patrons, and a codefendant's testimony that the defendant retrieved a gun and shot the victim was sufficiently repeated by the testimony of other witnesses, who also connected the defendant with the shooting pursuant to the corroboration requirement in former O.C.G.A. § 24-4-8 (see O.C.G.A. § 24-14-8). Baker v. State, 273 Ga. App. 297, 614 S.E.2d 904 (2005).

Directed verdicts in aggravated assault and armed robbery cases. — Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt as required by former O.C.G.A. § 24-4-6 (see O.C.G.A. § 24-14-6). Jordan v. State, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

Directed verdict in aggravated assault with intent to rape cases. — Denial of a motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, was proper because the evidence was sufficient to support the defendant's conviction of aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21; defendant came to the home of the victim, who was a former girlfriend, and the victim claimed that the defendant physically and sexually assaulted her, causing multiple serious injuries and bruises. Goodall v. State, 277 Ga. App. 600, 627 S.E.2d 183 (2006).

Directed verdict in aggravated battery cases. — Because the defendant shot the victim in the buttocks, rendering the victim's rectum and a portion of the victim's colon useless for a period of time, the evidence sufficed to sustain an aggravated battery conviction under O.C.G.A. § 16-5-24(a); consequently, the trial court properly denied the defendant's motion for a directed verdict. Parham v. State, 270 Ga. App. 54, 606 S.E.2d 79 (2004).

Directed verdicts in aggravated sexual battery cases. — Aggravated sexual battery conviction was upheld on appeal as was the trial court's order denying the defendant a directed verdict of acquittal because: (1) the victim's testimony sufficiently demonstrated that the defendant put the defendant's hand inside her vaginal area; (2) the victim's testimony authorized the jury to conclude that the defendant penetrated the victim's sexual organ with a foreign object; (3) similar transaction evidence was properly admitted to prove the defendant's bent of mind and motive; (4) each similar transaction witness positively identified the defendant as the person who committed the independent act, and the proof of one of the incidents tended to prove the offense at trial, which also involved digital penetration in a hospital setting; and (5) three other similar transaction incidents, while not involving an actual touching, were properly admitted as evidence that the

defendant offered a female money or clothing in exchange for a sexual favor of some sort; finally, because the defendant failed to object that testimony from these witnesses was cumulative, the defendant waived this claim of error for purposes of appeal. Enurah v. State, 279 Ga. App. 883, 633 S.E.2d 52 (2006).

Directed verdict on aggravated sodomy charge. — Denial of a motion for directed verdict on a charge of aggravated sodomy was proper because the defendant and codefendant sexually assaulted three victims during an armed robbery, including one instance in which the defendant and the codefendant took turns raping one victim, and the aggravated sodomy was committed during the sexual assaults; the jury could reasonably find that the defendant and codefendant had a common criminal intent to commit the sexual assaults and the defendant could be found guilty of the act performed by the codefendant. Coley v. State, 272 Ga. App. 446, 612 S.E.2d 608 (2005).

Directed verdict in aggravated stalking cases. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to two aggravated stalking charges, despite claims that: (1) the state failed to prove the defendant acted for the purpose of harassing and intimidating the victim; and (2) the defendant lacked the requisite intent to commit the crimes; the former argument attacked the credibility of the witnesses, which the appeals court did not weigh, and, regarding the latter argument, the intention with which an act was committed was a jury question. Chatham v. State, 280 Ga. App. 695, 634 S.E.2d 856 (2006).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because evidence of the defendant's continuing unauthorized contacts with the victim and repeated violations of restraining orders established a pattern of harassing behavior; a permanent restraining order had been entered that prohibited the defendant from having any contact with the victim, but the defendant violated that order by sending a letter to the victim that caused the victim to fear for the victim's own family and that of the victim's family. Additionally, a directed verdict was also inappropriate when the evidence authorized the jury to find that venue in Lowndes County was properly established; the victim and the victim's family resided in Lowndes County, and the victim's mother testified that the defendant had sent the letter to their residence and that the letter was retrieved from the mailbox at their residence. Bowen v. State, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

Trial court did not err by denying the defendant's motion for a directed verdict because the jury was authorized to find the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a); the victim testified that the defendant had previously threatened the victim, the defendant had a history of violence against the victim, and the defendant made repeated phone calls and sent several text messages to the victim. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Directed verdicts in armed robbery cases. — Despite the defendant's assertion that the defendant only pretended to have a weapon while robbing a restaurant, the trial court did not err in denying the defendant's motions for a directed verdict of acquittal on charges of armed robbery in violation of O.C.G.A. § 16-8-41(a) and possession of a firearm during the commission of a felony as the victims testified that the defendant used something that felt and looked like a gun and one victim, the night manager, testified that the defendant threatened to "blow" that victim's head off if the victim did not open the safe; such testimony sufficiently showed that the defendant's actions created a reasonable apprehension on the part of the victims that an offensive weapon was being used. White v. State, 258 Ga. App. 546, 574 S.E.2d 629 (2002).

Trial court properly denied the defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1 because there was sufficient evidence to support the defendant's conviction of

Application (Cont'd)

armed robbery in violation of O.C.G.A. § 16-8-41; defendant and two others waited at a vacant house for a pizza delivery person, and upon arrival, the defendant held up a revolver and demanded the pizza. Oliver v. State, 270 Ga. App. 429, 606 S.E.2d 874 (2004).

Despite the defendant's contention on appeal that the state's evidence was insufficient, specifically, regarding the presence of a gun, given that the state presented sufficient evidence to support the jury's finding of a reasonable apprehension on the part of the victim that an offensive weapon was being used in an armed robbery, when coupled with the defendant's admission to possessing a gun at the time of the robbery, the defendant's armed robbery conviction was upheld; thus, the defendant was not entitled to a directed verdict of acquittal. Fluellen v. State, 284 Ga. App. 584, 644 S.E.2d 486 (2007).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of former O.C.G.A. § 24-4-8 (see O.C.G.A. § 24-14-8) since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757 (2011).

Directed verdict in armed robbery and aggravated assault cases. — Trial court properly denied the defendant's motion for a directed verdict on an armed robbery and aggravated assault charge as there was evidence that the defendant picked up a coin bag from a table in a laundry room, twice pointed a gun at the victim's neck, ordered the victim to kneel, demanded the victim's wallet and keys, and left the laundry room with the coin bag and the victim's keys. Kirk v. State, 271 Ga. App. 640, 610 S.E.2d 604 (2005).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal on the defendant's aggravated assault with intent to rob convictions because the jury was authorized to conclude that the defendant fired a gun at the victims to further a robbery, and the indictment did not charge the defendant with a specific intent to rob the victims but only with a general intent to rob; the defendant approached the victims, pointed a gun toward the head of one of the victims, and demanded money, and after robbing that victim, the defendant fled and fired several shots at the porch where the victims had been standing and at the victims once the victims began chasing the defendant. Johnson v. State, 304 Ga. App. 371, 696 S.E.2d 396 (2010).

Directed verdict in armed robbery and theft of a motor vehicle. — In a case wherein a defendant confessed that after killing the defendant's mother the defendant took cash and blank checks from the mother's purse and drove away in the mother's car, sufficient evidence existed to support the defendant's conviction for armed robbery and theft by taking a motor vehicle, in addition to the defendant's conviction for malice murder; as a result, the trial court did not err by denying the defendant's motion for a directed verdict of acquittal on the counts charging armed robbery and theft by taking a motor vehicle. Hester v. State, 282 Ga. 239, 647 S.E.2d 60 (2007).

Directed verdict in attempt to commit armed robbery cases. — In a criminal trial on a charge of criminal attempt to commit armed robbery, a trial court properly denied the defendant's motion for directed verdict; the criminal attempt under O.C.G.A. § 16-4-1 was committed when the defendant and the defendant's two coworkers obtained equipment, including guns and ammunition, in preparation for robbing a store, drove to the store, and were thereafter spotted by the police. Level v. State, 273 Ga. App. 601, 615 S.E.2d 640 (2005).

Directed verdict in attempted arson and aggravated assault case. — Denial of the defendant's motions for a directed verdict and judgment notwithstanding the verdict was proper as the evidence established the essential ele-

ments of attempted arson and aggravated assault; the evidence showed that the defendant poured gasoline near two ignition sources, a light bulb and hot water heater, in the crawlspace of his estranged girlfriend's house and then told the estranged girlfriend's adult children to light the water heater's pilot flame. McGraw v. State, 276 Ga. App. 607, 624 S.E.2d 232 (2005).

Directed verdict in burglary cases. — As the defendant assisted her husband in committing burglaries by not only driving with him to the scene of the crimes, but by serving as the getaway driver, the evidence sufficed to show that she was a party to her husband's crimes, and the denial of the defendant's motion for directed verdict was proper. Head v. State, 261 Ga. App. 185, 582 S.E.2d 164 (2003).

Trial court correctly denied the defendant's motion for a directed verdict on burglary charges since: (1) the evidence showed that property which was reported stolen from various residences was found at the house where the defendant was staying; (2) recent unexplained possession of that property was probative evidence of burglary; and (3) shoe prints made on the premises of two burglarized residences belonged to shoes owned by the defendant. Porter v. State, 264 Ga. App. 526, 591 S.E.2d 436 (2003).

Defendant's motion for directed verdict of acquittal was properly denied because evidence from independent sources sufficiently corroborated the accomplice's statements implicating the defendant in the burglary. The accomplice's statements were corroborated by the victim's testimony that the defendant saw the victim bring the shotguns inside the apartment, by the victim's wife's testimony that the defendant had seen the victims leave the victims' apartment, and by the apartment manager's testimony that the defendant had been standing outside the victims' apartment, along with the accomplice, during the time period when the crimes were committed. Stocks v. State, 268 Ga. App. 351, 601 S.E.2d 729 (2004).

Because the evidence presented by the state was sufficient to sustain the defendant's conviction for burglary, trial counsel's failure to move for a directed verdict did not constitute ineffective assistance. Brown v. State, 289 Ga. App. 297, 656 S.E.2d 582 (2008).

Trial court did not err in denying the defendant's motion for a directed verdict, which was based on the argument that the state's case relied too heavily on allegedly tainted evidence concerning the victims' pretrial identification of burglars, because at the time trial counsel moved for the directed verdict, the allegedly tainted identification evidence had been admitted without objection and, accordingly, the trial court properly considered that evidence in deciding the motion; even in the absence of testimony concerning the victims' pretrial identification of the defendant, there was sufficient evidence to support the defendant's conviction because the defendant and the codefendant matched the general description of the burglars that the victims gave to police, the defendants were seen walking a short distance from the scene, not long after the burglary occurred, at the time police first saw them, the codefendant was carrying a backpack stolen during the break-in, when the codefendant saw police, the codefendant immediately discarded the backpack, and a number of items stolen during the burglary were recovered from the front porch of the defendant's residence. Bell v. State, 306 Ga. App. 853, 703 S.E.2d 680 (2010).

Directed verdict for violating age prohibition for body piercing. — Denial of the defendant's motion for a directed verdict of acquittal was proper, in the defendant's conviction of piercing the body of a person under the age of 18, O.C.G.A. § 16-5-71.1(a), as the defendant did not verify that an individual was, in fact, 18 years old before the defendant pierced the individual's tongue. At the time, the individual was 17 years old. Sparks v. State, 292 Ga. App. 143, 664 S.E.2d 247 (2008).

Directed verdict in child molestation cases. — Child's testimony that the child saw the defendant molest the child's sister was sufficient competent evidence to support a conviction for that crime, and the trial court did not err by denying the defendant's motion for directed verdict. Mantooth v. State, 197 Ga. App. 797, 399 S.E.2d 505 (1990), overruled on other

Application (Cont'd)

grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Trial court did not err in denying the defendant's motion for a directed verdict on the charge of aggravated child molestation because the evidence was sufficient to allow a jury to find that the defendant had the requisite intent for aggravated child molestation as the fact that the defendant expected a drug dealer to give the defendant and the defendant's daughter crack cocaine in exchange for their sexual favors did not exclude a finding that the defendant also intended the sexual acts to arouse or satisfy the defendant or the daughter's sexual desires. Odom v. State, 267 Ga. App. 701, 600 S.E.2d 759 (2004).

Trial court's denial of the defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, on two counts of child molestation in violation of O.C.G.A. § 16-6-4, was proper because the evidence of the defendant's inappropriate sexual abuse of the victim, defendant's son, sufficiently placed the dates of the charged offenses within the seven-year limitations period of O.C.G.A. §§ 17-3-1(c) and 17-3-2.1(a)(5). Allen v. State, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Because the 13-year-old male victim testified that when the victim was sleeping the defendant pulled down the victim's pants and underwear and performed oral sex on him, and that testimony was corroborated by the defendant's girlfriend who observed the incident, there was sufficient evidence to support the defendant's conviction for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), as there was sufficient evidence to establish that the defendant committed "sodomy," as that term was defined under O.C.G.A. § 16-6-2(a); accordingly, the trial court properly denied the defendant's motion for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1. Steverson v. State, 276 Ga. App. 876, 625 S.E.2d 476 (2005).

Trial court did not err by denying a defendant's motion for a directed verdict of acquittal on a child molestation charge, despite a claim that no physical evidence of other support for the victim's testimony was presented as: (1) Georgia law did not require corroboration of a child molestation victim's testimony; and (2) the victim's testimony was sufficient to support the defendant's conviction. Keith v. State, 279 Ga. App. 819, 632 S.E.2d 669 (2006).

Directed verdict of acquittal unwarranted as: (1) the credibility of the child victim and any conflicts in the trial testimony were matters solely within the province of the jury to decide; (2) physical findings were not required to corroborate the charges of child molestation, aggravated sexual battery, and aggravated child molestation; and (3) the victim's testimony alone was sufficient to authorize the jury to find the defendant guilty of the crimes charged under the standard of Jackson v. Virginia. Hutchinson v. State, 287 Ga. App. 415, 651 S.E.2d 523 (2007).

Trial court did not err in denying the defendant's motion for a directed verdict on the count of an indictment charging the defendant with attempted aggravated child molestation because the defendant was convicted only of the offense of criminal attempt, which was supported by the evidence, and the defendant could be convicted of the lesser-included offense of criminal attempt pursuant to a proper jury instruction. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal as to the child-molestation count because the evidence was sufficient to support the jury's findings that the defendant committed the offense of child molestation, O.C.G.A. § 16-6-4(a)(1); the jury was authorized to infer that the defendant was kissing the victim on the mouth because the victim testified that they were kissing, and the evidence was sufficient to show that the defendant violated the statute prohibiting child molestation in at least two of the ways alleged in the indictment, which charged the defendant with kissing the victim on the mouth, exposing the defendant's privates to and having intercourse with the victim, who was under 16 years of age, with intent to arouse and satisfy their sexual desires. Judice v. State, 308 Ga. App. 229, 707 S.E.2d 114 (2011).

Trial court properly denied defendant's motion for a directed verdict based on the testimony of the victim that defendant repeatedly had sexual intercourse and engaged in other sexual acts with the victim, who was younger than 16, as well as the wife's testimony that defendant admitted to having sex with the victim. Jones v. State, 333 Ga. App. 796, 777 S.E.2d 480 (2015).

Motion for a judgment of acquittal on charges of aggravated sexual battery, aggravated child molestation, and child molestation was properly denied as the defendant's testimony that the defendant blacked out during the incident did not demand a finding that the defendant lacked the requisite criminal intent; the victim testified that the defendant began rubbing the victim's legs, touched the victim's "private part" through her clothing, pulled down the defendant's pants as well as the victim's pants, picked the victim up, and began rubbing the victim up and down against the defendant's "private part." Ward v. State, 274 Ga. App. 511, 618 S.E.2d 154 (2005).

Directed verdict in concealment of death and theft by taking case. — Trial court did not err in denying the defendant's motion for directed verdict of acquittal as the defendant did not show that the defendant's trial for charges of concealment of a death and theft by taking was conducted in an improper venue, that there was a fatal variance between the allegations in the indictment and the proof offered at trial, that the case against the defendant was barred by the statute of limitations, or that the indictment was fatally defective. James v. State, 274 Ga. App. 498, 618 S.E.2d 133 (2005).

Directed verdict in trafficking in cocaine cases. — In a trial when the defendant was subsequently convicted of trafficking in cocaine, the trial court did not err in overruling the defendant's motion for directed verdict of acquittal on the ground that as a matter of law the state failed to exclude every reasonable hypothesis except that the contraband was in the defendant's actual or constructive possession. Since the defendant presented no evidence to show that anyone else had equal access to the defendant's personal bag under the bed in the room the defendant rented, there was clearly sufficient evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Mathis v. State, 204 Ga. App. 896, 420 S.E.2d 788, cert. denied, 204 Ga. App. 922, 420 S.E.2d 788 (1992).

Trafficking in cocaine and heroin possession upheld based on circumstantial evidence. — Defendant's convictions for trafficking in cocaine and possession of heroin with intent to distribute, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(a), were supported by sufficient circumstantial evidence pursuant to former O.C.G.A. § 24-4-6 (see O.C.G.A. § 24-14-8) since it was shown that a woman stated that the defendant was residing in an apartment and selling drugs, a search of the apartment revealed drugs, cash, and photographs and papers with the defendant's name on them, as well as a sweater which the defendant was seen wearing, and the defendant changed the locks on the apartment; accordingly, the trial court's denial of the defendant's motions for a directed verdict pursuant to O.C.G.A. § 17-9-1 and for a new trial pursuant to O.C.G.A. § 5-5-23 were properly denied. Williams v. State, 262 Ga. App. 67, 584 S.E.2d 625 (2003).

Directed verdict in possession of cocaine with intent to distribute case. — Despite the defendant's equal access claim, because: (1) the evidence sufficiently showed the defendant's ownership and possession of the vehicle where the contraband was found; (2) the similar transaction evidence showed that the defendant previously admitted possessing an almost identical array of drugs and drug processing paraphernalia; (3) the informant was a mere tipster and not a material or necessary witness; and (4) trial counsel did not render ineffective assistance, the defendant's possession of cocaine with intent to distribute conviction was upheld on appeal; thus, the trial court properly denied the defendant's motion for a directed verdict of acquittal. Cauley v. State, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Codefendants' convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession

Application (Cont'd)

with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), were unsupportable as a matter of law, and the trial court erred by denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence and the reasonable inferences derived therefrom were insufficient to connect the codefendant to the cocaine, which was found in an upstairs bedroom occupied by the codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Directed verdict in trafficking in cocaine cases. — Defendant's motion for a directed verdict of acquittal was properly denied and the evidence supported the defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) as the defendant arranged the drug transaction with an undercover officer, accepted the container in which the officer directed the defendant to place the cocaine, and delivered to the officer 397 grams of cocaine with a purity of 44 percent. Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417 (2004).

Directed verdict in sale of cocaine cases. — Because the evidence supporting the defendant's convictions revealed that the defendant was twice caught on tape selling crack cocaine to confidential informants, and a police officer testified that the location of one of the sales was within 200 to 300 feet of a public housing project, the defendant's convictions for selling cocaine and of distributing cocaine within 1,000 feet of a housing project and 1,000 feet of a school were upheld; thus, the defendant was not entitled to a directed verdict of acquittal. Banks v. State, 270 Ga. App. 221, 606 S.E.2d 34 (2004).

Directed verdict in possession with intent to distribute cocaine case. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal under O.C.G.A. § 17-9-1(a) in a case for possession with intent to distribute cocaine in violation of O.C.G.A. § 16-13-30; defendant was seen fleeing into the woods wearing an unmarked black hat, a dog smelled the defendant on the same hat that was found near the defendant and that contained cocaine, and the defendant was not wearing a hat when the defendant was found. Riggins v. State, 281 Ga. App. 266, 635 S.E.2d 867 (2006).

Directed verdict on charge of possession of cocaine with intent to distribute. — Defendant's motion for a directed verdict of acquittal on a charge of possession of cocaine with intent to distribute was properly denied; the evidence establishing the defendant's constructive possession of cocaine included the defendant's presence in the room where the cocaine was found, the defendant's actual possession of a key to the apartment where the cocaine was found and $346 in cash, testimony by another individual at the scene that the individual and the defendant were partners in the drug trade, and the defendant's giving a false name when police arrived. Jackson v. State, 276 Ga. App. 694, 624 S.E.2d 270 (2005).

Directed verdict in trafficking in methamphetamine cases. — After a search of the defendant's car produced, among other things, drugs, syringes, scales, and a slip of paper with amounts of money listed next to various names and initials, there was sufficient evidence from which the jury was authorized to find the defendant guilty beyond a reasonable doubt of trafficking in methamphetamine; the trial court therefore did not err in denying the defendant's motion for a directed verdict of acquittal. Yarbrough v. State, 264 Ga. App. 848, 592 S.E.2d 681 (2003).

Trial court's denial of a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1 was proper as the evidence was sufficient to support a conviction of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e); there was clearly evidence that the sale of the drug involved more than 28 grams of methamphetamine, that the defendant either possessed or sold the methamphetamine through the defendant's presence when the drug was being cut, weighed,

packaged, and sold, and that the defendant was liable as an aider and abettor under O.C.G.A. § 16-2-21 even if there was no evidence that the defendant either arranged the sale or received any money in connection therewith. Blackwood v. State, 277 Ga. App. 870, 627 S.E.2d 907 (2006).

Trial court did not err in denying a codefendant's motion for a directed verdict on the charge of trafficking in methamphetamine because based upon the circumstantial evidence presented, the jury was authorized to find that the codefendant was in joint constructive possession of the methamphetamine with the defendant, which was located at the kitchen table where the defendant had been sitting; the defendant lived at the residence with the codefendant, the defendant was present at the time of a controlled buy, and the defendant had access to the drugs that were seized from the kitchen table. Fyfe v. State, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Defendant was not entitled to a directed verdict of acquittal because the jury was authorized to find the defendant guilty of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) beyond a reasonable doubt since the evidence was sufficient to show that the defendant knowingly had the power and intention to exercise dominion and control over the drugs, which were stashed inside a green vehicle; the defendant had moments earlier given an accomplice the keys to the vehicle, told the accomplice where to drive and park the vehicle, and led the accomplice to a motel. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Trial court erred in denying the codefendant's motion for a directed verdict after the codefendant was convicted of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) because the evidence against the codefendant was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the codefendant was in actual or constructive possession of the drugs found in a vehicle, and there was no presumption of drug possession since there was no evidence that the codefendant owned or controlled the vehicle in which the drugs were found; there was no evidence that the codefendant had even been in or had any connection to that vehicle, no testimony implicated the codefendant in the transaction, and the evidence showed nothing more than the codefendant's presence in the vehicle with the defendant, but there was no evidence that the codefendant had the power and intent to exercise control over the drugs. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Directed verdict in sale of methamphetamine case. — Conviction for the sale of methamphetamine was upheld on appeal because the state presented sufficient evidence to support a charge of the sale of methamphetamine before the defendant moved for a directed verdict of acquittal, specifically, that the drugs allegedly sold to an informant were packaged in the same type of Ziploc bag as those found on the defendant's person, and the defendant was in possession of a large of amount of cash and paraphernalia. Ramey v. State, 288 Ga. App. 800, 655 S.E.2d 675 (2007).

Directed verdict in possession of methamphetamine cases. — Although the defendant contended that the trial court erred by denying the defendant's motion for a directed verdict of acquittal because presence in the vicinity of contraband did not establish possession, the defendant and the codefendant were indicted and tried together for possession of methamphetamine, the jury was entitled to conclude that the defendant was in possession of the methamphetamine-coated pipe, which was found in the car the defendant drove, next to the driver's seat; moreover, the jury heard the officer's testimony that the defendant stated at arrest that the defendant was aware the item was used to smoke methamphetamine, and the trial court charged the jury on the doctrine of equal access. Thus, the jury was able to contemplate and reject the equal access defense, and sufficient evidence was presented for the jury to find that the defendant possessed the methamphetamine. Dover v. State, 307 Ga. App. 126, 704 S.E.2d 235 (2010).

Application (Cont'd)

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to the charge of possession of methamphetamine because the trier of fact was presented with sufficient evidence to determine beyond a reasonable doubt that the defendant was guilty of possessing methamphetamine since the court was authorized to conclude that the defendant either dropped or discarded the methamphetamine during the struggle with police when the defendant fled from a traffic stop; the evidence included the officer's testimony that the officer saw the defendant tuck something into a waistband while in a car, the defendant's flight from law enforcement after being stopped for a minor traffic offense, the proximity of the methamphetamine to the location where the defendant fell to the ground, and the defendant's statement to the officer that the defendant had exchanged drugs for use of the car. Bone v. State, 311 Ga. App. 390, 715 S.E.2d 789 (2011).

Directed verdict in driving without insurance cases. — Defendant's conviction for driving without insurance in violation of O.C.G.A. § 40-6-10(b) was based on sufficient evidence and, accordingly, the trial court's denial of the defendant's motion for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1 was properly denied since the jury determined, based mainly on circumstantial evidence, that the elements of the crime were satisfied; the record revealed that the defendant was involved in a collision, slowed down briefly and then fled the scene, and then produced an insurance card which did not appear to be authentic and was not validated by the insurance company. Augustin v. State, 260 Ga. App. 631, 580 S.E.2d 640 (2003).

Defendant's motion for a directed verdict on the charge of driving with no proof of insurance was properly denied because the arresting officer confirmed several times that the defendant could not find the defendant's proof of insurance, which was sufficient evidence to sustain the conviction. Broadnax-Woodland v. State, 265 Ga. App. 669, 595 S.E.2d 350 (2004).

Directed verdict in issues of delinquency. — Evidence was sufficient to authorize a trial court to find the defendant delinquent for being a party to a homicide, pursuant to O.C.G.A. § 16-2-20(b)(3), and, thus, the defendant's motion for a directed verdict of acquittal was properly denied; the defendant's intent could be inferred easily from the fact that the defendant stood and watched while a friend beat the victim and defecated on the victim, never leaving to call for help. In the Interest of K.B.T., 279 Ga. App. 350, 631 S.E.2d 412 (2006).

Trial court did not err in denying a defendant juvenile's motion for a directed verdict and in adjudicating the defendant delinquent on an obstruction charge because an officer working as a security guard at a restaurant was engaged in the lawful discharge of the officer's official duties at the time of the officer's encounter with the defendant as required by O.C.G.A. § 16-10-24. In the Interest of D.S., 295 Ga. App. 847, 673 S.E.2d 321 (2009).

Directed verdict in disorderly conduct cases. — Trial court properly denied the defendant's motion for a directed verdict on a charge of disorderly conduct since the evidence did not demonstrate that the defendant's cursing and violent movement of the defendant's car door was directed solely at the passenger, as the defendant alleged, but was directed at the victim; furthermore, there was evidence that the defendant "violently" shook the defendant's keys at the victim, and the victim saw the defendant actually damaging the victim's vehicle by scratching the vehicle with a key. Crutcher v. State, 267 Ga. App. 410, 599 S.E.2d 353 (2004).

Directed verdicts in drug cases. — Defendant's spontaneous oral identification of a substance as marijuana and possession of over 12 pounds of the substance authorized denial of a directed verdict of acquittal by the trial court pursuant to O.C.G.A. § 17-9-1. Turner v. State, 173 Ga. App. 782, 328 S.E.2d 368 (1985).

There was sufficient evidence to support the defendant's convictions for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a) and possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(5) and, accordingly, the trial court's denial of the

defendant's motion for a directed verdict pursuant to O.C.G.A. § 17-9-1 was proper; the record revealed that upon being stopped for a seatbelt violation, the defendant and the defendant's passenger were very anxious, their versions of where the defendants had been conflicted, and upon a consensual search of the car, a pistol and cocaine were found, which gave rise to a rebuttable presumption that the defendant and the passenger were in joint constructive possession thereof. Taylor v. State, 263 Ga. App. 420, 587 S.E.2d 791 (2003), cert. denied, 542 U.S. 941, 124 S. Ct. 2916, 159 L. Ed. 2d 820 (2004).

Defendant was not entitled to an acquittal on either a charge of conspiracy to manufacture methamphetamine or possession of methamphetamine as the evidence showed that methamphetamine was being manufactured inside the residence in which the defendant was found, and conviction of possession of methamphetamine did not rest solely upon evidence that the methamphetamine was found on the premises also occupied by others, nor did such conviction rest solely upon the defendant's spatial proximity to the contraband. McWhorter v. State, 275 Ga. App. 624, 621 S.E.2d 571 (2005).

Trial court properly denied the defendant's motion for a directed verdict of acquittal, and properly entered judgments of conviction against the defendant for misdemeanor possession of marijuana and possession of cocaine as the evidence sufficiently showed that the defendant possessed marijuana which police found in a search of the defendant's home and that the defendant possessed cocaine found in a search of the home and car. Heller v. State, 275 Ga. App. 637, 621 S.E.2d 591 (2005).

Trial court did not err by denying the defendant's motion for a directed verdict on a charge of felony possession of marijuana. The amount of marijuana was established by a witness's testimony that the defendant returned to the witness's apartment with "about a pound" of marijuana in a grocery bag. Rosser v. State, 284 Ga. 335, 667 S.E.2d 62 (2008).

Denial of a motion for mistrial or directed verdict on a possession of marijuana charge based on the state's alleged failure to prove the evidence was marijuana beyond a reasonable doubt was proper. The defendant referred to the substance as marijuana during the defendant's testimony, and this, together with an officer's testimony, was sufficient for the jury to find the defendant guilty of possession of marijuana beyond a reasonable doubt. Dulcio v. State, 297 Ga. App. 600, 677 S.E.2d 758 (2009).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1)(A), and possession of marijuana with intent to distribute, O.C.G.A. § 16-13-30(j), because the verdict was not insupportable as a matter of law; in addition to evidence that the defendant rented a hotel room where illegal drugs were found, had a key to the suite, and was going to the suite at a time when a great quantity and variety of drugs were in open view, there was other evidence linking the defendant to the contraband found there, including the defendant's suspicious behavior upon seeing officers near the suite and the presence of the defendant's personal property inside the suite. Glass v. State, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal after a jury found the defendant guilty of possession of methamphetamine because the totality of the evidence, although circumstantial, was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt and to reject as speculative and unreasonable the hypothesis that someone else discarded the drugs in a patrol car; the defendant possessed a homemade smoking pipe containing methamphetamine residue, there was similar transaction evidence, and the patrol officer testified that the officer had exclusive control of the officer's patrol car, the officer stayed with the officer's car whenever the car was serviced by third parties, the officer searched the backseat immediately after the defendant exited from the car, and the officer discovered the drugs directly up under the seat where the defendant had been sitting. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

Application (Cont'd)

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of distribution of marijuana, O.C.G.A. § 16-13-30(j), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(4); the testimony of a party to the transaction was corroborated by the observations of the detectives, the marijuana taken into evidence, the written statements of the parties regarding the defendant's involvement, and the defendant's own statement to a detective. Arnett v. State, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Directed verdict in firearm possession cases. — Trial court erred in denying the codefendant's motion for a directed verdict after the codefendant was convicted of possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(5) because the evidence did not support the "during the commission of a felony" element of the firearm possession charge; the evidence against the codefendant was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the codefendant was in actual or constructive possession of drugs found in the vehicle in which the codefendant was riding. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Evidence sufficient to show drug transaction within 1,000 feet of public housing. — Defendant was not entitled to a directed verdict of acquittal under O.C.G.A. § 17-9-1(a) on a charge of distributing cocaine within 1,000 feet of a public housing project in violation of O.C.G.A. § 16-13-32.5(b); because another participant in the drug transaction testified that the transaction occurred at the "Atlanta Street Apartments," and an officer familiar with the area testified that the "Atlanta Street Apartments" were owned by a housing authority and people of lower income lived there, evidence was sufficient to show that the transaction occurred within 1,000 feet of a housing project. Barnett v. State, 276 Ga. App. 238, 623 S.E.2d 136 (2005).

Directed verdicts in DUI cases. — Directed verdicts of acquittal were not required on charges because the evidence was sufficient to enable any rational trier of fact to find the defendant guilty beyond a reasonable doubt of driving under the influence of alcohol in both manners charged and of carrying a concealed weapon. Anderson v. State, 203 Ga. App. 118, 416 S.E.2d 309, cert. denied, 203 Ga. App. 905, 416 S.E.2d 309 (1992).

Because the defendant made no objection to the admissibility of the defendant's breath test results or to any of the trooper's testimony concerning a roadblock or the defendant's condition in the defendant's criminal trial on driving under the influence charges, the evidence was properly before the trial court and the evidence supported the charges, such that denial of the defendant's motion for a directed verdict pursuant to O.C.G.A. § 17-9-1(a) was proper. Overton v. State, 270 Ga. App. 285, 606 S.E.2d 306 (2004).

Because the state failed to present sufficient evidence that the defendant drove a vehicle within three hours prior to the Intoxilyzer 5000 test being administered, and no evidence was presented to support a per se violation of the offense, a driving under the influence of alcohol with an unlawful blood alcohol level conviction was reversed; but, given the defendant's admission to losing control of the vehicle and running into an embankment on the opposite side of the road, and evidence of a blood alcohol level well above the legal limit, which constituted circumstantial evidence of being a less-safe driver, a less-safe driving under the influence conviction was upheld, and no error resulted from the trial court's denial of a motion for directed verdict as to this charge. Norton v. State, 280 Ga. App. 303, 640 S.E.2d 48 (2006).

Given that sufficient evidence was presented through the testimony of the arresting officer, the property damage victims, and the defendant's admissions, and a 16-year gap between the current DUI offense and a prior DUI arrest did not require exclusion of the prior DUI as a similar transaction, as it provided evi-

dence of the defendant's bent of mind to get behind the wheel of a vehicle when it was less safe to do so, the defendant's conviction for the recent offense was upheld on appeal; thus, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal. Evans v. State, 287 Ga. App. 74, 651 S.E.2d 363 (2007).

Because sufficient evidence was presented to support a finding that the defendant was intoxicated to the level that the intoxication caused both the defendant's loss of consciousness and an accident resulting in the defendant's truck straddling a ditch with the truck's nose down at close to a 90-degree angle, and the responding deputies testified that the defendant appeared to be under the influence of alcohol to the extent that it was less safe to drive, the defendant's conviction for violating O.C.G.A. § 40-6-391(a)(1) was supported by sufficient direct evidence of guilt; thus, a directed verdict of acquittal as to the DUI charge was properly denied. Stewart v. State, 288 Ga. App. 735, 655 S.E.2d 328 (2007).

Directed verdict in bus hijacking case. — Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of bus hijacking, O.C.G.A. § 16-12-123(a)(1)(A), because the jury was authorized to conclude beyond a reasonable doubt that the defendant exercised control of the bus by force; the defendant brandished a handgun in the open door of the bus as the defendant ordered a passenger to get off, and the bus driver testified that the driver did not feel free to drive away because the driver felt the driver's life was in danger and the driver did not want to agitate the defendant. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Directed verdicts in kidnapping cases. — Trial court did not err when the court denied a motion for a verdict of acquittal or "not guilty" in a prosecution for kidnapping since there was evidence that the defendant asserted control of the victim by ordering the victim to enter an apartment, and that the defendant participated in repeated assaults and the ultimate death of the victim after having forcibly kept the victim in the apartment. Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (1998).

There was sufficient evidence for a rational trier of fact to have found beyond a reasonable doubt that the defendant was guilty of kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) since the victim testified that the defendant held a knife to the victim's throat, made the victim get into the defendant's truck and drove for a while, and that the defendant told the victim that the defendant was going to kill the victim, at which point the victim escaped; accordingly, the trial court's denial of the defendant's motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1 was proper. Mann v. State, 264 Ga. App. 631, 591 S.E.2d 495 (2003), overruled on other grounds, Kaiser v. State, 285 Ga. App. 63, 646 S.E.2d 84 (2007).

Conviction for kidnapping with bodily injury, in violation of O.C.G.A. § 16-5-40(a), was not supported by sufficient evidence of asportation as the defendant brandished a gun at the victim and attempted to have the victim get into the car but instead, the victim braced the victim's back against the car and refused to move, whereupon a struggle ensued between the victim and the defendant and the victim fell to the ground; such movement of the victim did not constitute asportation, and the trial court erred in denying a motion for a directed verdict pursuant to O.C.G.A. § 17-9-1. Leppla v. State, 277 Ga. App. 804, 627 S.E.2d 794 (2006).

It was not error for the trial court to deny the defendant's motion for a directed verdict of acquittal on the kidnapping charge because during the incident, as the victim exited the defendant's truck, the defendant grabbed the victim by the neck and moved the victim away from the more public area near the truck into a backyard, and after beating the victim in that location, the defendant moved the victim deeper into the backyard toward the tree line; when the defendant finished beating the victim the defendant picked the victim up and carried the victim to a trailer. The defendant moved the victim away from the area before the defendant began the

Application (Cont'd)

beating, which was not necessary to the battery and independently increased the victim's danger and prevented the victim from making an escape, calling for help, or being spotted by witnesses. Amaya v. State, 308 Ga. App. 460, 708 S.E.2d 28 (2011).

Trial court did not err in allowing the jury to consider the lesser included offense of false imprisonment after granting a directed verdict on the kidnapping charges against the defendant because false imprisonment was a lesser included offense of kidnapping, and the indictment against the defendant contained all the essential elements related to false imprisonment. Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

Directed verdict in impersonating an officer, kidnapping, and other charges. — Because sufficient evidence showed that the defendant, by posing as a police officer and driving the victims to remote locations, used fear and intimidation to ensure that the victims would cooperate and agree to have sex, the defendant was not entitled to an acquittal as to the charges of impersonating an officer, aggravated sodomy, attempted aggravated sodomy, aggravated assault and rape; furthermore, though both victims willingly got into the defendant's car, after the victims pleaded to be let go and the defendant refused to grant those pleas, that act amounted to a kidnapping. Dasher v. State, 281 Ga. App. 326, 636 S.E.2d 83 (2006).

Directed verdict in kidnapping, rape, and robbery trials. — Trial court's denial of the defendant's motion for acquittal, pursuant to O.C.G.A. § 17-9-1, was proper as there was sufficient evidence to support the defendant's convictions for kidnapping, rape, and robbery by intimidation in violation of O.C.G.A. §§ 16-5-40, 16-6-1, and 16-8-41, respectively, because the victim positively identified the defendant upon the defendant's arrest and at trial, there was similar transaction evidence from another victim who was approached and threatened in the same manner, and there was also corroborative physical evidence; defendant threatened the victim, who was at a bus stop, with a gun, robbed her, forced her to a storage area in a garage, and raped her. Sims v. State, 275 Ga. App. 836, 621 S.E.2d 869 (2005).

Directed verdict in murder cases. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as the evidence was sufficient to show that the defendant killed the victim without justification or mitigation by strangling the victim and that the defendant, without the authority and with the intent to steal from the victim, entered the victim's apartment with keys defendant had access to as a maintenance worker in the victim's apartment complex. Oliver v. State, 276 Ga. 665, 581 S.E.2d 538 (2003).

Because the defendant admitted that, while the children were sleeping and to scare defendant's girlfriend, defendant used a cigarette lighter to set fire to the bedding on the corner of the son's bed, causing a fire in a trailer that killed the son and two daughters, the evidence was sufficient to enable a rational trier of fact to find that defendant was, beyond a reasonable doubt, guilty of three counts of malice murder, three counts of felony murder, and two counts of arson in the first degree; thus, the trial court did not err by denying defendant's motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a). Riley v. State, 278 Ga. 677, 604 S.E.2d 488 (2004).

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

Directed verdict in murder and aggravated assault case. — Convictions for felony murder and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-1 and 16-5-21, were supported by sufficient evidence including

that the defendant and the codefendant were acting in concert, and the denial of the defendant's motion for a judgment of acquittal pursuant to O.C.G.A. § 17-9-1 was proper; the defendant argued with the victim, a prostitute, and refused to pay for the victim's services, prompting the victim to get a gun and fire a shot into the air, whereupon the defendant and a codefendant fired their guns back at the victim in a car leaving the area, and a bullet from the codefendant's gun killed the victim. Stinchcomb v. State, 280 Ga. 170, 626 S.E.2d 88 (2006).

Directed verdict in obstruction of officer cases. — Defendant was not entitled to a directed verdict of acquittal on obstruction of an officer charge since the defendant consented to the deputy's entry into the defendant's home and the defendant knowingly and wilfully grabbed the deputy's arm to stop the deputy from arresting a woman while in the lawful discharge of the deputy's duties. Schroeder v. State, 261 Ga. App. 879, 583 S.E.2d 922 (2003).

Defendant was not entitled to a directed verdict on the count charging the defendant with obstructing a correctional officer in the lawful discharge of the officer's official duties because the record did not support the defendant's argument that the state failed to prove that the person named in the indictment was a correctional officer even though the evidence showed that the dispatcher had not yet been trained five months after the dispatcher was employed. Grier v. State, 262 Ga. App. 777, 586 S.E.2d 448 (2003).

Because sufficient evidence was presented that the defendant physically assaulted an off-duty sheriff's officer prior to arrest and continued to resist and obstruct the officer's official duties thereafter, the defendant was properly denied an acquittal and a new trial. Helton v. State, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

Authority of officer questioned in motion for directed verdict. — University police officer had authority under O.C.G.A. § 40-13-30 to issue citations for an accident that occurred at an intersection that bordered the campus, and the trial court, therefore, properly denied the defendant's motion for a directed verdict of acquittal under O.C.G.A. § 17-9-1 relating to the charge of failing to obey a traffic control device in violation of O.C.G.A. § 40-6-20; the broad language of § 40-13-30 gave any officer of Georgia that had authority to arrest for a misdemeanor the authority to prefer charges and bring offenders to trial. Hawkins v. State, 281 Ga. App. 852, 637 S.E.2d 422 (2006).

Directed verdict in less safe driver cases. — Because: (1) the appeals court did not weigh the evidence or determine witness credibility, despite the two conflicting views of the evidence; and (2) a jury charge related to HGN tests, where no HGN test was given, was proper, sufficient evidence supported the defendant's less-safe driver conviction under O.C.G.A. § 40-6-391(a)(1); thus, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal. Massa v. State, 287 Ga. App. 494, 651 S.E.2d 806 (2007).

Directed verdict in driving under a suspended license case. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal under O.C.G.A. § 17-9-1 after a jury found the defendant guilty of driving on a suspended license in violation of O.C.G.A. § 40-5-121(a) because there was some evidence that the defendant was served with a notice of suspension pursuant to O.C.G.A. § 40-5-60; the state introduced the defendant's driver's license history report, which showed that the defendant had been served with the notice of the license suspension by a police officer, and the officer testified that the officer served the defendant with the notice. Sledge v. State, 312 Ga. App. 97, 717 S.E.2d 682 (2011).

Directed verdict in rape cases. — Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, given the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement; hence, the jury had the right to accept the victim's testimony depicting

Application (Cont'd)

non-consensual, forcible intercourse, as satisfying the requirements of O.C.G.A. § 16-6-1. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

Directed verdict in statutory rape cases. — Trial court did not err in denying a motion for a directed verdict on a charge of statutory rape as the victim's recantation did not render the evidence against the defendant insufficient because the victim's prior inconsistent statements concerning the sexual activity was substantive evidence of guilt; further, the prior inconsistent statements, corroborated by statements to others, as well as the defendant's own testimony that there was a sexual relationship, satisfied the sufficiency of the evidence standard of Jackson v. Virginia, 443 U.S. 307 (1999). Lewis v. State, 278 Ga. App. 160, 628 S.E.2d 239 (2006).

Directed verdict in robbery by sudden snatching. — Because the state's evidence failed to show that the robbery victim was aware that something was being taken before that taking was complete, the defendant was entitled to a directed verdict of acquittal on a robbery by sudden snatching charge; however, given that: (1) the defendant gained entry to a back office by passing through a storage area, and the jury implicitly rejected an argument that the absence of an "Employees Only" sign meant, despite the victim's testimony to the contrary, that the defendant had permission to enter either the storage area or the office; and (2) the defendant admitted to entering the office without permission, took a cash bag, and reentered the store in a manner intending to hide from view, a burglary conviction was upheld. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385 (2006).

Directed verdict in shoplifting cases. — In defendant's shoplifting conviction, the trial court did not err by failing to grant a directed verdict of acquittal because, as the defendant claimed, the state failed to exclude every reasonable conclusion from the circumstantial evidence presented; the evidence showed that the defendant was in the lobby of the store when the alarm was triggered, that the defendant ran, that the defendant was apprehended, that a bag from the store was recovered, and that the bag contained a number of items from the store but no receipt. Smith v. State, 275 Ga. App. 60, 619 S.E.2d 694 (2005).

Trial court did not err by denying the defendant's motion for a directed verdict of acquittal with regard to the defendant's trial for felony shoplifting because the testimony of the store's loss prevention officer established each element of the crime and provided sufficient evidence to support the conviction. Parham v. State, 320 Ga. App. 676, 739 S.E.2d 135 (2013).

Directed verdict in theft by receiving stolen property case. — Evidence was sufficient to sustain the defendant's conviction of theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) and, thus, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because the defendant's vehicle was stopped for violating traffic laws, the defendant could not produce a driver's license or proof of insurance, the personal information the defendant gave conflicted with the information on the identification card, the vehicle the defendant was driving had no vehicle tag, and the rental application found in the glove compartment along with a health insurance application showed that the car was rented to a person other than the defendant as the evidence showed that the defendant knew or should have known that the car the defendant possessed was stolen. Richardson v. State, 275 Ga. App. 320, 620 S.E.2d 522 (2005).

Directed verdict in theft by taking case. — Because no evidence was presented that the defendant converted the victim's funds for the defendant's own use or cashed the victim's check and because the state did not exclude every other reasonable hypothesis, the evidence was insufficient to convict the defendant of theft by taking, under O.C.G.A. § 16-8-2; consequently, the trial court erred in denying the defendant's motion for a directed verdict of acquittal. Hydock v. State, 275 Ga. App. 122, 619 S.E.2d 807 (2005).

Trial court did not err in denying the defendant's motion for a directed verdict

because the evidence was sufficient for a rational trier of fact to infer that the defendant acted with criminal intent and to find the defendant guilty of theft by taking in violation of O.C.G.A. § 16-8-2, and whether the defendant intended to deprive the victims of the victims' property was a question for the trier of fact, who was not required to believe the defendant's testimony; the manner in which the property was appropriated was irrelevant, and even if the trial court had accepted the defendant's claim that the defendant lawfully appropriated the trailer, the evidence supported a finding that although the defendant could have had lawful possession of the truck initially, the defendant failed to return the truck, or even provide the victims with the location of the truck upon their demands. Rushing v. State, 305 Ga. App. 629, 700 S.E.2d 620 (2010).

Directed verdict on charge of theft by taking. — Defendant's recent possession of stolen goods, coupled with other evidence linking the defendant with the theft, negated the propriety of a directed verdict of acquittal on a charge of theft by taking. Rautenberg v. State, 178 Ga. App. 165, 342 S.E.2d 355 (1986).

Directed verdict in possession of tools for crime cases. — In a prosecution for the possession of tools for the commission of a crime, which was a felony, while the evidence presented against the defendant was sufficient to support the jury's verdict, because the defendant's conduct could also have been charged as a misdemeanor offense of possession of a drug related object, pursuant to O.C.G.A. § 16-13-32.2(a) and the rule of lenity, the felony conviction was reversed, and the matter was remanded for a resentencing on the misdemeanor offense; hence, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal. Washington v. State, 283 Ga. App. 570, 642 S.E.2d 199 (2007).

Trial court erred in denying the defendant's motion for a directed verdict of acquittal because the evidence was insufficient to support the defendant's conviction for possession of tools for the commission of a crime for lack of evidence showing that body armor was a tool commonly used in the commission of attempted armed robbery pursuant to O.C.G.A. § 16-7-20(a). Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Directed verdict on charge of terroristic threats. — Trial judge did not err in denying the defendant's motion for a directed verdict of acquittal on a charge of terroristic threats, as due to the implicit nature of the threats against an undercover officer, a reasonable inference of guilt could be found from the evidence; as corroborating evidence existed that proved the incident occurred as alleged, the trial court did not abuse the court's discretion in allowing the jury to weigh the issue of corroboration and make a conclusion based on the evidence presented. Mendoza v. State, 274 Ga. App. 662, 618 S.E.2d 712 (2005).

Because evidence of the defendant's act of pointing the defendant's finger like a gun and threatening the victim, along with the use of racial slurs and profanity, was sufficient to support a charge of terroristic threats, the defendant's conviction was upheld on appeal, supporting the denial of a motion for a directed verdict of acquittal as to that charge; further, as to the state's evidence in support of the charge, given the equivalence between the words "ought" and "should," the trial court did not abuse the court's discretion when the court overruled an objection to the state's assertion during closing argument that the defendant told the victim, "I ought to kill you." Self v. State, 288 Ga. App. 77, 653 S.E.2d 787 (2007).

Directed verdict in vehicular homicide and DUI cases. — Trial court did not err in denying the defendant's motions for directed verdict and new trial because the evidence was sufficient to sustain the defendant's convictions for vehicular homicide and DUI since several witnesses on the scene testified that the defendant was in the driver's seat of the vehicle immediately after the accident. Hunt v. State, 261 Ga. App. 417, 582 S.E.2d 493 (2003).

Directed verdict in voluntary manslaughter cases. — Defendant's motion for a directed verdict was properly denied as the evidence supported the defendant's

Application (Cont'd)

conviction for voluntary manslaughter because: (1) the victim assaulted the defendant, but turned away to leave the scene; (2) after the victim turned away, the defendant shot the victim in the back from two and one-half feet away; (3) the jury could reject the defendant's justification defense; (4) the defendant was identified as the assailant on the night of the shooting; and (5) the defendant admitted firing a gun at the victim. Nelloms v. State, 273 Ga. App. 448, 615 S.E.2d 153 (2005).

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of defense of habitation, O.C.G.A. § 16-3-23, because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to find that the defendant's stabbing of the victim was not justified in defense of the defendant's habitation; the jury was authorized to rely upon the defendant's prior inconsistent statement to the defendant's relative to conclude that the victim's entry into the defendant's apartment was not "violent and tumultuous," and based upon the eyewitness testimony of a neighbor, the jury also was authorized to find that the victim was unarmed and that deadly force was not necessary for the defendant's protection. Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

Directed verdict in racketeering crime offenses. — Trial court properly denied a defendant's motion for a directed verdict with regard to the racketeering charges brought against the defendant for which the defendant was convicted of as the activities that the defendant engaged in involving various codefendants, the abduction of a store manager, and the victim's murder were sufficiently linked to form a racketeering pattern, but sufficiently distinguishable so that the crimes were not mere single transactions. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Defendant's motion for a directed verdict was properly denied because the defendant strangled the victim, robbed the victim, buried the victim, and then drove the victim's car for approximately two weeks after the crimes. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11 (2005).

Trial court did not err in denying a motion for directed verdict. Loggins v. State, 169 Ga. App. 511, 313 S.E.2d 769 (1984).

Verdict of acquittal not demanded. — Although there was no conflict in the evidence, the evidence does not demand a verdict of acquittal if there is evidence from which the jury could infer that the defendant was attempting to take a shotgun without paying for the shotgun. Brown v. State, 160 Ga. App. 285, 287 S.E.2d 278 (1981).

Denial of a motion for directed verdict was upheld as there was sufficient evidence to support the verdict, including testimony by an officer identifying the defendant as a passenger in a stolen car and DNA evidence matching blood found on the defendant's shoes to a victim. Gonzalez v. State, 277 Ga. App. 362, 626 S.E.2d 569 (2006).

Trial court did not err when the court denied the defendant's motion to dismiss based on a purported violation of the defendant's constitutional right to a speedy trial because the circumstances of the case warranted a finding that the twelve-month, ten-day delay between the defendant's indictment and the filing of the defendant's motion to dismiss was not presumptively prejudicial. The defendant was serving a sentence on an unrelated charge in Mississippi when the indictment was returned, a requisition warrant had to be obtained from the Mississippi Governor, which process was initiated within a month of the defendant's indictment and took three months before the warrant was issued, and the defendant was brought to Georgia two months after the warrant issued and was arraigned approximately two months later. Rogers v. State, 286 Ga. 387, 688 S.E.2d 344 (2010).

Trial court properly denied a defendant's motion under O.C.G.A. § 17-9-1(a) for an acquittal in the defendant's trial for

aiding and abetting a housemate in committing acts of aggravated child molestation against the defendant's children because there was ample evidence that the defendant acquiesced in and encouraged the acts of child molestation by forcing the children to sleep in the same room with the housemate, although the children objected. Valentine v. State, 301 Ga. App. 630, 689 S.E.2d 76 (2009).

Based on the evidence presented by the state from the eyewitnesses and the medical examiner, even if the defendant's act of beating the decedent victim was not the direct cause of death, given that it either materially contributed to the death or materially accelerated the death, the defendant was not entitled to an acquittal. Jones v. State, 281 Ga. 758, 642 S.E.2d 816 (2007).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal after a jury convicted the defendant of two counts of cruelty to children in violation of O.C.G.A. § 16-5-70(b) because the state did not fail to prove that the defendant used a bat and a belt as stated in the indictment; both victims, who were the defendant's adopted children, testified that the defendant beat the victims with a belt and a bat and that the beatings occurred when the victims did not complete the exercises that the defendant required the victims to do on a daily basis. Dinkler v. State, 305 Ga. App. 444, 699 S.E.2d 541 (2010), overruled on other grounds, Stuart v. State, 318 Ga. App. 839, 734 S.E.2d 814 (2012).

Superior court did not abuse the court's discretion in denying the defendant's motion for discharge and acquittal because the defendant's right to a speedy trial was not violated; the defendant did not assert the right until the defendant filed the motion, which was approximately 48 months from the time of the indictment, the defendant did not maintain that the defendant suffered any extraordinary anxiety or concern due to the delay in trial, and the defendant made no challenge to the finding of the defense's failure to show diligence in attempting to locate witnesses, i.e., that the witnesses were unavailable to the defendant. Williams v. State, 290 Ga. 24, 717 S.E.2d 640 (2011).

Defendant's claim that the defendant was entitled to a directed verdict based on a fatal variance between the names of the victims in the indictment and the evidence failed because the state presented sufficient evidence to allow a reasonable trier of fact to conclude the names in the indictment referred to the victims present during the home invasion. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Because there was evidence, including blood that was a match for the defendant's DNA on the inside of the display case, showing that the defendant was connected to the crimes of robbery and theft by receiving, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal. Watson v. State, 337 Ga. App. 16, 785 S.E.2d 656 (2016).

Proof of conspiratorial acts on dates not alleged in indictment. — Defendants were not entitled to directed verdicts of acquittal even though the state's evidence failed to prove that a conspiracy took place within the time frame alleged in the indictment since the indictment did not allege that the dates of the offense were material, and under these circumstances the state was entitled to offer any evidence proving commission of the conspiratorial acts on any date within the statute of limitations. Ledesma v. State, 251 Ga. 885, 311 S.E.2d 427, cert. denied, 467 U.S. 1241, 104 S. Ct. 3510, 82 L. Ed. 2d 819 (1984).

Directed verdict proper when inadequate link between arson conspiracy and murder. — Conspiracy to commit arson, without more, does not naturally, necessarily, and probably result in the murder of one coconspirator by another; thus, the defendant was improperly convicted of murder and a motion for a directed verdict of acquittal should have been granted because although the defendant was guilty of conspiracy to commit arson, the subsequent murder of one coconspirator by another to keep the murdered coconspirator quiet was not reasonably foreseen as a necessary, probable consequence of the arson conspiracy. Everritt v. State, 277 Ga. 457, 588 S.E.2d 691 (2003).

Application (Cont'd)

Directed verdict in financial transaction card theft case. — Trial court did not err in denying the defendant's motion for a directed verdict on the charge of financial transaction card theft because the victim was in constructive possession of the victim's credit card, which was sufficient to establish the allegation set forth in the accusation; because the victim was the cardholder on the account, the victim had the authority to exercise dominion and control over the credit card that had been issued in the victim's name. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Directed verdict in driving without a valid license case. — Because the charge of being a habitual violator operating a vehicle without a valid driver's license, O.C.G.A. § 40-5-58(c)(1), demanded a verdict of acquittal as a matter of law, the trial court erred by denying the defendant's motion for a directed verdict; the defendant was not driving without a valid driver's license because the arresting officer testified that the defendant had a probationary driver's license on the day of the arrest. Murray v. State, 315 Ga. App. 653, 727 S.E.2d 267 (2012).

Practice and Procedure

Ruling on motion after jury dispersed. — Defendant failed to show any harm so as to justify reversal after the trial court reserved a ruling on a motion for a directed verdict of acquittal and ruled upon the motion after the jury had dispersed. Ballantine v. State, 194 Ga. App. 560, 390 S.E.2d 887, cert. denied, 194 Ga. App. 911, 390 S.E.2d 887 (1990).

There is no prohibition on the court's reservation of a final ruling on a motion for a directed verdict of acquittal and the court rendering a decision after the jury returns a verdict and is dispersed. State v. Seignious, 197 Ga. App. 766, 399 S.E.2d 559 (1990).

Venue properly established. — Trial court did not err in denying the defendant's motion for directed verdict of acquittal after a jury convicted the defendant of two counts of cruelty to children in violation of O.C.G.A. § 16-5-70(b) because venue was properly established by the state; one of the victims testified that the victim and the victim's sister lived about three blocks from the courthouse in which the trial was held, and the defendant testified that the defendant had been living in the same home for 14 years and that the defendant and the defendant's spouse had attempted to adopt in the county where the trial was held. Dinkler v. State, 305 Ga. App. 444, 699 S.E.2d 541 (2010), overruled on other grounds, Stuart v. State, 318 Ga. App. 839, 734 S.E.2d 814 (2012).

Trial court did not err in denying the defendant's motion for a directed verdict because the testimony, taken as a whole, was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the child molestation was committed in Fayette County; during trial and the victim's forensic interview, the victim described that the molestation incident occurred during a visit to the victim's aunt's residence, which was located in Fayette County, Georgia, and two detectives testified that the referenced visit and molestation incident took place at a residence in Fayette County. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Trial court erred in granting the defendant's motion for directed verdict after the judgment of conviction had been entered because the trial court's reservation of a ruling upon the motion was entered after the trial court imposed sentencing and entered the court's judgment of conviction; therefore, the decision on the motion came too late and was procedurally barred. State v. Canup, 300 Ga. App. 678, 686 S.E.2d 275 (2009).

Directed verdict granted as to some items in the accusation but not as to all. — Defendant's substantial rights were not affected and the trial court did not err in granting a directed verdict as to some items in the accusation of shoplifting, but not as to all, as the defendant was not surprised, and the defendant could not be prosecuted later for the same offense. Smith v. State, 275 Ga. App. 60, 619 S.E.2d 694 (2005).

Trial judge's interruption of defense counsel's argument of motion for directed verdict, in which the judge stated that the judge was aware of counsel's reasons for the motion, did not constitute harmful error; there was sufficient evidence to find the defendant guilty of the offense charged. Morris v. State, 205 Ga. App. 650, 423 S.E.2d 54 (1992).

Review of directed verdict motion. — Overruling of a motion for directed verdict of acquittal is reviewable on appeal. Bethay v. State, 235 Ga. 371, 219 S.E.2d 743 (1975).

Scope of appellate review of denial of directed verdict. — Supreme Court will hold that the trial court did not err in failing to direct a verdict of acquittal if the Supreme Court cannot say that there was no conflict in the evidence and the evidence demanded a verdict of acquittal. Conger v. State, 250 Ga. 867, 301 S.E.2d 878 (1983); Horton v. State, 194 Ga. App. 797, 392 S.E.2d 259, cert. denied, 194 Ga. App. 911, 392 S.E.2d 259 (1990).

Although the denial of a motion for a directed verdict of acquittal is reviewable on appeal, it is the basis for reversal only when the evidence demands a verdict of not guilty. Meade v. State, 165 Ga. App. 556, 301 S.E.2d 912 (1983); Johnson v. State, 165 Ga. App. 773, 302 S.E.2d 626 (1983).

Test for determining sufficiency of the evidence. — In light of the test established in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), which holds that evidence to support a criminal conviction must be such that a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt, that test rather than the "any evidence" test of Bethay v. State, 235 Ga. 371, 219 S.E.2d 743 (1975) is the proper test for a reviewing court to use when the sufficiency of evidence is challenged, whether the challenge arises from the overruling of a motion for directed verdict or the overruling of a motion for a new trial based upon allegedly insufficient evidence. Humphrey v. State, 252 Ga. 525, 314 S.E.2d 436 (1984).

Same test for directed verdict and sufficiency of evidence. — Standard of review for the denial of a motion for a directed verdict of acquittal is the same as that for reviewing the sufficiency of the evidence to support a conviction; a motion for a directed verdict in a criminal case should only be granted when there is no conflict in the evidence and the evidence demands a verdict of acquittal as a matter of law. On appeal, the evidence must be viewed in the light most favorable to the verdict, the defendant no longer enjoys the presumption of innocence, and an appellate court does not weigh the evidence or determine witness credibility but only determines whether the evidence was sufficient for a conviction. Truitt v. State, 266 Ga. App. 56, 596 S.E.2d 219 (2004).

On appeal from overruled motion, all evidence in the case can be considered. — On appeal of the overruling of a motion for directed verdict of acquittal made at the close of the state's case in chief, the reviewing court can consider all the evidence in the case in determining whether the trial court erred in overruling the motion. Bethay v. State, 235 Ga. 371, 219 S.E.2d 743 (1975); Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980).

On appeal from an overruled motion, all evidence in a case can be considered whether overruled at the close of the state's case or at the conclusion of all evidence. Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980).

Consideration of rebuttal evidence by appellate court. — Defendant prosecuted for the sale of methamphetamine was not entitled to a directed verdict of acquittal due to the state's failure to prove venue because the state introduced testimony, on rebuttal, establishing that the crime occurred in the county in which the defendant was prosecuted, establishing venue beyond a reasonable doubt, and the appellate court was required to consider this rebuttal evidence when reviewing the denial of the defendant's motion. Reynolds v. State, 265 Ga. App. 776, 595 S.E.2d 606 (2004).

When failure to direct verdict of acquittal or not guilty constitutes error. — It constitutes reversible error for the trial court to refuse to direct a verdict of acquittal if there is absolutely no conflict in the evidence and the verdict of

Practice and Procedure (Cont'd)

acquittal is demanded as a matter of law. Bethay v. State, 235 Ga. 371, 219 S.E.2d 743 (1975); Sims v. State, 242 Ga. 256, 248 S.E.2d 651 (1978).

If the evidence demands a verdict of acquittal, the failure of a trial judge to so direct a verdict is reversible error. Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687 (1980).

It is only if the evidence demands a verdict of not guilty that it is error for the trial court to refuse to grant a motion for a directed verdict of acquittal. Battle v. State, 155 Ga. App. 541, 271 S.E.2d 679 (1980).

Directed verdict motion on constitutional challenge held untimely. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal as to the aggravated sexual battery charge, which specifically alleged that O.C.G.A. § 16-6-22.2(b) violated the equal protection clause of both the Georgia and U.S. Constitutions, as the defendant did not move for a directed verdict until filing a second motion for a new trial, which was considered untimely. Phillips v. State, 284 Ga. App. 224, 644 S.E.2d 153 (2007).

Motion not moot by nolle prosequi of charges. — After a trial court in the defendant's criminal matter entered an order of nolle prosequi regarding criminal charges against the defendant, the defendant's motion for discharge and acquittal, based on a claim that the trial court failed to comply with the demand for a speedy trial under O.C.G.A. § 17-7-170, should have still been ruled on; accordingly, it was error to find that defendant's petition for a writ of mandamus, pursuant to O.C.G.A. § 9-6-20, seeking to have the trial court judge rule on the motion for discharge and acquittal, was rendered moot. Davis v. Wilson, 280 Ga. 29, 622 S.E.2d 325 (2005).

RESEARCH REFERENCES

C.J.S. — 22 C.J.S., Criminal Law: Substantive Procedures, § 188 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 639 et seq. 23A C.J.S., Criminal Procedure and Rights of the Accused, §§ 1387, 1980 et seq.

ALR. — Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence, 17 A.L.R. 910.

Power of court to enter nolle prosequi or dismiss prosecution, 69 A.L.R. 240.

Propriety of direction of verdict of guilty or of instruction or requested instruction requiring jury in criminal case to take the law from the court, or advising them as to their duty in that regard, 72 A.L.R. 899.

Power of trial court to dismiss defendant in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 A.L.R. 187.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case, 82 A.L.R.3d 974.

Prejudicial effect of juror misconduct arising from internet usage, 48 A.L.R.6th 135.

17-9-2. Jury to judge law and facts and give general verdict; imposition of sentence; form and construction of verdicts.

The jury shall be the judges of the law and the facts in the trial of all criminal cases and shall give a general verdict of "guilty" or "not guilty." Upon a verdict of "guilty," the sentence shall be imposed by the judge, unless otherwise provided by law. Verdicts are to have a reasonable intendment, are to receive a reasonable construction, and are not to be avoided unless from necessity.

History. — Laws 1833, Cobb's 1851 Digest, p. 835; Code 1863, §§ 3481, 4532; Code 1868, §§ 3503, 4552; Code 1873, §§ 3561, 4646; Code 1882, §§ 3561, 4646; Penal Code 1895, § 1033; Penal Code 1910, § 1059; Code 1933, § 27-2301; Ga. L. 1974, p. 352, § 1.

Cross references. — Ga. Const. 1983, Art. I, Sec. I, Para. XI. Trial juries, § 15-12-120 et seq.

U.S. Code. — Verdicts, Federal Rules of Criminal Procedure, Rule 31.

Law reviews. — For comment on Finch v. State, 87 Ga. App. 426, 74 S.E.2d 121 (1953), granting defendant a new trial where the jury returned inconsistent verdicts, see 17 Ga. B.J. 381 (1955).

JUDICIAL DECISIONS

Analysis

General Consideration
Practice and Procedure
Jury Instructions
Verdicts

General Consideration

For historical development of the principle that the jury are "judges of the law and the facts," see Harris v. State, 190 Ga. 258, 9 S.E.2d 183 (1940).

This section as amended applied to trials conducted after July 1, 1974, rather than to offenses committed after that date. Henderson v. State, 134 Ga. App. 898, 216 S.E.2d 696 (1975), overruled on other grounds, Moran v. State, 139 Ga. App. 274, 228 S.E.2d 216 (1976), but see 1974 Op. Att'y Gen. No. U74-74.

Construction with general verdict requirement. — Verdict of guilty but mentally ill under O.C.G.A. § 17-7-131 does not conflict with the requirement of a general verdict as provided by O.C.G.A. § 17-9-2. Mitchell v. State, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 369 S.E.2d 487 (1988).

O.C.G.A. § 19-10-1(i) is an exception to the use of a general verdict form in criminal cases as provided by O.C.G.A. § 17-9-2; the statute authorizes but does not require the trier of fact to return a special verdict as to the issue of paternity. Whitman v. State, 212 Ga. App. 523, 442 S.E.2d 313 (1994).

Duties of court and jury generally. — It is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence. Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939); Harris v. State, 190 Ga. 258, 9 S.E.2d 183 (1940); Griffin v. State, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

Court is responsible for the correct exposition of the law. It is the duty of the jury to take the law from the court, as it is their duty to take the evidence from the witnesses. Griffin v. State, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

Trial court and jury issues. — Whether a particular offense is a lesser included offense of another is an issue for the trial court to resolve, not the jury; whether an accused is guilty of a particular lesser included offense, based on the evidence and proper charge by the court, is the issue for the jury. Sanders v. State, 212 Ga. App. 832, 442 S.E.2d 923 (1994).

Jurors are judges of the law insofar as jurors are judges of the facts. — Right of the jury to judge the law and the facts does not authorize the jury to get the law except through the court. There must be some channel through which the jury is to get the law. It is the jury's duty, the jury's necessary duty, to find out what the law is, and to come to a conclusion upon the matter, just as it is the jury's duty to find out what the facts are. Jurors have to judge both to come to a conclusion as to both. The judge is the channel through which the jurors are to get the law, just as the evidence introduced is the channel through which the jurors are to get the facts. Jurors have no right to go out of the evidence for the facts, nor to go away from

General Consideration (Cont'd)

the judge for the law. From these two courses the jurors are to get the material for their verdict, and the jurors are thus judges of the law and facts, and must find a general verdict, including law and fact. Edwards v. State, 53 Ga. 428 (1874).

While the jurors are made absolutely and exclusively judges of the facts in the case, the jurors are, in this sense only, judges of the law. Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939); Harris v. State, 190 Ga. 258, 9 S.E.2d 183 (1940); Griffin v. State, 154 Ga. App. 261, 267 S.E.2d 867 (1980).

Jury are the judges of the law and the facts so as to enable the jury to apply the law to the facts, and bring in a general verdict, but jurors have no right to make law. The law is laid down in the Code and it is the province of the court to construe the law and give the law in the charge, and of the jury to take the law as given, apply the law to the facts as found by the jury, and bring in a general verdict. Harris v. State, 190 Ga. 258, 9 S.E.2d 183 (1940).

How verdicts to be construed generally. — Verdicts are to be construed in the light of the pleadings, the issues made by the evidence, and the charge of the court. Reed v. State, 87 Ga. App. 154, 73 S.E.2d 223 (1952).

Supreme Court must assume judgment valid. — It is the duty of the Supreme Court to construe the verdict of the jury and the judgment and sentence of the court as valid and binding. Owen v. White, 182 Ga. 67, 185 S.E. 97 (1936).

Verdict may be construed in the light of the issues actually submitted to the jury under the charge of the court. If, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal. Henson v. Scoggins, 203 Ga. 540, 47 S.E.2d 643 (1948).

In the construction of verdicts, the accusation must be considered. Arnold v. State, 51 Ga. 144 (1874); Dunbar v. State, 21 Ga. App. 502, 94 S.E. 587 (1917).

Construction of ambiguous verdict. — Verdict is to be given a reasonable intendment and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court. If, when so construed, the verdict expresses with reasonable certainty a finding supported by the evidence, the verdict is to be upheld as legal. Barbour v. State, 8 Ga. App. 27, 68 S.E. 458 (1910).

Use of preprinted jury verdict form. — It is not error to use the preprinted jury verdict form: "We, the jury, find the defendant __ guilty." Dixon v. State, 154 Ga. App. 828, 269 S.E.2d 909 (1980).

Use of a printed verdict form which reads "We the jury find the defendant __ guilty" is not harmful error constituting reason for reversal. Chance v. State, 154 Ga. App. 543, 268 S.E.2d 737 (1980).

Failure of transcript to show either the verdict or sentence. — Failure of the transcript of a criminal trial to show either the jury verdict or the sentence by the judge has no bearing on the validity of the conviction, especially when the punishment was written on the indictment by the jury foreman, and the judge published the verdict and sentence in open court. Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31 (1974).

Cited in Brown v. State, 40 Ga. 689 (1870); Dunbar v. State, 21 Ga. App. 502, 94 S.E. 587 (1917); Johnson v. State, 29 Ga. App. 659, 116 S.E. 226 (1923); B'Gos v. State, 43 Ga. App. 379, 159 S.E. 137 (1931), cert. dismissed, 175 Ga. 627, 165 S.E. 566 (1932); Arrington v. State, 48 Ga. App. 70, 171 S.E. 878 (1933); Meriwether v. State, 189 Ga. 746, 8 S.E.2d 72 (1940); Hopkins v. State, 190 Ga. 180, 8 S.E.2d 633 (1940); Griffin v. State, 195 Ga. 368, 24 S.E.2d 399 (1943); Central of Ga. R.R. v. Sellers, 129 Ga. App. 811, 201 S.E.2d 485 (1973); Johnson v. State, 134 Ga. App. 67, 213 S.E.2d 170 (1975); Willingham v. State, 134 Ga. App. 144, 213 S.E.2d 516 (1975); Rhodes v. State, 135 Ga. App. 484, 218 S.E.2d 159 (1975); Mealor v. State, 135 Ga. App. 682, 218 S.E.2d 683 (1975); Jones v. State, 235 Ga. 103, 218 S.E.2d 899 (1975); Stanley v. State, 136 Ga. App. 385, 221 S.E.2d 242 (1975); McNeese v. State, 236 Ga. 26, 222 S.E.2d 318 (1976); Atkins v. State, 236 Ga. 624, 225 S.E.2d 7 (1976); Partain v. State, 139 Ga. App. 325, 228 S.E.2d 292 (1976); Richardson v. State, 144 Ga. App. 416, 240 S.E.2d 917

(1977); Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978); Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902 (1978); Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979); Taylor v. State, 245 Ga. 501, 265 S.E.2d 803 (1980); State v. Wilkerson, 161 Ga. App. 185, 288 S.E.2d 137 (1982); Pender v. State, 249 Ga. 495, 292 S.E.2d 69 (1982); Bryant v. State, 163 Ga. App. 872, 296 S.E.2d 168 (1982); McGee v. State, 172 Ga. App. 208, 322 S.E.2d 500 (1984); Barnes v. State, 184 Ga. App. 513, 361 S.E.2d 876 (1987); Wilkes v. State, 210 Ga. App. 898, 437 S.E.2d 837 (1993); Carter v. State, 224 Ga. App. 445, 481 S.E.2d 238 (1997); Davis v. State, 225 Ga. App. 627, 484 S.E.2d 655 (1997); Stevenson v. State, 234 Ga. App. 103, 506 S.E.2d 226 (1998); Parker v. State, 270 Ga. 256, 507 S.E.2d 744 (1998); Scott v. State, 243 Ga. App. 383, 532 S.E.2d 141 (2000).

Practice and Procedure

Joint indictment for offense which does not require joint act. — If two parties are jointly indicted for an offense which does not require in its commission the joint act of both, but may be separately committed by either, a verdict finding one of the defendants guilty, if supported by the evidence, would be authorized. Cruce v. State, 59 Ga. 83 (1877); Easterling v. State, 12 Ga. App. 690, 78 S.E. 140 (1913).

Requirements of jury communications after deliberations have started. — In an exercise of the court's inherent power to maintain a court system capable of providing for the administration of justice in an orderly and efficient manner, trial courts should be required to have jurors' communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction. Lowery v. State, 282 Ga. 68, 646 S.E.2d 67, cert. denied, 552 U.S. 999, 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

When court may avoid jury verdict. — Court is not privileged to invade the province of the jury and avoid the jury's verdicts unless from clear necessity, and the rule is to be applied only in cases in which such verdicts are in irreconcilable conflict. Jackson v. State, 230 Ga. 640, 198 S.E.2d 666 (1973).

Improper closing argument. — When defendant was charged with, inter alia, child molestation, the prosecutor's remark, in closing argument, that if the jury found the defendant not guilty the jury would be calling the defendant's victims liars, was improper because it could be construed as improperly suggesting to the jurors that the jurors go beyond the jurors' role of reaching a verdict based solely on the law and the evidence, but, under the circumstances, the error was harmless. Hunt v. State, 268 Ga. App. 568, 602 S.E.2d 312 (2004).

Resequestration if verdict of involuntary manslaughter without due caution. — Verdict of guilty of "involuntary manslaughter without due caution and circumspection," is so uncertain as to authorize the judge not to receive the verdict, and to send the jury back; and when the jury returns with a verdict of voluntary manslaughter, which is fully supported by the evidence, the presiding judge was right to receive the verdict, and no error was committed. Turbaville v. State, 58 Ga. 545 (1877).

Verdict which finds neither what is charged in the indictment nor a lesser grade. — If the jury intends conviction and punishment of something, but the verdict returned is neither as to something charged in the indictment nor of a lesser grade of the crime actually charged against a defendant, the verdict returned is a mere nullity and has the legal effect of an acquittal. Cross v. State, 124 Ga. App. 152, 183 S.E.2d 93 (1971).

Acquittal if verdict does not find necessary facts for crime. — If the verdict applies directly to the offense expressly charged, but stops short in the verdict's finding of the requisite facts to constitute that offense, the verdict is equivalent to an acquittal. Couch v. State, 28 Ga. 367 (1859); O'Connell v. State, 55 Ga. 191 (1875); Wells v. State, 116 Ga. 87,

Practice and Procedure (Cont'd)

42 S.E. 390 (1902); Lambert v. State, 17 Ga. App. 348, 86 S.E. 782 (1915).

Variance between offense as charged in indictment and form of jury verdict. — If one is charged in an indictment with the offense of involuntary manslaughter in the commission of an unlawful act, a verdict of the jury that "We, the jury, find the defendant guilty of involuntary manslaughter by his negligence, and we recommend that he be punished as for a misdemeanor," is a verdict finding the defendant guilty of the offense as charged and is not rendered ambiguous by the words "by his negligence" or by the fact that the jury made a recommendation that the defendant be punished as for a misdemeanor when the jury did not have the power to do so. Cain v. State, 53 Ga. App. 331, 185 S.E. 615 (1936).

Involuntary manslaughter verdict not inconsistent with felony murder/cruelty to children verdict. — In a shaken baby death, an involuntary manslaughter verdict was not mutually exclusive of a guilty verdict for felony murder/cruelty to children because, consistent with the jury's guilty verdict on the felony murder charge, an offense requiring criminal intent, the jury predicated the jury's involuntary manslaughter verdict on a misdemeanor involving criminal intent, battery, or simple battery under O.C.G.A. §§ 16-5-23(a) and 16-5-23.1(a), although the jury was also instructed on reckless conduct, a misdemeanor committed by criminal negligence, O.C.G.A. § 16-5-60(b). Drake v. State, 288 Ga. 131, 702 S.E.2d 161 (2010).

Erroneous interchange of terms "maximum" and "minimum" in verdict. — It is reasonable to construe a verdict finding the accused guilty and fixing a "maximum" penalty of one year, and a "minimum" penalty of one and one-half years as meaning a minimum of one year and a maximum of one and one-half years so as to uphold the validity of the verdict. Jordan v. State, 36 Ga. App. 648, 137 S.E. 798 (1927).

Reference to evidence or court's charge to interpret verdict impermissible. — Though complaint of a verdict is made in a motion for a new trial and not by a motion in arrest of judgment, it is not legitimate to refer either to the evidence or the charge of the court for the purpose of ascertaining what the verdict really meant. English v. State, 105 Ga. 516, 31 S.E. 448 (1898).

There is no error in trial court, rather than jury, sentencing defendant. Daniel v. State, 248 Ga. 271, 282 S.E.2d 314 (1981).

In the defendant's trial for murder, the trial court properly exercised the court's discretion to sentence the defendant to life in prison with the possibility of parole under O.C.G.A. §§ 16-5-1(e)(1), 17-9-2, and 17-10-7(a), rather than life without the possibility of parole, because parole did not extend the duration of the sentence. Blackwell v. State, 302 Ga. 820, 809 S.E.2d 727 (2018).

Court of Appeals may recognize hypothesis supporting innocence of accused. — Whether or not in a given case circumstances are sufficient to exclude every reasonable hypothesis save the guilt of the accused is primarily a question for determination by the jury; however, if there appears a hypothesis from the evidence pointing to the innocence of the accused, and which tested by all human experience is a reasonable one, the Court of Appeals may declare it to be true as a matter of law. Bogan v. State, 158 Ga. App. 1, 279 S.E.2d 229 (1981).

Verdict with recommendation regarding parole. — Since there were two counts of murder and the jury reached a unanimous verdict on both counts that "we recommend mercy or that defendant's punishment be life imprisonment with the stipulation that it be life without parole," the jury's verdict was clear, and the jury's "stipulation" regarding parole was mere surplusage not affecting the jury's recommendation of mercy so that the trial court erred in not accepting the verdict. Westbrook v. State, 256 Ga. 776, 353 S.E.2d 504 (1987).

Affidavit regarding viewing crime scene. — Juror's affidavit stated only that, after viewing the scene of the crime, some of the jurors had concluded, based upon the jurors' observations, that the defendant's testimony had been false in

some respects, the affidavit showed only that the jurors acted as jurors after a judicially sanctioned scene view and did not show that any juror acted as an unsworn witness against the defendant as to any finding resulting from an unauthorized visit to the scene of the crime, and the trial court did not err in refusing to consider the affidavit. Harper v. State, 182 Ga. App. 760, 357 S.E.2d 117 (1987).

Instructing jurors that the jurors cannot abstain is not error. — Telling a jury that the jury must vote one way or another, and that a juror cannot abstain from voting was not error. Thompson v. State, 166 Ga. App. 850, 305 S.E.2d 662 (1983).

It is clearly the law that the jury must vote either guilty or not guilty, and consequently the court likewise committed no error in advising the jury that the jury could not vote to "pass." Jordan v. State, 172 Ga. App. 496, 323 S.E.2d 657 (1984).

Determinative factor in deciding whether verdicts are repugnant is whether the acquittal of one charge necessarily includes a finding against a fact that is essential to conviction for the other charge. If so, the evidence is then insufficient to support a verdict of guilty in the convicted charge. Shehee v. State, 167 Ga. App. 542, 307 S.E.2d 54 (1983); Taylor v. State, 177 Ga. App. 624, 340 S.E.2d 263 (1986).

Jury Instructions

It is the duty of the judge to charge the law in a criminal case. Darsey v. State, 136 Ga. 501, 71 S.E. 661 (1911), writ dismissed, 231 U.S. 741, 34 S. Ct. 318, 58 L. Ed. 462 (1913); Holton v. State, 137 Ga. 86, 72 S.E. 949 (1911).

To the jury, the highest and best evidence of what the law is, is the charge of the court; indeed, the jury's only final access to the law is through this charge. Habersham v. State, 56 Ga. 61 (1876).

Jury must accept as the law what the court charges the jury as being the law. Darsey v. State, 136 Ga. 501, 71 S.E. 661 (1911); Holton v. State, 137 Ga. 86, 72 S.E. 949 (1911); Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939).

Erroneous but nonfatal instruction in civil case. — It was erroneous in a civil case to charge the jury, "after you have ascertained the facts, then you will apply the facts to the law, and then you are the sole judges of the law and the facts in this case," but in the circumstances the error was not cause for a reversal. Higgins v. Trentham, 186 Ga. 264, 197 S.E. 862 (1938).

Since an accusation was drawn in the conjunctive, charging the defendant with being a less safe driver and with having a blood alcohol count over 0.10, providing a verdict form that listed separately each of the two methods by which the defendant was accused of violations and instructing the jury to indicate "guilty" or "not guilty" as to each method was not a request for a special verdict in violation of O.C.G.A. § 17-9-2. Dean v. State, 232 Ga. App. 390, 501 S.E.2d 895 (1998).

Instruction of jurors that jurors are judges of the law in applying the law to the facts. — Mere use of the words "except that" in an instruction that "the charge of the court is the law of the case, and by it you are bound, except that you are the judges of the law in applying it to the facts as you find them to be," could not mislead the jury into conceiving that the jury would be free to reject the law charged by the court. Davis v. State, 190 Ga. 100, 8 S.E.2d 394 (1940).

It is not error to so instruct the jury. — Court does not err in instructing the jury to take the law of the case from the court, apply the law to the facts as the jury might find the facts to be, and reach a verdict therefrom. Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939).

Words "with leniency" in verdict. — Because a jury was instructed not to concern itself with punishment and was never instructed that the jury could recommend leniency, the words "with leniency" in the verdict were mere surplusage and did not affect the validity of the jury's finding of guilt; consequently, the Court of Appeals erred by reversing the defendant's sentence as illegal. State v. Benton, 278 Ga. 503, 604 S.E.2d 169 (2004).

Failure to charge jury that the jury are judges of the law and facts. — It is

Jury Instructions (Cont'd)

not ground for reversal that the judge failed to charge the jury, without a request, that the jury were judges of the law and the facts. Turk v. State, 55 Ga. App. 732, 191 S.E. 283 (1937).

In response to the following question from the jury: "If the jury disagrees with the law that we have been charged with applying to the facts of this case, can we find the defendant not guilty for that reason?", the trial court did not err in refusing to charge that "the jury shall be the judges of the law and the facts" and, instead, charging the jury in the language of the suggested pattern jury instructions promulgated by the Council of Superior Court Judges. Cornwell v. State, 246 Ga. App. 686, 541 S.E.2d 101 (2000).

Trial court did not err in refusing to charge the jury that "the jury shall be the judges of the law and the facts in the trial of all criminal cases," after the court charged on the applicable law and instructed the jurors to apply the law to the facts as found by the jury. Chiasson v. State, 250 Ga. App. 63, 549 S.E.2d 503 (2001).

Charge that jurors are also judges of the law. — When the court instructs the jury that the jurors are judges of the facts, the jurors need not be instructed in the same connection that the jurors are also judges of the law, if in the general charge as a whole the jurors are correctly instructed as to the law. Webb v. State, 8 Ga. App. 430, 69 S.E. 601 (1910).

No need to instruct jury on prior sentencing procedure in noncapital felonies. — With the existence of mandatory judge sentencing in felony cases, except cases in which the death penalty may be imposed, it is unnecessary and inappropriate for the jury to receive any instructions from the trial judge on the previously applicable bifurcated procedure. Harris v. State, 234 Ga. 871, 218 S.E.2d 583 (1975).

Verdicts

Definition of special verdict. — Special verdict is rendered when the jury finds certain facts to exist, and leaves the court to determine whether or not, according to the law which controls these facts, the prisoner is guilty. McGuffie v. State, 17 Ga. 497 (1855); Isom v. State, 83 Ga. 378, 9 S.E. 1051 (1889).

Verdict on indictment which joins separate crimes as several counts. — When separate crimes are joined in one indictment, former Code 1933, § 27-2301 (see O.C.G.A. § 17-9-2) should be construed as applying to each one of those counts as separate and independent cases. A general verdict should be rendered as to each one of the separate cases. Lee v. State, 66 Ga. App. 613, 18 S.E.2d 778 (1942).

Verdict on offense eliminated by legislature. — When the offense charged in one count of the indictment was eliminated by the legislature prior to the defendant's trial and the trial court instructed the jury only with respect to a lesser included charge, but the jury nevertheless returned a verdict on the indicted offense, the court properly entered judgment on the lesser included charge. Blackstock v. State, 270 Ga. 117, 506 S.E.2d 130 (1998).

General verdict of guilty is a verdict on the highest offense charged. — If offenses of different grades are joined in the same indictment, a general verdict of guilty means guilty of the highest offense. Dean v. State, 43 Ga. 218 (1871); Estes v. State, 55 Ga. 131 (1875).

If two felonies only in degree are charged as separate counts of the same indictment, general verdict of, "We, the jury, find the defendants guilty and recommend mercy," is by intention of the law, a finding that the defendants are guilty of the highest offense charged in either of the counts in the indictment. Miller v. State, 60 Ga. App. 682, 4 S.E.2d 729 (1939).

General verdict of guilty is by intendment of the law a verdict that the defendant is guilty of the highest offense charged in the indictment. Bissell v. State, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

Unless judge submits only the lesser charge to the jury. — When one is tried on an indictment charging the person with the offense of robbery by force and by intimidation, and after the evidence has been adduced the judge submits to the jury only the question whether the

defendant is guilty of the offense of robbery by intimidation, a general verdict of guilty will be construed as convicting the accused only of the lesser offense of robbery by intimidation. If in such a case there is evidence authorizing the conviction of the defendant for robbery by intimidation, which is conceded by counsel for the defendant, a general verdict of guilty will not be disturbed as contrary to the evidence or to the law. Reed v. State, 87 Ga. App. 154, 73 S.E.2d 223 (1952).

Jury indicates guilt for similar lesser offense. — Indictment was for assault with intent to murder. The verdict was that the defendant was "guilty of shooting another unlawfully." It is contended in behalf of the accused that there is no such offense as this, and that the verdict is void for uncertainty. There is no merit in this contention. Under an indictment containing a single count for assault with intent to murder, there may be a conviction of the statutory offense of shooting at another, that being a lesser offense of the same general character. Wostenholms v. State, 70 Ga. 720 (1883); Watson v. State, 116 Ga. 607, 43 S.E. 32, 21 L.R.A. (n.s.) 1 (1902); Rhinehart v. State, 7 Ga. App. 425, 66 S.E. 982 (1910).

General verdict on multiple count indictment when evidence sufficient for conviction on all counts. — When several misdemeanors, which though of the same general character are separate and distinct offenses, are joined in different counts of the same indictment, such a verdict is to be construed as a conviction on all of the counts. Driver v. State, 112 Ga. 229, 37 S.E. 400 (1900).

If by the indictment the state is prosecuting not merely for one offense, but charges several different and distinct transactions, though of a kindred nature, in the respective counts of the indictment, a general verdict of guilty is not sustainable, and is contrary to the evidence, unless the proof is such as to uphold a conviction as to each and every offense alleged. Driver v. State, 112 Ga. 229, 37 S.E. 400 (1900).

Misdemeanors of a similar nature may be joined in the same indictment in any number of counts, and a general verdict as to each count should be returned. A general verdict of guilty as to such entire indictment will be set aside unless there is sufficient evidence to support each count of the indictment. If the evidence supports each count, such general verdict is a conviction on each count and the court may impose cumulative penalties. Lee v. State, 66 Ga. App. 613, 18 S.E.2d 778 (1942).

General verdict on multiple count indictment when evidence authorizes conviction on less than all counts. — It is error to refuse a new trial on an indictment containing two counts, both charges growing out of the same transaction when the evidence authorizes a conviction on the second count only and the verdict is a general verdict of guilty. Davis v. State, 59 Ga. App. 343, 200 S.E. 808 (1939).

General verdict possible although acquittal on some counts. — Verdict of guilty, specifying the particular counts to which the verdict relates, is nevertheless a general verdict, and there may be a conviction as to some of the counts and an acquittal as to the others. Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528 (1853); Lynes v. State, 46 Ga. 208 (1873); Wilson v. State, 67 Ga. 658 (1881).

General verdict on multiple count indictment when all but one count withdrawn. — State's counsel may abandon or the judge may withdraw from the consideration of the jury the unsupported counts, and in that event a general verdict of guilty will relate only to the counts submitted. Camp v. State, 91 Ga. 8, 16 S.E. 379 (1892); Waver v. State, 108 Ga. 775, 33 S.E. 423 (1899); Tooke v. State, 4 Ga. App. 495, 61 S.E. 917 (1908).

If there are two counts in the indictment, and during the trial of the case the state, through statement of the state's counsel made in open court, withdraws the second count of the indictment, a general verdict will be construed as meaning guilty on the first count only. Guthas v. State, 53 Ga. App. 362, 185 S.E. 837 (1936).

General verdict on indictment for offense which may be committed in various ways. — As to indictments charging misdemeanors only, if the indictment as a whole relates to but one offense, to but one transaction, stated in different

Verdicts (Cont'd)

counts with variation of details so that the indictment, as pleading, may adapt itself to the different phases which may appear in the proof at the trial, a general verdict of guilty, without a specification as to the count on which it is rendered, is sustainable and proper, if any one of the counts is supported by sufficient proof. Stewart v. State, 58 Ga. 577 (1877); Dohme v. State, 68 Ga. 339 (1882); Williams v. State, 107 Ga. 693, 33 S.E. 641 (1899).

If a statute provides that a single offense may be committed in distinct and various ways, the different and various ways may be charged in the same count, or in as many counts as there are various ways of committing the offenses. A general verdict on such an indictment charging the commission of such offense will be sustained if any of the counts is supported by evidence, even though there may be no evidence to sustain the conviction under the other counts specified in the indictment. Lee v. State, 66 Ga. App. 613, 18 S.E.2d 778 (1942).

Verdict of stabbing after indictment charging assault with deadly intent by stabbing. — Indictment for assault with intent to murder by stabbing includes the minor offense of stabbing, and a verdict finding this minor offense need not negative the exception in the statute by setting out that the stabbing was not done by the prisoner in the prisoner's own defense or other circumstances of justification; the meaning of the verdict, construed in light of the indictment, being that the accused was guilty of the offense, and not of the mere act of stabbing. Isom v. State, 83 Ga. 378, 9 S.E. 1051 (1889).

Jury need not deny mitigating circumstances for shooting. — It was clearly the intention of the jury in this case to find the accused guilty of the offense of shooting another as to which the court had fully instructed the jury. It is not necessary for the verdict to negative the statutory exception by stating that the shooting was "not in his own defense or under circumstances of justification." Arnold v. State, 51 Ga. 144 (1874); Isom v. State, 83 Ga. 378, 9 S.E. 1051 (1889); Kidd v. State, 10 Ga. App. 147, 75 S.E. 266 (1911).

Verdict finding one defendant guilty as charged and the other of lesser offense. — In a joint trial of two persons for murder, the jury returned a verdict finding one of the defendants guilty of murder, and finding the other guilty of manslaughter, it is error for the court to refuse to receive the verdict so far as the verdict related to the latter finding, and to require the jury to reconsider the case as to the latter accused under instruction that the latter cannot be convicted of voluntary manslaughter unless the codefendant also is guilty of that offense. Allen v. State, 164 Ga. 669, 139 S.E. 415 (1927).

OPINIONS OF THE ATTORNEY GENERAL

Section as amended applies to offenses committed on or after July 1, 1974. — This section, which authorized the jury to determine guilt or innocence and the judge to pass sentence, applied only to those defendants who allegedly committed criminal offenses on July 1, 1974, or thereafter. 1974 Op. Att'y Gen. No. U74-74, but see Henderson v. State, 134 Ga. App. 898, 216 S.E.2d 696 (1975), overruled on other grounds, Moran v. State, 139 Ga. App. 274, 228 S.E.2d 216 (1976).

General verdict is to be returned in both felony and misdemeanor verdicts. 1967 Op. Att'y Gen. No. 67-412.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 706, 709, 713, 718.

C.J.S. — 23A C.J.S., Criminal Procedure and Rights of the Accused, §§ 1772 et seq., 1777 et seq., 1792 et seq., 1895 et seq.

ALR. — Right of court to accept verdict upon one or more counts of an indictment

or information when jury is unable to reach a verdict on all counts or is silent as to part of counts, and effect of such acceptance, 114 A.L.R. 1406.

Power of trial court to dismiss defendant in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 A.L.R. 187.

Imposition or enforcement of sentence which has been suspended without authority, 141 A.L.R. 1225.

Power to impose sentence with direction that after defendant shall have served part of time he be placed on probation for the remainder of term, 147 A.L.R. 656.

Validity and effect of verdict in civil action finding defendant "not guilty," 7 A.L.R.2d 1341.

Withdrawal of waiver of right to jury trial in criminal case, 46 A.L.R.2d 919.

Right of accused to insist, over objection of prosecution or court, upon trial by court without a jury, 51 A.L.R.2d 1346; 37 A.L.R.4th 304.

Effect on verdict in criminal case of haste or shortness of time in which jury reached it, 91 A.L.R.2d 1238.

Inconsistency of criminal verdict with verdict on another indictment or information tried at the same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 A.L.R.3d 1149.

Validity and efficacy of accused's waiver of unanimous verdict, 97 A.L.R.3d 1253.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 35 A.L.R.4th 626.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 A.L.R.4th 304.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 A.L.R.4th 91.

17-9-3. Recommendations for mercy in capital cases other than those of homicide; effect of no recommendation for mercy in capital cases generally and where defendant under age of 17 at time of commission of offense.

In all capital cases, other than those of homicide, when the verdict is "guilty," with a recommendation for mercy, it shall be legal and shall mean imprisonment for life. When the verdict is "guilty," without a recommendation for mercy, it shall be legal and shall mean that the convicted person shall be sentenced to death. When it is shown that a person convicted of a capital offense without a recommendation for mercy had not reached his seventeenth birthday at the time of the commission of the offense, the punishment of such person shall not be death but shall be imprisonment for life.

History. — Ga. L. 1875, p. 106, § 2; Code 1882, § 4646a; Penal Code 1895, § 1034; Penal Code 1910, § 1060; Code 1933, § 27-2302; Ga. L. 1963, p. 122, § 2; Ga. L. 1974, p. 352, § 2.

Cross references. — Further provisions regarding jury recommendations in death penalty cases, § 17-10-2. Finding by jury of statutory aggravating circumstance and recommendation of death sentence as prerequisites to imposition of death sentence, § 17-10-31.

U.S. Code. — Verdicts, Federal Rules of Criminal Procedure, Rule 31.

Law reviews. — For article discussing the 1968 Criminal Code of Georgia, comparing preexisting provisions of Georgia criminal law, see 5 Ga. St. B.J. 185 (1968).

For article, "Jury Sentencing in Georgia — Time for a Change?," see 5 Ga. St. B.J. 421 (1969). For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article, "The Execution of America's Children," see 6 Ga. State U.L. Rev. 403 (1990).

JUDICIAL DECISIONS

Applicability to homicide cases. — Last sentence of O.C.G.A. § 17-9-3 applies to cases of homicide, the legislature having intended to create a general prohibition against the execution of persons who had not reached their 17th birthday at the time of the commission of the offense. Bankston v. State, 258 Ga. 188, 367 S.E.2d 36 (1988).

Verdict and not the indictment determined when this section applied. Cox v. State, 33 Ga. App. 144, 125 S.E. 731 (1924).

Judge may not give different sentence than law requires when guilty plea. — This section did not permit the judge, on a plea of guilty, to fix a different sentence than that prescribed by a particular section. Morris v. Clark, 156 Ga. 489, 119 S.E. 303 (1923).

Jury recommendation is binding. — In jury cases, the trial judge is bound by the jury's recommended sentence. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Charge cannot take away jury's role. — Charge depriving the jury of the right and duty devolving upon the jury by this section was erroneous. Thompson v. State, 160 Ga. 520, 128 S.E. 756 (1925).

When applicable, this section should be charged. Butt v. State, 150 Ga. 302, 103 S.E. 466 (1920).

Charge that gave the substance of this section would suffice. Lewis v. State, 25 Ga. App. 7, 102 S.E. 367 (1920).

Jury has power to fix minimum and maximum sentence after plea of innocence. — Power given to the jury to prescribe a minimum and maximum term is emphasized by the further provision that "in cases of pleas of guilty, then the judge shall have the right to prescribe such minimum and maximum term as he may see fit." Mitchell v. State, 34 Ga. App. 505, 130 S.E. 355 (1925).

Effect of jury failing to fix maximum and minimum. — If the jury fails to prescribe the maximum and minimum in a burglary case but merely recommends the defendant to the mercy of the court, the verdict is not in proper form, and it is error for the judge to receive the verdict and fix the minimum and maximum term of punishment. The judge should send the jury back with the instruction that the jury fix the minimum and the maximum penalty. Mitchell v. State, 34 Ga. App. 505, 130 S.E. 355 (1925).

Verdict of the jury fixing the same maximum and minimum is sufficient. Powell v. State, 25 Ga. App. 329, 103 S.E. 174 (1920); Johnson v. State, 154 Ga. 806, 115 S.E. 642 (1923).

Defendant has right to poll jury. — If the jury returns a maximum-minimum sentence and the judge immediately turns to the accused and states that that would be the accused's sentence, the accused is not deprived of the right to poll the jury. The accused has this privilege while the verdict is being reduced to writing and retired as a judgment. Taylor v. State, 36 Ga. App. 639, 138 S.E. 83 (1927).

Abuse of jury's discretion is not reviewable. — Whether or not a jury has abused the unlimited discretion given a jury by law, in regard to recommending a defendant to the mercy of the court, under which the defendant would be sentenced to life imprisonment, is in no instance subject to review by the courts. Aiken v. State, 170 Ga. 895, 154 S.E. 368 (1930).

Death sentence on seventeen year old. — If the defendant was 17 years old at the time of the crime, the defendant's death sentence does not violate O.C.G.A. § 17-9-3. Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Cited in Towns v. State, 149 Ga. 613, 101 S.E. 678 (1919); Daniel v. State, 24 Ga. App. 557, 101 S.E. 812 (1919); Walker v. Dorminey, 150 Ga. 635, 104 S.E. 447 (1920); Moore v. State, 150 Ga. 679, 104

S.E. 907 (1920); Thompson v. State, 151 Ga. 328, 106 S.E. 278 (1921); Durden v. State, 152 Ga. 441, 110 S.E. 283 (1921); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Holmes v. State, 224 Ga. 553, 163 S.E.2d 803 (1968); Massey v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968); Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); Cape v. Francis, 558 F. Supp. 1207 (M.D. Ga. 1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 843 et seq. 40A Am. Jur. 2d, Homicide, § 499 et seq. 75A Am. Jur. 2d, Trial, §§ 471 et seq., 1157 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2203 et seq.

ALR. — Bail: imposition of life sentence as affecting capital character of offense, 3 A.L.R. 970.

Recommendation of mercy in criminal case, 87 A.L.R. 1362; 138 A.L.R. 1230.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

17-9-4. Validity of judgment rendered by court having no jurisdiction of person or subject matter.

The judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it.

History. — Orig. Code 1863, § 3513; Code 1868, § 3536; Code 1873, § 3594; Code 1882, § 3594; Civil Code 1895, § 5369; Civil Code 1910, § 5964; Code 1933, § 110-709.

Cross references. — Corresponding provision relating to civil procedure, § 9-12-16.

JUDICIAL DECISIONS

Jurisdiction in criminal cases extends only to matters declared criminal by law. — In criminal cases, the jurisdiction of the court extends to such matters as the law has declared criminal, and none other. When a court undertakes to punish for an offense to which no criminality attaches, however reprehensible such offense may be in the forum of conscience, the court acts beyond the court's jurisdiction. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Indictment, information, or written accusation is the very groundwork of the whole superstructure of a prosecution for the commission of an offense. If such an information contains allegations of overt acts or conduct which does not constitute any crime known to the law, or undertakes to state an offense, but the facts stated do not constitute the offense, and no addition to them, however full and complete, can supply what is essential, the court is without jurisdiction to put the accused on trial. In such case, the judgment of conviction cannot be corrected, it is simply void. Imprisonment thereunder is illegal, and the accused is entitled to release in a habeas corpus proceeding, even though the accused might secure the same relief on appeal. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Court had no jurisdiction to amend defendant's sentence two years after sentence was imposed. — Trial court erred by denying the defendant's motion to vacate the defendant's amended sentence on drug-related charges as the trial court had no jurisdiction to amend the defendant's sentence since, at the time it was undertaken, over two years had passed since the sentence was originally

pronounced; thus, under O.C.G.A. § 17-10-1(f), there was no jurisdiction to amend the sentence. Hall v. State, 291 Ga. App. 649, 662 S.E.2d 753 (2008).

No reinvested subject matter jurisdiction in trial court. — When the sentence is not void and the defendant filed an application for review of the defendant's sentence under former O.C.G.A. § 17-10-6, as long as the sentence is one which is otherwise covered by an application, a Sentence Review Panel decision is totally insulated from a trial court's claim of reinvested subject matter jurisdiction over the question of punishment. McClendon v. State, 318 Ga. App. 676, 734 S.E.2d 505 (2012).

Allowing livestock to run at large is not criminal. — Appellate court reversed the trial court's judgment convicting the defendants of violating O.C.G.A. § 4-3-3 by allowing livestock to roam at large because § 4-3-3 was not a penal statute and the defendants were improperly charged by use of a uniform traffic citation in violation of O.C.G.A. § 17-7-71. Cotton v. State, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

Right to attack judgment as nullity not waived. — Since the defendant did not sign a jury trial waiver, the probate court was without authority to dispose of the case. Even though there was no indication that the waiver-of-jury-trial issue was raised in the superior court, this was a matter which went to the subject matter jurisdiction of the probate court, and the right to attack the judgment as a nullity was not waived by the failure to attack the judgment before. Davis v. State, 197 Ga. App. 746, 399 S.E.2d 554 (1990).

Motion to vacate does not lie in criminal case. — With regard to a defendant's convictions for burglary, two counts of aggravated assault and armed robbery, aggravated sodomy and rape, and possession of a firearm by a convicted felon, the trial court did not err by denying the defendant's motion to correct a void judgment and to correct an illegally merged sentence as the defendant's motion was essentially seeking to vacate the judgment of conviction, which motion was contrary to the longstanding rule that a motion to vacate a judgment will not lie in a criminal case. Johnson v. State, 287 Ga. App. 759, 652 S.E.2d 836 (2007).

Petitioner's motion to vacate the conviction was not an appropriate remedy in a criminal case after the petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of Chester v. State, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after the conviction had been affirmed on direct appeal, petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. Harper v. State, 286 Ga. 216, 686 S.E.2d 786 (2009).

Collateral attack on judgment if no law proscribes the act. — If there is no law proscribing the act in question, or if there was a law but the law was repealed prior to the date the offense was alleged to have been committed, or if there is a law but the law is unconstitutional, these are exceptions to the general rule that a judgment of a court having jurisdiction of the type of offense and the alleged offender is not open to collateral attack. The remedy of habeas corpus is available in these exceptional cases because the court is without jurisdiction in the particular case to render the particular judgment. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Remedy if conviction under one count valid, but void under the other. — Habeas corpus is not an available remedy if the petitioner is a state prisoner under a valid judgment of conviction under one count of a two-count indictment even though the judgment of conviction under the other count is void. Mandamus is the only remedy available by which the petitioner can collaterally attack the void judgment of conviction under the other count and compel the Board of Pardons and Paroles to consider the petitioner's application for parole. The petition for mandamus is not premature if the petitioner is being hurt by the void judgment of conviction under the other count in that that judgment stands as a bar to petitioner's right to have the petitioner's applica-

tion for parole considered. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Erroneous judgment is not void if jurisdiction exists. — Judgment, though the judgment may be erroneous, is not void if the court had jurisdiction of the case and the parties. Crutchfield v. State, 24 Ga. 335 (1858).

Question as to sufficiency of allegations differs from question of court's jurisdiction. — Question as to the sufficiency of the allegations, that is, the completeness of the allegations to charge an act and intent which would constitute a crime, is a question of pleading, and is different than a question as to whether the act charged constitutes a crime, a question of the court's jurisdiction. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Indictment failing to charge offense. — Person who is held or convicted under an indictment which fails to charge any offense against the laws of this state may secure that person's release by habeas corpus. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Functions of writ of error (see O.C.G.A. §§ 5-6-49 and 5-6-50) and writ of habeas corpus compared. — Function of the writ of error is to correct errors of law. The function of the writ of habeas corpus is to inquire into and determine the legality of the detention at the time of the hearing, such detention being illegal if the judgment of conviction is void. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

Habeas corpus is to correct void, not voidable judgments. — Rule that habeas corpus is not a substitute for writ of error (see O.C.G.A. §§ 5-6-49 and 5-6-50) means that habeas corpus will not lie to correct voidable judgments, that is, judgments which are merely erroneous, while habeas corpus will lie to secure a release from detention under a judgment which is utterly void. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963).

No requirement for prayer that judgment be declared void. — This section dispensed with the necessity of a prayer that a judgment of conviction be declared void. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963); Griffis v. Griffis, 229 Ga. 587, 193 S.E.2d 620 (1972).

If judgment void, no petition, notice, service, hearing, or order. — If an order and judgment are void and a nullity on the face of the record, no petition, notice, service, hearing, or order is necessary to set the judgment aside. It may be disregarded. Shotkin v. State, 73 Ga. App. 136, 35 S.E.2d 556 (1945), cert. denied, 329 U.S. 740, 67 S. Ct. 56, 91 L. Ed. 638 (1946).

Order properly set aside. — Trial court was authorized to set aside a void order granting an out-of-term motion to withdraw a guilty plea beyond the term in which the order was granted. Bennett v. State, 225 Ga. App. 284, 483 S.E.2d 612 (1997), rev'd, 268 Ga. 849, 494 S.E.2d 330 (1998).

Merger claims cannot be deemed waived. — Merger claims cannot be waived, even following a guilty plea, because a conviction that merges as a matter of law or fact with another conviction is void, and any resulting sentence is void and illegal, which means that the sentences may be challenged in any proper proceeding. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Court had jurisdiction. — Indictment alleging that the defendant committed criminal acts in Cobb County conferred jurisdiction over the defendant's person; consequently, the defendant failed to demonstrate that the defendant's sentences were void for lack of jurisdiction. Goodrum v. State, 259 Ga. App. 704, 578 S.E.2d 484 (2003).

Trial court properly denied the defendant's motion to vacate a malice murder conviction as the defendant's claim that the conviction preceded the indictment, and hence that the trial court lacked jurisdiction to hear the plea, was belied by the record. Jones v. State, 282 Ga. 568, 651 S.E.2d 728 (2007).

Trial court erred in denying the defendant's motion to hold the judgment void and reinstating the defendant's 20-year sentence for voluntary manslaughter because the defendant's application for an out-of-time sentence review was granted under O.C.G.A. § 17-10-6(a) (repealed); thus, the trial court's reinvested subject

matter jurisdiction over the question of the sentencing was improper. McClendon v. State, 318 Ga. App. 676, 734 S.E.2d 505 (2012).

Cited in Berkeley v. State, 74 Ga. App. 711, 41 S.E.2d 265 (1947); Wallace v. State, 112 Ga. App. 505, 145 S.E.2d 788 (1965); Pruitt v. State, 123 Ga. App. 659, 182 S.E.2d 142 (1971); Barrett v. State, 183 Ga. App. 729, 360 S.E.2d 400 (1987); Snellings v. State, 194 Ga. App. 552, 391 S.E.2d 36 (1990); Earp v. Brown, 260 Ga. 215, 391 S.E.2d 396 (1990); State v. Mohamed, 203 Ga. App. 21, 416 S.E.2d 358 (1992); Cabell v. State, 221 Ga. App. 192, 471 S.E.2d 222 (1996); Weatherbed v. State, 271 Ga. 736, 524 S.E.2d 452 (1999); Syms v. State, 244 Ga. App. 21, 534 S.E.2d 502 (2000); Bush v. State, 273 Ga. 861, 548 S.E.2d 302 (2001); McKenzie v. State, 302 Ga. App. 538, 691 S.E.2d 352 (2010); Munye v. State, 342 Ga. App. 680, 803 S.E.2d 775 (2017); Gray v. State, 351 Ga. App. 703, 832 S.E.2d 857 (2019).

RESEARCH REFERENCES

C.J.S. — 49 C.J.S. (Rev), Judgments, § 22 et seq. 89 C.J.S., Trial, § 992 et seq.

ARTICLE 2

RENDITION AND RECEIPT OF VERDICT

RESEARCH REFERENCES

ALR. — Necessity and sufficiency of adjudication of guilt, or of recital of or reference to verdict in judgment pronouncing sentence in criminal case, 69 A.L.R. 792.

Failure of verdict on conviction of larceny or embezzlement to state value of property, 79 A.L.R. 1180.

Absence of accused at return of verdict in felony case, 23 A.L.R.2d 456.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 35 A.L.R.4th 626.

17-9-20. Action by juror on private knowledge as to facts, witnesses, or parties.

A juror shall not act on his or her private knowledge respecting the facts, witnesses, or parties.

History. — Civil Code 1895, § 5337; Civil Code 1910, § 5932; Code 1933, § 110-108; Ga. L. 2011, p. 99, § 32/HB 24.

History of Code section. — This Code section is derived from the decisions in Chattanooga, R. & C. Ry. Co. v. Owen, 90 Ga. 265, 15 S.E. 853 (1892) and Pettyjohn v. Liebscher, 92 Ga. 154, 17 S.E. 1007 (1893).

Cross references. — Juror as witness, § 24-6-606.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article discussing swearing a juror as a witness, see 11 Ga. B.J. 321 (1949). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For comment on Tumlin v. State, 88 Ga. App. 713, 77 S.E.2d 555 (1953), holding that a juror is competent to testify in a

felony case against the accused and defendant is not deprived of right to fair trial, see 16 Ga. B.J. 346 (1954).

JUDICIAL DECISIONS

Juror as witness. — Juror is not incompetent to testify as a witness solely on account of having been impaneled and sworn in the case, if the juror is otherwise competent. Tumlin v. State, 88 Ga. App. 713, 77 S.E.2d 555 (1953), commented on in 16 Ga. B.J. 346 (1954).

Calling of juror as witness for state. — Defendant is not deprived of the right of trial by a fair and impartial jury merely because one of the jurors trying the case is called as a witness for the state. Tumlin v. State, 88 Ga. App. 713, 77 S.E.2d 555 (1953), commented on in 16 Ga. B.J. 346 (1954).

Duty to prevent improper acts and remarks and to caution jury. — When a statement is interfered with by improper acts and remarks, the jury should be prevented and the judge should at least caution the jury under this section that the jury cannot act upon outside information respecting the parties, the witnesses, or the facts in the case. Robinson v. State, 6 Ga. App. 696, 65 S.E. 792 (1909).

Unauthorized contact or communication between a witness and a juror does not vitiate an otherwise valid conviction unless the defendant was actually prejudiced. Clark v. State, 153 Ga. App. 829, 266 S.E.2d 577 (1980).

Cited in Garnett v. State, 10 Ga. App. 109, 72 S.E. 951 (1911).

RESEARCH REFERENCES

C.J.S. — 89 C.J.S., Trial, §§ 949, 951. 50A C.J.S., Juries, §§ 367 et seq., 377 et seq.

ALR. — Right of jury to act upon their own knowledge in determining property values, 104 A.L.R. 1017.

Expression of opinion by juror based upon or influenced by his own observation and experience in connection with his trade, business, or profession as ground for reversal or new trial, 156 A.L.R. 1033.

Evidentiary effect of view by jury in condemnation proceedings, 1 A.L.R.3d 1397.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Trial jurors as witnesses in same state court or related case, 86 A.L.R.3d 781.

Propriety of juror's tests or experiments in jury room, 31 A.L.R.4th 566.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A.L.R.4th 11.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995.

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

17-9-21. Receipt of verdicts.

Verdicts shall be received only in open court, in the absence of agreement of the parties.

History. — Orig. Code 1863, § 3486; Code 1868, § 3509; Code 1873, § 3567; Code 1882, § 3567; Civil Code 1895, § 5336; Civil Code 1910, § 5931; Code 1933, § 110-107.

Cross references. — Corresponding provision relating to civil procedure, § 9-12-3.

RESEARCH REFERENCES

ALR. — Judgments enforcing contract contrary to public policy as subject to collateral attack, 30 A.L.R. 1100.

Right to have jury polled regarding method of reaching verdict, 86 A.L.R. 203.

Absence of accused at return of verdict in felony case, 23 A.L.R.2d 456.

17-9-22. Expression of approval or disapproval of verdict of jury by judge.

(a) No judge of any court shall either directly or indirectly express in open court his approval or disapproval of the verdict of any jury in any case tried before him, except as provided in subsection (c) of this Code section; nor may any judge discharge any jury upon the ground that the verdict rendered in any case does not meet with his approval.

(b) If any judge of any court either directly or indirectly expresses in open court his approval or disapproval of the verdict of the jury in any case tried before him, he shall be disqualified from presiding in the case in the event a new trial is granted.

(c) Nothing in this Code section shall have the effect of prohibiting a judge of any court from approving or disapproving the verdict of a jury in any case tried before him in hearing a motion for a new trial that comes on before him; but the approval or disapproval on the hearing of a motion for new trial shall be expressed in the formal order of the judge in granting or overruling the motion and not otherwise.

History. — Ga. L. 1918, p. 168, §§ 1, 2; Code 1933, §§ 110-201, 110-202.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-8. Juries, T. 15, C. 12.

JUDICIAL DECISIONS

Judge not disqualified from hearing motion for new trial. — Former Code 1933, §§ 110-201—110-203 (see O.C.G.A. §§ 17-9-22 and 17-9-23) nowhere say a judge was disqualified in a hearing on a motion for a new trial, but say that if the judge in the original trial does certain things prohibited therein, the judge was disqualified on a retrial of the case in the event a new trial was granted. Johnson v. State, 76 Ga. App. 494, 167 S.E. 900 (1933).

Comment that verdict is proper and just. — Trial judge is not disqualified from passing upon the motion for a new trial when, after the verdict of guilty is returned into court, the judge states: "I think it is a proper verdict and one fully justified; I think the verdict is just." Johnson v. State, 46 Ga. App. 494, 167 S.E. 900 (1933).

Comments regarding sentencing options. — Judge's comments regarding sentencing options available in light of the convictions were not expressions of the judge's approval or disapproval of the verdict. Reynolds v. State, 231 Ga. App. 33, 497 S.E.2d 580 (1998).

Remedy for improper remark was not new trial. — Whether the trial court's statement to the jury after the guilty verdict was returned amounted to an improper expression of approval of the verdict was immaterial to the defendant's

appeal from the convictions since the remedy for such a remark was not a new trial, but to prohibit the offending judge from presiding over the new trial in the event a new trial was granted. Abernathy v. State, 278 Ga. App. 574, 630 S.E.2d 421 (2006).

Cited in Luke v. State, 131 Ga. App. 799, 207 S.E.2d 213 (1974); Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405 (1979); Mobley v. State, 162 Ga. App. 23, 288 S.E.2d 702 (1982); Magsby v. State, 169 Ga. App. 637, 314 S.E.2d 473 (1984); Smith v. State, 258 Ga. 676, 373 S.E.2d 200 (1988).

RESEARCH REFERENCES

C.J.S. — 89 C.J.S. (Rev), Trial, § 610 et seq.

ALR. — Necessity of repeating definition of legal or technical term in different parts of instructions in which it is employed, 7 A.L.R. 135.

Threat to dismiss jury in criminal case for term, unless they could agree on verdict, as coercion, 10 A.L.R. 421.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus, 124 A.L.R. 1079.

Statute providing for change of judge or venue on ground of bias or prejudice as applicable to proceeding for modification of decree of divorce, 143 A.L.R. 411.

Disqualification of judge in pending case as subject to revocation or removal, 162 A.L.R. 641.

Reviewability of action of judge in disqualifying himself, 162 A.L.R. 654.

What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea, 63 A.L.R.2d 782.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.

17-9-23. Commending or complimenting of jury by judge.

No judge of any court may commend or compliment a jury during the term of any court for discharging its duty if the commendation or compliment has the effect of approving of a verdict.

History. — Ga. L. 1918, p. 168, § 3; Code 1933, § 110-203.

Cross references. — Corresponding provision relating to civil procedure, § 9-10-8.

JUDICIAL DECISIONS

Comment by judge that verdict is proper and just. — Trial judge is not disqualified from passing upon the motion for a new trial when, after the verdict of guilty is returned into court, the judge states: "I think it is a proper verdict and one fully justified; I think the verdict is just." Johnson v. State, 46 Ga. App. 494, 167 S.E. 900 (1933).

Penalty is disqualification from presiding over new trial. — Penalty for violating this section was the same as that prescribed for a judge's approval or disapproval of the verdict of the jury in open court, which penalty is the judge's disqualification in case a new trial should be granted. Johnson v. State, 46 Ga. App. 494, 167 S.E. 900 (1933).

Disqualification is not from hearing motion for new trial. — Former Code 1933, §§ 110-201—110-203 (see O.C.G.A. §§ 17-9-22 and 17-9-23) nowhere say a judge was disqualified in a hearing on a motion for a new trial, but say that, if the judge in the original trial does certain things prohibited therein, the judge was disqualified on a retrial of the case, in the event a new trial was granted. Johnson v. State, 46 Ga. App. 494, 167 S.E. 900 (1933).

Court's thanking jury for jury's service prior to determination that verdict was unanimous did not prejudice the verdict under O.C.G.A. § 17-9-23. Mobley v. State, 162 Ga. App. 23, 288 S.E.2d 702 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d, Trial, § 1268 et seq.

C.J.S. — 88 C.J.S. (Rev), Trial, §§ 305, 318 et seq.

ALR. — Threat to dismiss jury in criminal case for term, unless they could agree on verdict, as coercion, 10 A.L.R. 421.

ARTICLE 3

AMENDMENT AND IMPEACHMENT OF VERDICT

17-9-40. Amendment of verdict after dispersion of jury.

A verdict may be amended in mere matter of form after the jury have dispersed; but, after it has been received, recorded, and the jury dispersed, it may not be amended in matter of substance, either by what the jurors say they intended to find or otherwise.

History. — Orig. Code 1863, § 3422; Code 1868, § 3442; Code 1873, § 3492; Code 1882, § 3492; Civil Code 1895, § 5111; Civil Code 1910, § 5695; Code 1933, § 110-111.

Cross references. — Corresponding provision relating to civil procedure, § 9-12-7.

JUDICIAL DECISIONS

Verdicts in criminal cases may be reformed in presence of jury and even after jury has dispersed. Dansby v. State, 165 Ga. App. 41, 299 S.E.2d 579 (1983).

Return after dispersal of verdict which is too uncertain. — When by consent the jury in a criminal case disperses after agreeing upon the jury's finding, and thereafter return into court a verdict which is too uncertain or indefinite to support a judgment, it is beyond the power of the court to order this verdict to be so amended as to cure the defects therein. Any action by the court in attempting to thus amend such a verdict should be treated as a mere nullity. Wells v. State, 116 Ga. 87, 42 S.E. 390 (1902).

Conforming verdict to language of Code section charged. — When the jury returned a verdict of "involuntary manslaughter," without specification, the trial court does no more than conform the verdict to the pleadings and the evidence when the court asks the foreperson to conform the verdict to the language of O.C.G.A. § 16-5-3(a), unlawful act-involuntary manslaughter, when there is no evidence of lawful act-unlawful manner involuntary manslaughter. Brown v. State, 166 Ga. App. 765, 305 S.E.2d 386 (1983).

Amendment of guilty verdict to guilty but mentally ill not permitted. — Since the jury was instructed on possible verdicts of guilty and guilty but mentally ill and returned a verdict of guilty, amendment of the verdict from guilty to guilty but mentally ill would constitute an impermissible substantive change. Hollis v. State, 215 Ga. App. 35, 450 S.E.2d 247 (1994).

No amendment of guilty but mentally ill verdict. — Trial court erred in permitting the jury to consider a verdict of guilty but mentally ill on a misdemeanor

count of making harassing telephone calls as that verdict is available only in felony cases. Converting, on appeal, the verdict to guilty would have constituted an impermissible substantive change in the verdict, violative of O.C.G.A. § 17-9-40, and therefore the verdict had to be reversed. Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Juror's affidavit should not have been considered to impeach a verdict. — Habeas court erred in setting aside a murder conviction based on claims that counsel was ineffective in failing to challenge an alternate juror, who was seated after the juror had been excused and had researched the case on the Internet, because the juror's affidavit should not have been considered to impeach the verdict, pursuant to O.C.G.A. § 17-9-40, and the research was not the type of conduct that deprived the petitioner of a fair trial. O'Donnell v. Smith, 294 Ga. 307, 751 S.E.2d 324 (2013).

Cited in Rolle v. State, 177 Ga. App. 79, 338 S.E.2d 519 (1985).

RESEARCH REFERENCES

C.J.S. — 89 C.J.S., Trial, §§ 1074 et seq., 1166 et seq.

ALR. — Power of court to mold or amend verdict with respect to the parties for or against whom it was rendered, 106 A.L.R. 418.

Entry of final judgment after disagreement of jury, 31 A.L.R.2d 885.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition, 56 A.L.R.2d 213.

Competency of juror's statement or affidavit to show that verdict in a civil case was not correctly recorded, 18 A.L.R.3d 1132.

Jury's discussion of parole law as ground for reversal or new trial, 21 A.L.R.4th 420.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case, 21 A.L.R.4th 444.

Propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated, 14 A.L.R.5th 89.

17-9-41. Use of affidavits of jurors relating to verdict.

Repealed by Ga. L. 2011, p. 99, § 33/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Civil Code 1895, § 5338; Civil Code 1910, § 5933; Code 1933, § 110-109.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Ga. L. 2016, p. 864, § 17/HB 737, part of an Act to revise, modernize, and correct the Code, purported to designate this reserved Code section as repealed; however, due to the pre-existing designation of this Code section as repealed, this amendment has not been given effect.

ARTICLE 4

MOTIONS IN ARREST

Cross references. — Appeal by state from order, decision, or judgment arresting judgment of conviction on legal grounds, § 5-7-1.

RESEARCH REFERENCES

ALR. — Appealability of order arresting judgment in criminal case, 98 A.L.R.2d 737.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 A.L.R.3d 404.

17-9-60. Jurisdiction of motion; notification of opposing party.

All motions to arrest a judgment must be made to the court by which the judgment was rendered, and the opposite party must have reasonable notice of such motions.

History. — Orig. Code 1863, § 3511; Code 1868, § 3534; Code 1873, § 3592; Code 1882, § 3592; Civil Code 1895, § 5367; Civil Code 1910, § 5962; Code 1933, § 110-707.

JUDICIAL DECISIONS

Service on state not required before term of court expired. — Trial court erred in dismissing the defendant's motion to withdraw a guilty plea, which was filed by letter before the term of court expired but not served on the state, because the state had reasonable notice of the motion to withdraw 18 days before it was first set for a hearing, and over two years before the hearing was eventually held. The court looked to O.C.G.A. § 17-9-60 for guidance as to whether the state was required to be served with the motion prior to the expiration of the term of court, and concluded that it was not. McKiernan v. State, 286 Ga. 756, 692 S.E.2d 340 (2010).

Cited in Berkeley v. State, 74 Ga. App. 711, 41 S.E.2d 265 (1947); Bowen v. State, 144 Ga. App. 329, 241 S.E.2d 431 (1977); Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

RESEARCH REFERENCES

ALR. — Meritorious defense as condition of injunction against or direct attack upon judgment for want of jurisdiction, 118 A.L.R. 1498.

Power of lower court to set aside, on ground of fraud, judgment entered pursuant to mandate of, or affirmed by, reviewing court, 146 A.L.R. 1230.

Power of court to vacate or modify its judgment or order after expiration of prescribed period upon application made within that period, 168 A.L.R. 204.

17-9-61. Time and grounds for motion generally.

(a) When a judgment has been rendered, either party may move in arrest thereof for any defect not amendable which appears on the face of the record or pleadings.

(b) A motion in arrest of judgment must be made during the term at which the judgment was obtained.

History. — Orig. Code 1863, §§ 3506, 3507; Code 1868, §§ 3529, 3530; Code 1873, §§ 3587, 3588; Code 1882, §§ 3587, 3588; Civil Code 1895, §§ 5362, 5363; Civil Code 1910, §§ 5957, 5958; Code 1933, §§ 110-702, 110-703.

JUDICIAL DECISIONS

What constitutes "the face of the record or pleadings." — When it is sought to arrest a judgment imposing a sentence in a criminal case, "the face of the record or pleadings" have been held to be the indictment, plea, verdict, and judgment. Hall v. State, 202 Ga. 42, 42 S.E.2d 130 (1947).

Challenge to the sufficiency of the substance of an indictment can be made after trial by means of a motion in arrest of judgment. Bowman v. State, 227 Ga. App. 598, 490 S.E.2d 163 (1997).

Challenge to enhanced sentence based on allegedly defective indictment. — Defendant could not challenge a sentence for family violence battery on appeal, claiming that the sentence was erroneously enhanced from a misdemeanor to a felony under O.C.G.A. § 16-5-23.1(f)(2) based on a previous conviction arising from a guilty plea to the same offense that was based on a defective indictment because since the defendant failed to challenge the indictment at the time the defendant pleaded guilty, the proper remedy was a motion in arrest of judgment under O.C.G.A. § 17-9-61(b) or habeas corpus. Grogan v. State, 297 Ga. App. 251, 676 S.E.2d 764 (2009).

After defendant's conviction has been affirmed on appeal, motion in arrest of judgment is one of three available remedies. — Petitioner's motion to vacate the conviction was not an appropriate remedy in a criminal case after the petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of Chester v. State, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after the conviction had been affirmed on direct appeal, the petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. Harper v. State, 286 Ga. 216, 686 S.E.2d 786 (2009).

Absent perjury, fraud, accident, or mistake, only defects not amendable form basis for motion. — Verdict of a jury and the judgment based thereon cannot be set aside on a motion filed for that purpose, except for defects not amendable which appear on the face of the record, unless the verdict is obtained by perjury, fraud, accident, or mistake. Bonner v. State, 63 Ga. App. 464, 11 S.E.2d 431 (1940).

When arrest of judgment should be granted. — Motion in arrest of judgment due to a defective indictment should only be granted when the indictment was absolutely void. State v. Hammons, 252 Ga. App. 226, 555 S.E.2d 890 (2001).

Certification of judge as to judge's knowledge of events as basis for motion. — In a motion for new trial it might be appropriate for a judge to certify to events which transpired in the judge's presence, but such certification of anything within the judge's knowledge would not constitute the basis for a motion in arrest of judgment. Pippin v. State, 172 Ga. 224, 157 S.E. 185, answer conformed to, 43 Ga. App. 16, 157 S.E. 913 (1931).

Certification of judge as to allegations in motion does not make allegations part of the record. — Fact that the judge below certifies on appeal to the truth of the allegations in the motion in arrest of judgment does not make those facts a part of the record to which the motion in arrest relates. Pippin v. State, 172 Ga. 224, 157 S.E. 185, answer conformed to, 43 Ga. App. 16, 157 S.E. 913 (1931).

What matters not properly presented in motion in arrest of judgment. — Motion in arrest of judgment is not the proper mode of presenting to the attention of the court errors in overruling a motion for continuance or in allowing a separation of the jury. Pippin v. State, 172 Ga. 224, 157 S.E. 185, answer conformed to, 43 Ga. App. 16, 157 S.E. 913 (1931).

Erasure and substitute in verdict as grounds for appellate investigation. — If a verdict is rendered by a jury and there is an erasure and substitution of words, and the meaning of the verdict is perfectly clear, there is no reason why the verdict should be rejected, nor does such erasure constitute a basis for investiga-

tion by the appellate courts. Pippin v. State, 172 Ga. 224, 157 S.E. 185, answer conformed to, 43 Ga. App. 16, 157 S.E. 913 (1931).

Attack by motion on constitutionality of a statute not invoked in the prosecution. — When, by motion in arrest of judgment, a portion of a criminal statute is attacked as unconstitutional, and when neither the indictment, plea, verdict, nor judgment contains anything to indicate that the portion of the statute attacked as unconstitutional was applied or invoked in the prosecution, such motion in arrest of judgment does not present the question to the Supreme Court for determination. Hall v. State, 202 Ga. 42, 42 S.E.2d 130 (1947).

Time of motions. — Limitation provided by the statute as to the time within which each must be made constitutes the only difference between a motion to set aside and a motion to arrest in judgment. Artope v. Barker, 74 Ga. 462 (1885); Regopoulas v. State, 116 Ga. 596, 42 S.E. 1014 (1902); Garfield Oil Mills v. Stephens, 16 Ga. App. 655, 85 S.E. 983 (1915); Maddox Coffee Co. v. McHan, 22 Ga. App. 198, 95 S.E. 736 (1918).

Motions in arrest of judgment may be filed in the criminal cases within the term the judgment was rendered. Lacey v. State, 253 Ga. 711, 324 S.E.2d 471 (1985).

Defendant's challenge to the defendant's misdemeanor traffic convictions by a motion to vacate was not an appropriate remedy and the defendant's motion could not be construed as a motion for arrest of judgment or other alternative motion because the motion was untimely under O.C.G.A. § 40-13-33(a); the 180-day limit applied to any challenge that could have been brought by habeas corpus, and suspension of a driver's license interfered with a liberty interest. Munye v. State, 342 Ga. App. 680, 803 S.E.2d 775 (2017), cert. denied, No. S18C0239, 2018 Ga. LEXIS 236 (Ga. 2018).

Court correctly dismissed the defendant's motions in arrest of judgment, which were both filed in the trial court on July 12, 2016, as untimely because the defendant's convictions were entered on May 10, 2016, during the trial court's May 2016 term, which ended on July 3; although one of the motions was postmarked on July 1, that did not help the defendant as both motions were filed with the clerk of court after the May term had ended and were therefore untimely. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646 (2018).

Motion filed 21 years after conviction. — Motion in arrest of judgment based on a claim that an indictment lacked an essential element had to be made during the term in which the judgment was obtained and the defendant's motion, filed 21 years after the defendant was convicted on a charge of armed robbery, was untimely. Motes v. State, 262 Ga. App. 728, 586 S.E.2d 682 (2003).

Motion in arrest of judgment, like a motion for withdrawal of plea, must be made at the same term the judgment was obtained; a trial court was without jurisdiction to grant the defendant's motion to withdraw the defendant's guilty plea which was not filed within the same term of court, and the trial court was directed to reinstate the original conviction and sentence. Bonner v. State, 268 Ga. App. 170, 601 S.E.2d 478 (2004).

When judgments on defendants' convictions were entered in April 2003 but their motions in arrest of judgment were not filed until January 2005, the motions were untimely. Mitchell v. State, 282 Ga. 416, 651 S.E.2d 49 (2007).

With regard to a defendant's convictions for burglary, two counts of aggravated assault and armed robbery, aggravated sodomy and rape, and possession of a firearm by a convicted felon, the trial court did not err by denying the defendant's motion to correct a void judgment and to correct an illegally merged sentence as the defendant's motion was essentially seeking to vacate the judgment of conviction, which motion was contrary to the longstanding rule that a motion to vacate a judgment will not lie in a criminal case. Johnson v. State, 287 Ga. App. 759, 652 S.E.2d 836 (2007).

Defendant waived the defendant's right to be tried under a perfect indictment because the defendant did not file a special demurrer within ten days after the arraignment as required by O.C.G.A. § 17-7-110. Additionally, to the extent the

defendant's motion was one in arrest of judgment, the motion was untimely because the motion was not filed in the same term of court as the judgment as required by O.C.G.A. § 17-9-61. Thompson v. State, 286 Ga. 889, 692 S.E.2d 379 (2010), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Because the defendant did not file a timely special demurrer to the indictment or a timely motion in arrest of judgment, the defendant waived any claim that could have been raised via special or general demurrer. Kirt v. State, 309 Ga. App. 227, 709 S.E.2d 840 (2011).

Court's delay in providing written notice does not extend time. — Defendant's motion in arrest of judgment did not toll the time for filing an appeal of the defendant's conviction under O.C.G.A. § 5-6-38(a) as the motion was filed after the term of the trial court in which the defendant was convicted and was untimely under O.C.G.A. § 17-9-61(b); the fact that the trial court was late in sending the defendant written notice of the court's ruling on the motion in arrest of judgment did not deny the defendant the right to appeal the defendant's conviction, which was lost years earlier when the motion in arrest of judgment was untimely filed. Smith v. State, 263 Ga. App. 414, 587 S.E.2d 787 (2003).

Denial of motion for out-of-time appeal was not an abuse of discretion as the trial court credited defense counsel's testimony that counsel advised the defendant of the defendant's right to appeal the defendant's aggravated assault conviction within 30 days, that the evidence against the defendant was overwhelming, that counsel did not discern any appropriate grounds for filing an appeal, and that the defendant took counsel's advice to file a motion to remold the defendant's sentence instead. Huff v. State, 271 Ga. App. 553, 610 S.E.2d 177 (2005).

Motion properly denied. — Inasmuch as it was established that a violation of O.C.G.A. § 40-6-395 was alleged to have occurred in Douglas County, Georgia, the State Court of Douglas County had subject-matter jurisdiction over the case; thus, the denial of the defendant's motion in arrest of judgment was not error. Harbuck v. State, 280 Ga. 775, 631 S.E.2d 351 (2006).

Trial court did not err by denying the defendant's motion for a new trial on the ground that the indictment was defective for failing to allege the essential element of intent to commit a theft because the indictment clearly charged that the defendant attempted to commit a burglary, not that the defendant completed the crime. Coleman v. State, 318 Ga. App. 478, 735 S.E.2d 788 (2012), recons. denied; overruled on other grounds by State v. Heath, 2020 Ga. LEXIS 362 (Ga. 2020).

Evidentiary hearing not required. — Trial court's denial of the defendant's motion to allow an out-of-time appeal without conducting an evidentiary appeal was not an abuse of discretion as the defendant explained to the trial court that the defendant decided, as a matter of strategy, to file a pro se motion in arrest of judgment under O.C.G.A. § 17-9-61 rather than an immediate direct appeal; there was no need to inquire further into whether the defendant received ineffective assistance of counsel in failing to file an immediate direct appeal. Smith v. State, 263 Ga. App. 414, 587 S.E.2d 787 (2003).

Preservation for appellate review. — Because the defendant's motion in arrest of judgment was untimely under O.C.G.A. § 17-9-61(b), in that the motion was filed over five years after judgment was entered, the denial of the motion by the trial court was not subject to appellate review. Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011).

Cited in Gravitt v. State, 165 Ga. 779, 142 S.E. 100 (1928); Pippin v. State, 172 Ga. 224, 157 S.E. 185 (1931); Phillips v. State, 60 Ga. App. 622, 4 S.E.2d 698 (1939); Berkeley v. State, 74 Ga. App. 711, 41 S.E.2d 265 (1947); Sellers v. State, 82 Ga. App. 761, 62 S.E.2d 395 (1950); McEwen v. State, 108 Ga. App. 352, 133 S.E.2d 38 (1963); Hatfield v. State, 119 Ga. App. 110, 166 S.E.2d 431 (1969); Edwards v. State, 226 Ga. 811, 177 S.E.2d 668 (1970); Wiley v. State, 124 Ga. App. 654, 185 S.E.2d 582 (1971); Bowen v. State, 144 Ga. App. 329, 241 S.E.2d 431 (1977); Hubbard v. State, 167 Ga. App. 32, 305 S.E.2d 849 (1983); State v. Kight, 175 Ga.

App. 65, 332 S.E.2d 363 (1985); May v. State, 179 Ga. App. 736, 348 S.E.2d 61 (1986); Hill v. State, 183 Ga. App. 654, 360 S.E.2d 4 (1987); State v. O'Quinn, 192 Ga. App. 359, 384 S.E.2d 888 (1989); Walker v. State, 199 Ga. App. 701, 405 S.E.2d 887 (1991); Hammock v. State, 201 Ga. App. 614, 411 S.E.2d 743 (1991); Stargell v. State, 204 Ga. App. 45, 418 S.E.2d 372 (1992); Cabell v. State, 221 Ga. App. 192, 471 S.E.2d 222 (1996); Worle v. State, 227 Ga. App. 575, 489 S.E.2d 374 (1997); Dandy v. State, 253 Ga. App. 407, 559 S.E.2d 150 (2002); Pearson v. State, 258 Ga. App. 651, 574 S.E.2d 820 (2002); Dasher v. State, 285 Ga. 308, 676 S.E.2d 181 (2009); McDaniel v. State, 298 Ga. App. 558, 680 S.E.2d 593 (2009); Fouts v. State, 322 Ga. App. 261, 744 S.E.2d 451 (2013); Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

RESEARCH REFERENCES

ALR. — Time within which application to reopen or set aside a judgment by confession under warrant of attorney may be made, 112 A.L.R. 797.

Scope and character of meritorious defense as condition of relief from judgment, 174 A.L.R. 10.

Right of successful party to have judgment in his favor vacated or set aside on grounds of mistake, inadvertence, excusable neglect, or the like, 40 A.L.R.2d 1127.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Right to a jury trial on motion to vacate judgment, 75 A.L.R.3d 894.

DNA evidence as newly discovered evidence which will warrant grant of new trial or other postconviction relief in criminal case, 125 A.L.R.5th 497.

Actual innocence exception to procedural bars in state post-conviction proceedings, 97 A.L.R.6th 263.

17-9-62. Defects in pleadings or record aided by verdict or amendable not subject to motion.

A judgment may not be arrested for any defect in the pleadings or record that is aided by verdict or amendable as a matter of form.

History. — Orig. Code 1863, § 3509; Code 1868, § 3532; Code 1873, § 3590; Code 1882, § 3590; Civil Code 1895, § 5365; Civil Code 1910, § 5960; Code 1933, § 110-705.

Cross references. — Corresponding provision relating to civil procedure, § 9-12-15.

RESEARCH REFERENCES

C.J.S. — 49 C.J.S., Judgments, §§ 54, 410.

17-9-63. Motion not relating to merits of offense charged not to be granted.

No motion in arrest of judgment shall be granted for any matter not affecting the real merits of the offense charged in the indictment or accusation.

History. — Laws 1833, Cobb's 1851 Digest, p. 833; Code 1863, § 4517; Code 1868, § 4536; Code 1873, § 4629; Code 1882, § 4629; Penal Code 1895, § 955; Penal Code 1910, § 980; Code 1933, § 27-1601.

JUDICIAL DECISIONS

What constitutes "the face of the record or pleadings." — When it is sought to arrest a judgment imposing a sentence in a criminal case "the face of the record or pleadings" have been held to be the indictment, plea, verdict, and judgment. Hall v. State, 202 Ga. 42, 42 S.E.2d 130 (1947).

Defects which will sustain a motion in arrest of judgment generally. — In order to sustain a motion in arrest of judgment, the defects must appear on the face of the record and must be fatal defects. Hatcher v. State, 176 Ga. 454, 168 S.E. 278 (1933).

Enumerations of error which do not relate to unamendable defects appearing on the face of the record show no ground for reversal. Yarbrough v. State, 119 Ga. App. 46, 166 S.E.2d 35 (1969).

Motion reaches defects, not cured by verdict, to which general demurrer could be interposed. — In criminal cases, a motion in arrest of judgment will reach any defect apparent on the face of the record, not cured by the verdict, to which the general demurrer could have been successfully interposed before arraignment. Mullen v. State, 51 Ga. App. 385, 180 S.E. 521 (1935).

Motions filed in term in which judgments rendered are treated as motions in arrest of judgment. — Motions filed during the term in which judgment are rendered, alleging that the indictments are void, will be treated by the Supreme Court as motions in arrest of judgment as provided by this section. Marshall v. State, 229 Ga. 841, 195 S.E.2d 12 (1972).

Oral motion to quash raises question of whether motion in arrest of judgment would lie. — Oral motion to quash an indictment which is made after the issue has been joined raises only the question of whether the indictment is so defective that a motion in arrest of judgment would lie. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

If indictment attacked after verdict, presumption in favor of verdict. — After a verdict, every presumption and inference is in favor of the verdict. Hence, the pleading must be construed most strongly in favor of the pleader (the state). Rumph v. State, 60 Ga. App. 689, 4 S.E.2d 673 (1939).

If defendant did not demur to the indictment, but waited until after the verdict before attacking the verdict's sufficiency by way of a motion in arrest of judgment, every presumption and inference was in favor of the verdict, and the pleading would be construed most strongly in favor of the pleader (the state). Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940).

If the defendant waits until after the verdict and judgment and files a motion to set aside the verdict and judgment on the ground of certain alleged defects on the face of the indictment, every presumption is in favor of the verdict. Grier v. State, 64 Ga. App. 718, 13 S.E.2d 909 (1941).

Inconsistent verdict not a valid basis for a motion in arrest of judgment. — Because Georgia did not recognize the inconsistent verdict rule, the state properly assigned error to the trial court's grant of the defendant's motion in arrest of judgment; the evidence was sufficient to conclude that defendant was guilty of possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(1). State v. Robinson, 275 Ga. App. 117, 619 S.E.2d 806 (2005).

Irregularities in jury composition may not be addressed by motion. — Motion in arrest of judgment may not be considered when directed at irregularities in the composition of the jury because this section only relates to the merits of the offense charged and did not entertain collateral attacks. Bowen v. State, 144 Ga. App. 329, 241 S.E.2d 431 (1977).

Evidence that grand jury members were improperly drawn. — It is not within the province of this motion to embrace aliunde evidence tending to show

that the members of the grand jury were improperly drawn. Hand v. State, 88 Ga. App. 775, 77 S.E.2d 746 (1953).

Attack by motion on constitutionality of a statute not invoked in the prosecution. — If, by motion in arrest of judgment, a portion of a criminal statute is attacked as unconstitutional, and when neither the indictment, plea, verdict, nor judgment contains anything to indicate that the portion of the statute attacked as unconstitutional was applied or invoked in the prosecution, such motion in arrest of judgment does not present the question to the Supreme Court for determination. Hall v. State, 202 Ga. 42, 42 S.E.2d 130 (1947).

Indictment sets forth offense with sufficient clarity. — Court does not err in overruling a motion in arrest of judgment if it is reasonably apparent from the indictment that every essential ingredient of the offense is set forth with sufficient clearness to enable the defendant and the jury to understand the nature of the offense and to enable the defendant to prepare a defense. Rumph v. State, 60 Ga. App. 689, 4 S.E.2d 673 (1939).

Imperfect indictment which nonetheless charges violation understandable by the jury. — If a verdict, when construed with the indictment, does not find the defendant guilty of any offense, the judgment should be arrested, but when, regardless of the denomination of the offense, the allegations of the indictment charge, even imperfectly, a violation of the law which can be plainly understood by the jury, and a verdict finding the defendant guilty cannot be ignored without violating the rules of common sense, sentence should be pronounced upon the finding. Rumph v. State, 60 Ga. App. 689, 4 S.E.2d 673 (1939).

Before retrial, substance of indictment may also be tried by general demurrer. — Because a motion in arrest of judgment can be made after trial to challenge the substance of an indictment, it follows that a general demurrer can be made before retrial to challenge the substance of the indictment. Bramblett v. State, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978).

Form of objection if motion in arrest of judgment does not lie. — If an indictment is not on the indictment's face so defective that a motion in arrest of judgment would lie, an objection to the indictment must be in writing. An oral objection, being ineffective for its purpose, is the equivalent of none at all, and, if no other action be taken, a waiver results. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

Cited in McClendon v. State, 81 Ga. App. 218, 58 S.E.2d 462 (1950); Jennings v. Davis, 92 Ga. App. 265, 88 S.E.2d 544 (1955); Slaughter v. State, 98 Ga. App. 59, 104 S.E.2d 911 (1958); Johnson v. State, 116 Ga. App. 406, 157 S.E.2d 773 (1967); Palmer v. State, 144 Ga. App. 480, 241 S.E.2d 597 (1978); Joiner v. State, 163 Ga. App. 521, 295 S.E.2d 219 (1982); Brown v. State, 181 Ga. App. 865, 354 S.E.2d 169 (1987); Dandy v. State, 253 Ga. App. 407, 559 S.E.2d 150 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 700 et seq.

C.J.S. — 23A C.J.S., Criminal Procedure and Rights of the Accused, § 1980 et seq.

ALR. — Appealability of order arresting judgment in criminal case, 98 A.L.R.2d 737.

CHAPTER 10

SENTENCE AND PUNISHMENT

Article 1

Procedure for Sentencing and Imposition of Punishment

Sec.
17-10-1. (For effective date, see note.) Fixing of sentence; suspension or probation of sentence; change in sentence; eligibility for parole; prohibited modifications; exceptions.
17-10-1.1. Judicial consideration of victim impact statement; form document; manner of rebuttal; effect of noncompliance; no creation of cause of action or right of appeal.
17-10-1.2. Oral victim impact statement; presentation of evidence; cross-examination and rebuttal by defendant; effect of noncompliance; no creation of cause of action or right of appeal.
17-10-1.3. Factoring into sentencing determinations citizenship status of convict.
17-10-1.4. Split sentence.
17-10-2. Conduct of presentence hearings in felony cases; effect of reversal for error in presentence hearing.
17-10-3. Punishment for misdemeanors generally.
17-10-3.1. Punishment for violations of Code Section 40-6-391.
17-10-4. Punishment for misdemeanors of a high and aggravated nature.
17-10-5. Imposition of misdemeanor punishment for felonies punishable by imprisonment for term of ten years or less.
17-10-6. Review of sentences of imprisonment for period exceeding 12 years by three-judge panel [Repealed].
17-10-6.1. Punishment for serious violent offenders; authorization for reduction in mandatory minimum sentencing.
Sec.
17-10-6.2. Punishment for sexual offenders.
17-10-6.3. Disposition of cases currently under review by three-judge panel; duties and responsibilities of the president of The Council of Superior Court Judges of Georgia with respect to abolishing the three-judge panel.
17-10-7. Punishment of repeat offenders; punishment and eligibility for parole of persons convicted of fourth felony offense.
17-10-8. Payment of fine in felony case; rebate or refund of fine not permitted upon revocation of probation.
17-10-8.1. Fee for legal defense services as condition of probation.
17-10-9. (For effective date, see note.) Specification by judge imposing sentence of time from which penal sentence to run; effect of appeal.
17-10-9.1. Voluntary surrender to county jail or correctional institution; release of defendant.
17-10-10. Concurrent sentences.
17-10-11. (For effective date, see note.) Granting of credit generally; exceptions; use in determining parole eligibility; applicability of Code section.
17-10-12. Affidavit specifying number of days spent in confinement; disposition of affidavit; granting of credit to defendant.
17-10-13. Legal adjudication of guilt in court having jurisdiction to precede assessment of punishment.
17-10-14. Committal of person under 17 convicted of felony.
17-10-15. AIDS transmitting crimes; requiring defendant to submit to HIV test; report of results.
17-10-16. Sentence to imprisonment for

Sec.
life without parole authorized; ineligibility for parole or leave programs.
17-10-16.1. Seeking death penalty not prerequisite to life without parole sentence.
17-10-17. Sentencing of defendants guilty of crimes involving bias or prejudice; identification of increased sentence.
17-10-18. Notification to seek enhanced penalty.
17-10-19. Determination of defendant's guilt; object of the offense; enhancement of sentence.
17-10-20. Collection of fines and restitution in criminal cases.
17-10-21. Vacating of sentence for trafficking victim defendants.

Article 2

Death Penalty Generally

17-10-30. Procedure for imposition of death penalty generally.
17-10-30.1. Imprisonment for life without parole; finding of statutory aggravating circumstance required; duties of judge and jury [Repealed].
17-10-31. Requirement of jury finding of aggravating circumstance and recommendation of death penalty prior to imposition; arguments of counsel during sentencing phase; jury instructions; actions of judge in event of failure to reach unanimous verdict.
17-10-31.1. Requirement of jury finding of aggravating circumstance and recommendation of sentence of death or life without parole; duties of judge; jury instruction on meaning of "life without parole" and "life imprisonment." [Repealed].
17-10-32. Sentencing of person indicted for capital offense to life imprisonment or other punishment upon plea of guilty.
17-10-32.1. Sentencing of person subject to death penalty or life without parole upon plea of guilty; duties of judge [Repealed].
Sec.
17-10-33. Imposition of sentence of death upon judgment of death; to whom copies of sentence sent; conveying defendant to state correctional institution; expenses of transporting defendant.
17-10-34. Sentence to specify time period for and place of execution; appointing time period for execution of pregnant female.
17-10-35. Review of death sentences by Supreme Court; forwarding of record and transcript; scope of review; written briefs and oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.
17-10-35.1. Review of pretrial proceedings when death penalty is sought; reports investigating reversible error; transmittal of reports to Supreme Court; orders regarding review; Attorney General assistance; res judicata; applicability; waiver of rights.
17-10-35.2. Hearing to determine appropriateness of interim appellate review of pretrial rulings.
17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.
17-10-37. Appointment of assistant to Supreme Court to review death sentences; employment of staff to compile data.
17-10-38. Death sentences generally.
17-10-39. Procedure for determination if female sentenced to death is pregnant; suspension of execution of sentence; issuance of new order for execution of sentence; entry of order upon minutes of court.
17-10-40. Change of time period for execution when time period set for execution has passed; recordation on court minutes; length of and time limitation for new time period for execu-

Sec.
tion; setting day and time for execution.
17-10-41. Persons required to be present at executions.
17-10-42. Preparation and filing of certification of execution.
17-10-42.1. Participation of medical professionals in executions.
17-10-43. Disposition of body of executed person; payment of expenses of transporting body.
17-10-44. Apparatus, machinery, and appliances.

Article 3

Mentally Incompetent to Be Executed

17-10-60. "Mentally incompetent to be executed" defined.
17-10-61. No execution upon determination of mental incompetency to be executed.
17-10-62. Exclusive procedure for challenging mental competency to be executed.
17-10-63. Filing of application; contents.
17-10-64. Service of application.
17-10-65. Answer by respondent.
17-10-66. Examination of applicant.
17-10-67. When application to be filed.
17-10-68. Proof; disposition.
17-10-69. Prior adjudication as presumption of mental competency.
17-10-70. Appeals.
17-10-71. Procedure upon convicted person's regaining mental competency.

Cross references. — Prohibition against cruel and unusual punishment, U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Penalty for hiring applicant with criminal record, § 31-7-353.

U.S. Code. — Sentence and judgment, Federal Rules of Criminal Procedure, Rule 32.

Law reviews. — For article, "The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative," see 37 Mercer L. Rev. 981 (1986). For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For article, "Constructing Recidivism Risk," see 67 Emory L.J. 59 (2017).

For note, "Comparative Analysis of Democracy and Sentencing in the United States as a Model for Reform in Iraq," see 33 Ga. J. Int'l & Comp. L. 303 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Application date of provisions. — Sentence Reform Act of 1994 became effective January 1, 1995, and the new sentencing provisions created by the Act only apply to offenses committed on or after that date. 1997 Op. Att'y Gen. No. 97-10.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 706 et seq. 21A Am. Jur. 2d, Criminal Law, § 819 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2183 et seq.

ALR. — Right to recover back fine or penalty paid in criminal proceeding, 26 A.L.R. 1523.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Propriety of conditioning probation on defendant's not entering specified geographical area, 28 A.L.R.4th 725.

Right of convicted defendant to refuse probation, 28 A.L.R.4th 736.

Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

Insanity as defense to revocation of probation, 56 A.L.R.4th 1178.

The propriety of conditioning parole on defendant's not entering specified geographical area, 54 A.L.R.5th 743.

ARTICLE 1

PROCEDURE FOR SENTENCING AND IMPOSITION OF PUNISHMENT

Cross references. — Vacating of office by state officer convicted of felony, § 45-5-2. Suspension of county officer upon conviction for felony, § 45-5-6. Sentencing and sentence review, Uniform Superior Court Rules, Rule 35.2. Modification or vacation of juvenile court order of probation, Uniform Rules for the Juvenile Courts of Georgia, Rules 16.1 through 16.4.

Law reviews. — For annual survey on death penalty law, see 70 Mercer L. Rev. 73 (2018).

For note on the 1994 amendments of Code Sections 17-10-1, 17-10-6, 17-10-7 and enactment of Code Section 17-10-6.1 of this article, see 11 Ga. St. U.L. Rev. 159 (1994).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Governmental Entity's Liability for Injuries Caused by Negligently Released Individual, 19 POF2d 583.

Government's Breach of Plea Bargain, 27 POF2d 133.

17-10-1. (For effective date, see note.) Fixing of sentence; suspension or probation of sentence; change in sentence; eligibility for parole; prohibited modifications; exceptions.

(a)(1)(A) Except in cases in which life imprisonment, life without parole, or the death penalty may be imposed, upon a verdict or plea of guilty in any case involving a misdemeanor or felony, and after a presentence hearing, the judge fixing the sentence shall prescribe a determinate sentence for a specific number of months or years which shall be within the minimum and maximum sentences prescribed by law as the punishment for the crime. The judge imposing the sentence is granted power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper, including service of a probated sentence in the sentencing options system, as provided by Article 6 of Chapter 3 of Title 42, and including the authority to revoke the suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court, even before the probationary period has begun, subject to the conditions

set out in this subsection; provided, however, that such action shall be subject to the provisions of Code Sections 17-10-6.1 and 17-10-6.2.

(B) When a defendant with no prior felony conviction is convicted of felony offenses or is charged with felony offenses and is sentenced pursuant to subsection (a) or (c) of Code Section 16-13-2 or Article 3 of Chapter 8 of Title 42, and the court imposes a sentence of probation or not more than 12 months of imprisonment followed by a term of probation, the court shall include a behavioral incentive date in its sentencing order that does not exceed three years from the date such sentence is imposed. Within 60 days of the expiration of such incentive date, if the defendant has not been arrested for anything other than a nonserious traffic offense as defined in Code Section 35-3-37, has been compliant with the general and special conditions of probation imposed, and has paid all restitution owed, the Department of Community Supervision shall notify the prosecuting attorney and the court of such facts. The Department of Community Supervision shall provide the court with an order to terminate such defendant's probation which the court shall execute unless the court or the prosecuting attorney requests a hearing on such matter within 30 days of the receipt of such order. The court shall take whatever action it determines would be for the best interest of justice and the welfare of society.

(2)(A) Active probation supervision shall terminate in all cases no later than two years from the commencement of active probation supervision unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown; provided, however, that in those cases involving:

(i) The collection of restitution, the period of active probation supervision shall remain in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever first occurs;

(ii) A conviction under Chapter 15 of Title 16, the "Georgia Street Gang Terrorism and Prevention Act," the period of active probation supervision shall remain in effect until the termination of the sentence, but shall not exceed five years unless as otherwise provided in this paragraph; or

(iii) A conviction that requires the defendant to register on the state sexual offender registry pursuant to Code Section 42-1-12, the period of active probation supervision shall remain in effect until the court orders unsupervised probation, or until termination of the sentence, whichever first occurs.

(B) Probation supervision shall not be required for defendants sentenced to probation while the defendant is in the legal custody

of the Department of Corrections or the State Board of Pardons and Paroles.

(3)(A) Any part of a sentence of probation revoked for a violation other than a subsequent commission of any felony, a violation of a special condition, or a misdemeanor offense involving physical violence resulting in bodily injury to an innocent victim which in the opinion of the trial court constitutes a danger to the community or a serious infraction occurring while the defendant is assigned to an alternative probation confinement facility shall be served in a probation detention center, probation boot camp, weekend lock up, or confinement in a local jail or detention facility, or other community correctional alternatives available to the court or provided by the Department of Corrections.

(B) A parolee or probationer charged with a misdemeanor involving physical injury or an attempt to commit physical injury or terroristic threats or with a new felony shall not be entitled to bond pending a hearing on the revocation of his or her parole or probation, except by order of a judge of the superior, state, or magistrate court wherein the alleged new offense occurred after a hearing and upon determination of the superior, state, or magistrate court that the parolee or probationer does not constitute a threat to the community; provided, however, that this subparagraph does not authorize state or magistrate court judges to grant bail for a person charged with any offense listed in subsection (a) of Code Section 17-6-1.

(4) In cases of imprisonment followed by probation, the sentence shall specifically provide that the period of probation shall not begin until the defendant has completed service of the confinement portion of the sentence. No revocation of any part of a probated sentence shall be effective while a defendant is in the legal custody of the State Board of Pardons and Paroles.

(5)(A) When a defendant has been sentenced to probation, the court shall retain jurisdiction throughout the period of the probated sentence as provided for in subsection (g) of Code Section 42-8-34. Without limiting the generality of the foregoing, the court may shorten the period of active probation supervision or unsupervised probation on motion of the defendant or on its own motion, or upon the request of a community supervision officer, if the court determines that probation is no longer necessary or appropriate for the ends of justice, the protection of society, and the rehabilitation of the defendant. Prior to entering any order for shortening a period of probation, the court shall afford notice to the victim or victims of all sex related offenses or violent offenses resulting in serious bodily injury or death and, upon request of the victim or victims so

notified, shall afford notice and an opportunity for hearing to the defendant and the prosecuting attorney.

(B) The Department of Community Supervision shall establish a form document which shall include the elements set forth in this Code section concerning notification of victims and shall make copies of such form available to prosecuting attorneys in this state. When requested by the victim, the form document shall be provided to the victim by the prosecuting attorney. The form shall include the address of the community supervision office having jurisdiction over the case and contain a statement that the victim must maintain a copy of his or her address with the community supervision office and must notify the office of any change of address in order to maintain eligibility for notification by the Department of Community Supervision as required in this Code section.

(6)(A) Except as otherwise authorized by law, no court shall modify, suspend, probate, or alter a previously imposed sentence so as to reduce or eliminate a period of incarceration or probation and impose a financial payment which:

(i) Exceeds the statutorily specified maximum fine, plus all penalties, fees, surcharges, and restitution permitted or authorized by law; or

(ii) Is to be made to an entity which is not authorized by law to receive fines, penalties, fees, surcharges, or restitution.

(B) The prohibitions contained in this paragraph shall apply regardless of whether a defendant consents to the modification, suspension, probation, or alteration of such defendant's sentence and the imposition of such payment.

(C) Nothing in this paragraph shall prohibit or prevent a court from requiring, as a condition of suspension, modification, or probation of a sentence in a criminal case involving child abandonment, that the defendant pay all or a portion of child support which is owed to the custodial parent of a child which is the subject of such case.

(7) As used in this subsection, the term:

(A) "Active probation supervision" means the period of a probated sentence in which a probationer actively reports to his or her community supervision officer or is otherwise under the direct supervision of a community supervision officer.

(B) "Unsupervised probation" means the period of a probated sentence that follows active probation supervision in which:

(i) All of the conditions and limitations imposed by the court remain intact;

(ii) A probationer may have reduced reporting requirements; and

(iii) A community supervision officer shall not actively supervise such probationer.

(b) The judge, in fixing the sentence as prescribed in subsection (a) of this Code section, may make a determination as to whether the person being sentenced should be considered for parole prior to the completion of any requirement otherwise imposed by law relating to the completion of service of any specified time period before parole eligibility. In the event that the judge so determines, he or she may specify in the sentence that the person is sentenced under this subsection and may provide that the State Board of Pardons and Paroles, acting in its sole discretion, may consider and may parole any person so sentenced at any time prior to the completion of any minimum requirement otherwise imposed by law, rule, or regulation for the service of sentences or portions thereof. The determination allowed in this subsection shall be applicable to first offenders only.

(c) In any case in which a minor defendant who has not achieved a high school diploma or the equivalent is placed under a probated or suspended sentence, the court may require as a condition of probation or suspension of sentence that the defendant pursue a course of study designed to lead to achieving a high school diploma or the equivalent; and, in any case in which such a condition of probation may be imposed, the court shall give express consideration to whether such a condition should be imposed.

(d)(1) As used in this subsection, the term:

(A) "Developmental disability" shall have the same meaning as set forth in Code Section 37-1-1.

(B) "Indigent" means an individual who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents.

(C) "Significant financial hardship" means a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months.

(D) "Totally and permanently disabled" shall have the same meaning as set forth in Code Section 49-4-80.

(2) In determining the financial obligations, other than restitution, to impose on the defendant, the court shall consider:

(A) The defendant's financial resources and other assets, including whether any such assets are jointly controlled;

(B) The defendant's earnings and other income;

(C) The defendant's financial obligations, including obligations to dependents;

(D) The period of time during which the probation order will be in effect;

(E) The goal of the punishment being imposed; and

(F) Any other factor the court deems appropriate.

(3) In any case involving a violation of local ordinance, misdemeanor, or felony in which the defendant has been punished in whole or in part by a fine, the court shall be authorized to allow the defendant to satisfy such fine or any fee imposed in connection with probation supervision through community service as set forth in Article 3 of Chapter 3 of Title 42. One hour of community service shall equal the dollar amount of one hour of paid labor at the minimum wage under the federal Fair Labor Standards Act of 1938, in effect on January 1, 2018, unless otherwise specified by the court. A defendant shall be required to serve the number of hours in community service which equals the number derived by dividing the amount owed by the defendant, including moneys assessed by a provider of probation services, by the federal minimum hourly wage or by the amount specified by the court. If the court orders educational advancement, the court shall determine the numbers of hours required to be completed. Prior to or subsequent to sentencing, a defendant, or subsequent to sentencing, a community supervision officer, may request that the court make all or any portion of the amount owed by the defendant be satisfied under this subsection.

(4) At the time of sentencing, the court may waive the imposition of a fine, exclusive of the payment of statutory surcharges, upon a determination that a defendant has a significant financial hardship or inability to pay or other extenuating factors exist that prohibit payment or collection of such fine. When determining significant financial hardship, the court may consider whether the defendant is indigent and whether the defendant or his or her dependents has a developmental disability or is totally and permanently disabled. If the court waives the imposition of a fine under this paragraph, it shall instead impose a theoretical fine and the defendant shall be required to pay the statutory surcharges associated therewith.

(e) In any case involving a felony in which the defendant previously appeared before a juvenile court, the records of the dispositions of the defendant as well as any evidence used in any juvenile court hearing shall be available to the district attorney, the defendant, and the superior court judge in determining sentencing as provided in Code Section 15-11-703.

(f) (For effective date, see note.) Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed. The time periods prescribed in this subsection require the defendant to file a motion within such time periods; however, the court shall not be constrained to issue its order or hear the matter within such time periods. Prior to entering any order correcting, reducing, or modifying any sentence, the court shall afford notice and an opportunity for a hearing to the prosecuting attorney. Any order modifying a sentence which is entered without notice and an opportunity for a hearing as provided in this subsection shall be void. This subsection shall not limit any other jurisdiction granted to the court in this Code section or as provided for in subsection (g) of Code Section 42-8-34.

(g)(1)(A) In sentencing a defendant convicted of a felony to probated confinement, the sentencing judge may make the defendant's participation in a work release program operated by a county a condition of probation, provided that such program is available and the administrator of such program accepts the inmate.

(B) Any defendant accepted into a county work release program shall thereby be transferred into the legal custody of the administrator of said program; likewise, any defendant not accepted shall remain in the legal custody of the Department of Corrections.

(2) Work release status granted by the court may be revoked for cause by the sentencing court in its discretion or may be revoked by the state or local authority operating the work release program for any reason for which work release status would otherwise be revoked.

(3) The provisions of this subsection shall not limit the authority of the commissioner to authorize work release status pursuant to Code Section 42-5-59 or apply to or affect the authority to authorize work release of county prisoners, which shall be as provided for in Code Sections 42-1-4 and 42-1-9 or as otherwise provided by law.

(4) This subsection shall not apply with respect to any violent felony or any offense for which the work release status is specifically prohibited by law, including but not limited to serious violent felonies as specified in Code Section 17-10-6.1.

History. — Ga. L. 1919, p. 387, § 1; Code 1933, § 27-2502; Ga. L. 1950, p. 352, § 3; Ga. L. 1964, p. 483, §§ 2, 4; Ga. L. 1974, p. 352, §§ 3, 4; Ga. L. 1981, p. 1024, § 1; Ga. L. 1982, p. 3, § 17; Ga. L. 1984, p. 894, § 2; Ga. L. 1986, p. 842, § 1; Ga. L. 1988, p. 463, § 1; Ga. L. 1991, p. 310, § 1; Ga. L. 1992, p. 3221, § 1; Ga. L. 1993, p.

1654, § 1; Ga. L. 1994, p. 1959, § 9; Ga. L. 1995, p. 1043, § 1; Ga. L. 1996, p. 1257, § 1; Ga. L. 1998, p. 842, § 6; Ga. L. 2000, p. 20, § 7; Ga. L. 2001, p. 94, § 5; Ga. L. 2001, p. 1030, § 1; Ga. L. 2004, p. 775, § 1; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2006, p. 379, § 19/HB 1059; Ga. L. 2006, p. 710, § 7/SB 203; Ga. L. 2010, p. 230, § 10/HB 1015; Ga. L. 2012, p. 899, § 4-3/HB 1176; Ga. L. 2013, p. 141, § 17/HB 79; Ga. L. 2013, p. 222, § 7/HB 349; Ga. L. 2013, p. 294, § 4-17/HB 242; Ga. L. 2015, p. 5, § 17/HB 90; Ga. L. 2015, p. 422, § 5-30/HB 310; Ga. L. 2016, p. 443, § 13-4/SB 367; Ga. L. 2017, p. 585, § 2-1/SB 174; Ga. L. 2018, p. 550, § 2-6/SB 407; Ga. L. 2018, p. 1112, § 17/SB 365; Ga. L. 2020, p. 361, § 1/HB 984.

Delayed effective date. — Subsection (f), as set out above, becomes effective January 1, 2021. For version of subsection (f) as in effect until January 1, 2021, see the 2020 amendment note.

The 2018 amendments. — The first 2018 amendment, effective July 1, 2018, substituted "with no prior felony conviction is convicted of felony offenses or is charged with felony offenses and is sentenced pursuant to subsection (a) or (c) of Code Section 16-13-2 or Article 3 of Chapter 8 of Title 42, and the court imposes a sentence of probation or not more than 12 months of imprisonment followed by a term of probation," for "is convicted of felony offenses, has no prior felony conviction, and the court imposes a sentence of probation, not to include a split sentence," in the first sentence of subparagraph (a)(1)(B); substituted the present provisions of paragraph (a)(2) for the former provisions, which read: "Active probation supervision shall terminate in all cases no later than two years from the commencement of active probation supervision unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown; provided, however, that in those cases involving the collection of restitution, the period of active probation supervision shall remain in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever first occurs, and for those cases involving a conviction under Chapter 15 of Title 16, the 'Georgia Street Gang Terrorism and Prevention Act,' the period of active probation supervision shall remain in effect until the termination of the sentence, but shall not exceed five years unless as otherwise provided in this paragraph. Supervision shall not be required for defendants sentenced to probation while the defendant is in the legal custody of the Department of Corrections or the State Board of Pardons and Paroles."; and substituted the present provisions of subsection (d), for the former provisions, which read: "In any case involving a misdemeanor or a felony in which the defendant has been punished in whole or in part by a fine, the sentencing judge shall be authorized to allow the defendant to satisfy such fine through community service as defined in Code Section 42-3-50. One hour of community service shall equal the dollar amount of one hour of paid labor at the minimum wage under the federal Fair Labor Standards Act of 1938, in effect on January 1, 2017, unless otherwise specified by the sentencing judge. A defendant shall be required to serve the number of hours in community service which equals the number derived by dividing the amount of the fine by the federal minimum hourly wage or by the amount specified by the sentencing judge. Prior to or subsequent to sentencing, a defendant, or subsequent to sentencing, a community supervision officer, may request that the court make all or any portion of a fine be satisfied under this subsection." The second 2018 amendment, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, inserted "or she" near the beginning of the second sentence of subsection (b).

The 2020 amendment, effective January 1, 2021, added the second sentence in subsection (f).

Cross references. — Diploma requirement as condition of probation in juvenile proceeding, § 15-11-601. Discretion of judge to allow conditional discharge for first offenders of laws relating to possession of controlled substances or dangerous drugs, § 16-13-2. Sentence to imprisonment for life without parole authorized, § 17-10-16. Notification required to be given to commissioner of offender rehabil-

itation following imposition of sentence, and as to assignment of convicted person to correctional institution, § 42-5-50. Alternative provisions for sentencing of offenders between ages 17 and 25, § 42-7-3 et seq. Procedure for hearing and determining question of probation generally, § 42-8-34. Probation of first offenders, § 42-8-60.

Editor's notes. — Ga. L. 1991, p. 310, § 2, not codified by the General Assembly, provides that the 1991 amendments to this Code section, effective July 1, 1991, are applicable to sentences of probation entered prior to, on, or after July 1, 1991.

Ga. L. 1993, p. 1654, § 7, not codified by the General Assembly, and effective May 1, 1993, provides: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, a defendant whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act provided that: (1) jeopardy for the offense charged has not attached and the state has filed with the trial court notice of its intention to seek the death penalty or (2) the defendant has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking the death penalty after remand."

Ga. L. 1993, p. 1654, § 8, not codified by the General Assembly, and effective May 1, 1993, provides: "Except as provided in Section 6 of this Act [Code Section 17-10-32.1], the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act nor shall this Act be construed as repealing Code Sections 17-10-30, 17-10-31, or 17-10-32 of the Official Code of Georgia Annotated."

Ga. L. 1993, p. 1654, § 9, not codified by the General Assembly, and effective May 1, 1993, provides: "No person shall be sentenced to life without parole unless such person could have received the death penalty under the laws of this state as such laws have been interpreted by the United States Supreme Court and the Supreme Court of Georgia."

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act." This Act became effective January 1, 1995.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in State v. Allmond, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in State v. Allmond, it is the expressed intent

of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the '2001 Crime Prevention Act.'"

Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c)/HB 1059, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Ga. L. 2015, p. 5, § 54(e)/HB 90, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2015 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to subsection (d) of this Code section by Ga. L. 2015, p. 5, § 17/HB 90, was not given effect.

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article discussing the constitutionality of imposing harsher sentences upon defendants found guilty in new trial after appeal, see 6 Ga. St. B.J. 183 (1969). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11, 61 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015). For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 139 (2016). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 115 (2017). For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 45 (2018). For annual survey on criminal law, see 70 Mercer L. Rev. 63 (2018).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 183 (1993). For note on the 2001 amendment of this Code section, see 18 Ga. St. U.L. Rev. 47 (2001). For note, "'158-County Banishment' in Georgia: Constitutional Implications under the State Constitution and the Federal Right to Travel," see 36 Ga. L. Rev. 1083 (2002). For note, "Blakely v. Washington: Criminal Sentencing and the Sixth Amendment Limitation on Judicial Factfinding," see 56 Mercer L. Rev. 1079 (2005). For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

For comment on State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967), as to an indigent misdemeanant's right to counsel, see 19 Mercer L. Rev. 440 (1968).

JUDICIAL DECISIONS

Analysis

General Consideration
Sentencing Prerogatives of Trial Court
Modification of Sentence
Revocation of Probation or Suspension

General Consideration

Editor's notes. — Many of the cases noted below were decided prior to the 1994 amendment of paragraph (a)(1).

Purpose of Sentence Reform Act of 1994. — From the caption of the Act and from the declarations and findings enunciated in Section 2 of the Sentence Reform Act of 1994, Ga. L. 1994, p. 1959, it is apparent that the primary purpose of the Act was to limit probation and parole for certain violent felonies and to provide for sentences of life without parole. Moore v. Ray, 269 Ga. 457, 499 S.E.2d 636 (1998).

Effect of 1992 amendment. — Following the 1992 amendment of O.C.G.A. § 17-10-1, the trial court no longer has the power to revoke a probation sentence that has not yet begun. Lombardo v. State, 244 Ga. App. 885, 537 S.E.2d 143 (2000).

If the defendant's probation was revoked before the motion began, the defendant's probation was improperly revoked under former O.C.G.A. § 17-10-1, which was the statute in effect at the time that the defendant committed the crimes that led to the revocation of probation; former § 17-10-1, which was subject to O.C.G.A. § 42-8-34(g), did not grant the authority to revoke probation before probation began. Jones v. State, 260 Ga. App. 401, 579 S.E.2d 827 (2003).

Privatization of probation services. — In a suit brought by misdemeanor defendants challenging the privatization of probation services under O.C.G.A. § 42-8-100(g)(1), the Georgia Supreme Court agreed with the trial court that § 42-8-100(g)(1) was not unconstitutional on the statute's face and did not offend due process or equal protection nor condone imprisonment for debt. Sentinel Offender Svcs., LLC v. Glover, 296 Ga. 315, 766 S.E.2d 456 (2014).

Applicability to drug trafficking. — By the statute's express terms, mandatory sentence provisions of O.C.G.A. § 16-13-31 regarding trafficking in certain drugs are removed from the application of the probated and suspended sentence provisions of O.C.G.A. § 17-10-1(a). Moran v. State, 170 Ga. App. 837, 318 S.E.2d 716 (1984).

Pursuant to O.C.G.A. § 16-13-31(g)(1), the trial court lacked the authority to probate or suspend sentences imposed against two defendants in unrelated criminal actions, and neither the 2004 nor the 2006 amendments to the general sentencing provisions under O.C.G.A. § 17-10-1(a)(1) were relevant; moreover, because O.C.G.A. §§ 17-10-6.1 and 17-10-6.2 were statutes that defined certain categories of crimes and provided the sentencing guidelines for those categories, it did not appear that the list of these two exceptions normally would have included § 16-13-31 or any other specific criminal statute, and any omission would be significant only with regard to a statute that defined classes or categories of crimes. Gillen v. State, 286 Ga. App. 616, 649 S.E.2d 832 (2007), cert. denied, No. S07C1780, 2007 Ga. LEXIS 809 (Ga. 2007).

Application to felony public indecency conviction. — Because the defendant's sex offender registration as part of probation was limited to the maximum sentence allowed by law as punishment for that crime, the trial court did not improperly give the defendant an indeterminate sentence by requiring the defendant to register as a sexual offender following the defendant's conviction for felony public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

O.C.G.A. § 17-10-1 does not apply to sentences for conviction of certain crimes in which the legislature has dictated that life imprisonment must be imposed. Mosley v. State, 203 Ga. App. 275, 416 S.E.2d 736, cert. denied, 203 Ga. App. 907, 416 S.E.2d 736 (1992).

Even though O.C.G.A. § 17-10-1 (prior to the 1993 amendment) and O.C.G.A. § 16-8-41 did not mandate a life sentence, a life sentence on an armed robbery conviction was proper under the specific provisions of § 16-8-41. Stovall v. State, 216 Ga. App. 138, 453 S.E.2d 110 (1995).

O.C.G.A. § 17-10-1 does not apply when a life sentence or the death penalty are mandated for a conviction of kidnapping with bodily injury. Melton v. State, 216 Ga. App. 215, 454 S.E.2d 545 (1995).

Order included in a sentence for animal cruelty that seized animals would be retained did not violate O.C.G.A.

General Consideration (Cont'd)

§ 17-10-1(a)(6)(A) because that provision applies only to a trial court's modification, suspension, probation, or alteration of a previously imposed sentence. Sirmans v. State, 244 Ga. App. 252, 534 S.E.2d 862 (2000), cert. denied, 534 U.S. 831, 122 S. Ct. 76, 151 L. Ed. 2d 40 (2001).

Upon the conviction for the sale of cocaine, the trial court properly sentenced the defendant under O.C.G.A. § 17-10-7(c) and not O.C.G.A. § 17-10-1(a)(1), to the minimum sentence of ten years imprisonment under O.C.G.A. § 16-13-30(d), without the possibility of parole, as the defendant had three prior felony convictions. Fortson v. State, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Defendant's sentence of 30 years without parole for trafficking in cocaine was a sentence allowed under O.C.G.A. § 16-13-30(d), and hence, not illegal or void. Defendant could not have been sentenced under O.C.G.A. § 17-10-7(a), or the defendant's sentence would have been 40 years. Because the sentence was not void, the sentence was not subject to modification under O.C.G.A. § 17-10-1(f). State v. Blue, 304 Ga. App. 471, 696 S.E.2d 692 (2010).

O.C.G.A. § 17-10-1 did not govern motion to withdraw guilty plea after sentence. — Trial court erred in dismissing the defendant's motion to withdraw a guilty plea, which was filed by letter before the term of court expired but not served on the state because the state had reasonable notice of the motion to withdraw 18 days before the motion was first set for a hearing, and over two years before the hearing was eventually held. The court looked to O.C.G.A. § 17-9-60 for guidance as to whether the state was required to be served with the motion prior to the expiration of the term of court, and concluded that it was not. McKiernan v. State, 286 Ga. 756, 692 S.E.2d 340 (2010).

O.C.G.A. § 17-10-1 does not grant the trial court unlimited time in which to modify sentences. Latham v. State, 225 Ga. App. 147, 483 S.E.2d 322 (1997).

Ambiguity in sentencing resolved in favor of defendant. — Assuming the ambiguity of a sentence of the defendant convicted of child molestation and statutory rape to sentences of 20 years to serve and 20 years with ten years to serve and the balance on probation, and the defendant paying a $5,000 fine at the termination of the probation period, giving the benefit of the doubt to the defendant, the sentences for each count were construed to run concurrently rather than consecutively. Ogles v. State, 218 Ga. App. 92, 460 S.E.2d 866 (1995).

Construction with § 42-8-35.1 — Although O.C.G.A. § 17-10-1 gives the trial court the authority to order confinement in a probation boot camp for a misdemeanor probationer whose sentence of probation is revoked, it does not confer authority under O.C.G.A. § 42-8-35.1 to order that an original misdemeanor probation sentence be served in boot camp. Johnson v. State, 267 Ga. 77, 475 S.E.2d 595 (1996).

Construction with § 42-8-35.4. — Reading O.C.G.A. §§ 17-10-1(a)(3)(A) and 42-8-35.4 together, a court may confine a probation violator in a probation detention center, but not if probation is revoked for any of the reasons enumerated in § 17-10-1(a)(3)(A), and only if the defendant was put on probation previously for a forcible misdemeanor or a misdemeanor of a high and aggravated nature; a defendant who pled guilty to the misdemeanors of habitual violator, driving under the influence, possession of marijuana, and operating a vehicle without proof of insurance did not meet the criteria for confinement in a probation detention center upon revocation of probation under O.C.G.A. § 42-8-35.4, and so confinement in such a facility was unauthorized. Wilson v. Windsor, 280 Ga. 576, 630 S.E.2d 367 (2006).

Construction with § 17-10-6.1. — O.C.G.A. § 17-10-1(b) does not conflict with O.C.G.A. § 17-10-6.1 and, thus, the trial court has no discretion to alter or to allow the parole board to alter the mandatory minimum sentence of ten years for any serious violent felony including armed robbery. Taylor v. State, 241 Ga. App. 439, 526 S.E.2d 910 (1999).

Construction with § 16-6-1(b). — O.C.G.A. § 16-6-1(b) was a specific sen-

tencing statute for the offense of rape that prevailed over the general statute, O.C.G.A. § 17-10-1. Burke v. State, 274 Ga. App. 402, 618 S.E.2d 36 (2005).

Since the defendant pled guilty to aggravated child molestation, the trial court did not err in ruling that the court lacked discretion to sentence the defendant under O.C.G.A. § 17-10-1(b). Rolader v. State, 249 Ga. App. 213, 547 S.E.2d 778 (2001).

Reporting probation period. — Condition of probation placing the defendant on reporting probation for a period exceeding two years did not violate O.C.G.A. § 17-10-1. Darby v. State, 230 Ga. App. 32, 495 S.E.2d 146 (1998).

Warrantless searches vs. warrantless arrests. — Trial court erred in denying a probationer's motion to suppress the evidence seized from the probationer's apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence was seized without a warrant after the probationer was not found in the apartment and had to be excluded under the Fourth Amendment as the search conducted was only permissible insofar as the search involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer's arrest. The probationer was never placed on notice that the probationer was going to be subjected to warrantless searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007).

Motion to vacate sentence was untimely filed. — Denial of the defendant's motion to vacate sentence was affirmed since the motion was untimely filed four years after the trial court received the remittitur of an earlier affirmance of the defendant's conviction; moreover, the defendant's sentence resulted from the defendant's conviction and did not involve the defendant's status as a probationer in a different county. Esquivel v. State, 266 Ga. App. 715, 598 S.E.2d 24 (2004).

As the defendant filed a petition to correct void sentence more than two years after the remittitur of the defendant's direct appeal, defendant could only challenge the sentence if it was void, pursuant to O.C.G.A. § 17-10-1(f). McConnell v. State, 281 Ga. App. 303, 635 S.E.2d 882 (2006).

Appeal of a trial court's denial of a defendant's motion to correct sentence was dismissed because the motion was filed beyond the time specified in O.C.G.A. § 17-10-1(f), the sentence was within the applicable penalty range, and the sentence was not void despite the defendant's claim that the prosecution introduced erroneous and inflammatory information at the sentencing hearing; further, the sentence was not "enhanced" beyond the maximum penalty and Apprendi did not apply. Burg v. State, 297 Ga. App. 118, 676 S.E.2d 465 (2009), cert. denied, No. S09C1217, 2009 Ga. LEXIS 419 (Ga. 2009).

Sentencing court lacked jurisdiction over the defendant's motion to vacate the defendant's sentence because the motion was filed three years after sentencing and the defendant did not assert a claim that the sentence was void, meaning that it was a sentence that the law did not allow. von Thomas v. State, 293 Ga. 569, 748 S.E.2d 446 (2013).

Motions to withdraw guilty plea. — Because the defendant was sentenced during the July 2002 term of court, but the defendant's motions to withdraw the guilty plea were not filed until May 2, 2003 and June 4, 2003, during the May 2003 term of court, at the time defendant filed the motion to withdraw the plea, the only means available to challenge defendant's plea was through a petition for writ of habeas corpus. Kuntz v. State, 276 Ga. App. 483, 623 S.E.2d 684 (2005).

If defendant pled guilty to charges of murder and armed robbery, but the record did not support a finding that the defendant was advised of all the defendant's constitutional rights by either the defendant's attorney or the sentencing court and that the defendant made a knowing and intelligent waiver of those rights, the habeas court erred by denying the defendant's petition for habeas corpus. Johnson v. Smith, 280 Ga. 235, 626 S.E.2d 470 (2006).

Ex post facto inquiry. — To determine if an ex post facto violation resulted from

General Consideration (Cont'd)

use of the applied law in a probation revocation matter, the law in effect at the time of the probation revocation must be measured against the law in effect at the time of the initial offense, not the law in effect at the time of the act that resulted in probation revocation. Walker v. Brown, 281 Ga. 468, 639 S.E.2d 470 (2007).

Cited in Brown v. Ricketts, 233 Ga. 809, 213 S.E.2d 672 (1975); Seagraves v. State, 135 Ga. App. 42, 217 S.E.2d 377 (1975); Sheffield v. State, 235 Ga. 507, 220 S.E.2d 265 (1975); Ingram v. State, 137 Ga. App. 412, 224 S.E.2d 527 (1976); Mauldin v. State, 139 Ga. App. 13, 227 S.E.2d 862 (1976); Robinson v. State, 139 Ga. App. 480, 228 S.E.2d 615 (1976); Hardin v. State, 141 Ga. App. 115, 232 S.E.2d 631 (1977); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979); Amerson v. Zant, 243 Ga. 509, 255 S.E.2d 34 (1979); Burns v. State, 153 Ga. App. 529, 265 S.E.2d 859 (1980); Cofer v. Hawthorne, 154 Ga. App. 875, 270 S.E.2d 84 (1980); Ward v. State, 248 Ga. 60, 281 S.E.2d 503 (1981); Howell v. State, 160 Ga. App. 562, 287 S.E.2d 573 (1981); Johns v. State, 160 Ga. App. 535, 287 S.E.2d 617 (1981); State v. Shuman, 161 Ga. App. 304, 287 S.E.2d 757 (1982); Strickland v. State, 165 Ga. App. 197, 300 S.E.2d 537 (1983); State v. Baldwin, 167 Ga. App. 737, 307 S.E.2d 679 (1983); Lowry v. State, 171 Ga. App. 118, 318 S.E.2d 744 (1984); Griffin v. State, 172 Ga. App. 184, 322 S.E.2d 295 (1984); Wallace v. State, 175 Ga. App. 685, 333 S.E.2d 874 (1985); Etchison v. State, 175 Ga. App. 723, 334 S.E.2d 324 (1985); Moreland v. State, 183 Ga. App. 113, 358 S.E.2d 276 (1987); Crumbley v. State, 261 Ga. 610, 409 S.E.2d 517 (1991); Browner v. State, 206 Ga. App. 676, 426 S.E.2d 673 (1992); Brady v. State, 212 Ga. App. 853, 443 S.E.2d 522 (1994); Tuttle v. State, 215 Ga. App. 396, 450 S.E.2d 863 (1994); Murray v. State, 216 Ga. App. 593, 455 S.E.2d 79 (1995); Stone v. State, 218 Ga. App. 350, 461 S.E.2d 548 (1995); Day v. State, 242 Ga. App. 899, 531 S.E.2d 781 (2000); United States v. Ayala-Gomez, 255 F.3d 1314 (11th Cir. 2001); State v. Huckeba, 258 Ga. App. 627, 574 S.E.2d 856 (2002); Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003); Walker v. State, 289 Ga. App. 879, 658 S.E.2d 375 (2008); Allen v. State, 286 Ga. 392, 687 S.E.2d 799 (2010); Shelton v. State, 307 Ga. App. 599, 705 S.E.2d 699 (2011); Stephens v. State, 289 Ga. 758, 716 S.E.2d 154 (2011); McClendon v. State, 318 Ga. App. 676, 734 S.E.2d 505 (2012); Parham v. State, 320 Ga. App. 676, 739 S.E.2d 135 (2013); Myrick v. State, 325 Ga. App. 607, 754 S.E.2d 395 (2014); Munye v. State, 342 Ga. App. 680, 803 S.E.2d 775 (2017); State v. Hudson, 303 Ga. 348, 812 S.E.2d 270 (2018).

Sentencing Prerogatives of Trial Court

Powers of trial judge generally. — O.C.G.A. §§ 17-10-1 and 17-10-8, when read together, provide that the judge fixing sentence shall prescribe a determinate sentence for a specific number of years within the limits set by law, may probate a noncapital felony sentence upon such terms as the judge deems proper, and may impose a fine upon the convicted party not to exceed $10,000 (or the fine fixed by law, whichever is greater). State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

There was no violation of the defendant's rights under O.C.G.A. § 17-10-1 since the sentence as finally entered did not vary from that which was orally announced by the trial court and there was no increase. Lester v. State, 190 Ga. App. 59, 378 S.E.2d 364 (1989).

O.C.G.A. § 17-10-1 authorizes the trial court to sentence a defendant to any amount of time within the limits provided by law. Baldwin v. State, 217 Ga. App. 866, 460 S.E.2d 80 (1995).

If the sentences imposed are within the statutory limits, the sentences are not unconstitutional. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980).

Trial court did not have the power to sentence the defendant who was convicted of armed robbery after the defendant was already convicted of committing other felonies to probation, or to suspend any part of the defendant's sentence, and because life in prison was the maximum penalty

for armed robbery, the trial court properly sentenced the defendant to life in prison without parole. Thompson v. State, 265 Ga. App. 696, 595 S.E.2d 377 (2004).

Requiring wearing bracelet reading "D.U.I. CONVICT." — Court had authority to impose as a condition of probation the requirement that the defendant wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT." Such requirement did not impose cruel and unusual punishment or deprive the defendant of equal protection and it was not an impermissibly indeterminate condition. Ballenger v. State, 210 Ga. App. 627, 436 S.E.2d 793 (1993).

Sentence of specific range of years satisfies requirement that sentence be determinate. — In a burglary prosecution, since the judge sentenced the defendant "during the full term of not less than one year and not more than two years," the verdict was in substantial compliance with this section, and the sentence based thereon was valid. Edwards v. State, 64 Ga. App. 266, 13 S.E.2d 39 (1941).

When the jury finds the defendant guilty of voluntary manslaughter and court then sentences defendant to serve not less than seven years, nor more than ten years in the penitentiary, the statutory requirement that the judge prescribe a determinate sentence for a specific number of years is satisfied. Randolph v. State, 75 Ga. App. 253, 43 S.E.2d 101 (1947).

Correction of written sentence to conform to oral pronouncement. — Trial court did not err by correcting the court's written sentence to conform with the court's oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Imposition of life sentence for armed robbery was within the range of punishment prescribed therefor and did not violate the mandate that sentences be for a determinate period. Williams v. State, 214 Ga. App. 421, 447 S.E.2d 714 (1994); Curry v. State, 217 Ga. App. 623, 458 S.E.2d 385 (1995); Echols v. Thomas, 265 Ga. 474, 458 S.E.2d 100 (1995).

Imposition of life sentence for aggravated assault and armed robbery was allowable and did not violate the requirement that the defendant be given a determinative sentence for a specific number of years. Curry v. State, 217 Ga. App. 623, 458 S.E.2d 385 (1995).

Under the provisions of O.C.G.A. § 17-10-1 as the statute existed prior to the 1993 amendment, it was within the discretion of the trial court to impose concurrent life sentences for rape and aggravated sodomy convictions; a sentence for a specific number of years was not required. Cofield v. State, 216 Ga. App. 623, 455 S.E.2d 342 (1995), overruled by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

Under the provisions of O.C.G.A. § 17-10-1 as the statute existed prior to the 1993 amendment, it was within the discretion of the trial court to impose a life sentence for armed robbery; a sentence for a specific number of years was not required. Null v. State, 216 Ga. App. 641, 455 S.E.2d 359 (1995).

Under the provisions of O.C.G.A. § 17-10-1 as the statute existed prior to the 1993 amendment, it was within the discretion of the trial court to impose a life sentence for rape; a sentence for a specific number of years was not required. Parker v. State, 216 Ga. App. 649, 455 S.E.2d 360 (1995).

Trial court correctly sentenced a defendant to serve life without the possibility of parole because the defendant was a four-time recidivist and the maximum sentence for rape was life in prison. Further, the state provided the defendant with notice prior to trial that the state would seek to have the defendant sentenced as a recidivist, pursuant to O.C.G.A. § 17-10-7. Hall v. State, 292 Ga. App. 544, 664 S.E.2d 882, cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

Sentencing Prerogatives of Trial Court (Cont'd)

Imposition of consecutive life sentences on two rape convictions was void because the sentence deprived the defendant of the right to receive a determinate sentence since the trial judge was authorized to impose a sentence "within the minimum and maximum prescribed by law as the punishment for the crime." Day v. State, 216 Ga. App. 29, 453 S.E.2d 73 (1994).

Life sentence or determinate sentence. — O.C.G.A. § 16-8-41(b) (punishment for armed robbery), read in conjunction with O.C.G.A. § 17-10-1, authorizes the imposition of a life sentence or a determinate sentence at the discretion of the trial judge, whether or not the offender is a recidivist. Worley v. State, 265 Ga. 251, 454 S.E.2d 461 (1995).

Banishment valid if logically related to rehabilitation. — If there is no showing that the sentence of banishment from the county is unreasonable or otherwise fails to bear a logical relationship to the rehabilitative scheme of the sentence pronounced for the defendant's crime, there is no showing of an abuse of discretion, and the Court of Appeals may refuse to disturb the sentence of the trial court. Wilson v. State, 151 Ga. App. 501, 260 S.E.2d 527 (1979).

Guilty plea prevents discharge for null sentence, requires remand. — Plea of guilty by the defendant appearing in the record, the defendant cannot be discharged, although the sentence is a nullity. In such event, the case is remanded to the court below with direction that the applicant be taken before the proper court in order that a legal sentence may be imposed upon the applicant. Heard v. Gill, 204 Ga. 261, 49 S.E.2d 656 (1948).

Guilty plea is a consideration in sentencing; a consideration that is not present when one is found guilty by a jury. Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Guilty plea not a conviction. — Georgia Supreme Court has explained that a first offender's guilty plea does not constitute a conviction as that term is defined in the Criminal Code of Georgia. Mays v. State, 345 Ga. App. 562, 814 S.E.2d 418 (2018).

Guilty plea not conviction and does not qualify under statute. — Trial court did not err in failing to give the defendant a behavioral-incentive date as required by O.C.G.A. § 17-10-1(a)(1)(B) because although it was undisputed that the defendant had no prior felony convictions, and the trial court imposed only a sentence of probation, the plain language of § 17-10-1(a)(1)(B) provided that the statute only applied when a defendant was convicted of felony offenses and since the defendant was sentenced as a first offender, the defendant was not convicted of any felony offenses. Mays v. State, 345 Ga. App. 562, 814 S.E.2d 418 (2018).

Consideration of not guilty plea. — When considering the appropriate sentence, a trial judge may consider the entering of a "not guilty" plea by a defendant as evidence of that defendant's lack of remorse, but may not assess a harsher penalty merely because the state has exerted unnecessary energy in prosecuting that defendant. Sparks v. State, 176 Ga. App. 8, 335 S.E.2d 298 (1985).

Sentence received by one joint defendant is irrelevant in the trial of another. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980).

Criminal statutes must be strictly construed against the state and liberally in favor of human liberty. If a statute increasing a penalty is capable of two constructions, the statute should be construed so as to operate in favor of life and liberty. Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979).

Former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7) did not compel a maximum sentence in confinement for second offenders, but the trial judge had discretion to probate or suspend this maximum sentence pursuant to former Code 1933, § 27-2502 (see O.C.G.A. § 17-10-1). Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979); Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874 (1980).

Power to sentence corporation. — Pursuant to O.C.G.A. § 16-2-22(a), a corporation can be prosecuted for violating the law, and a court may sentence a cor-

poration to serve a term for years (even though such sentence be incapable of enforcement) and may suspend that sentence and impose a fine. State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

Under this section, the judge, not the jury, passed sentence after determination of guilt. Huff v. State, 135 Ga. App. 134, 217 S.E.2d 187 (1975).

Judge decides if sentences concurrent or consecutive. — Discretion as to whether the sentences are to be served concurrently or consecutively resides entirely and solely with the trial judge, unaffected and uninfluenced by any recommendation of the jury in such respect, and it is error for the judge to be guided by a jury decision. Huff v. State, 135 Ga. App. 134, 217 S.E.2d 187 (1975).

Consecutive sentences affirmed. — Denial of the defendant's motion attacking the defendant's consecutive sentences for burglary as void was affirmed as under O.C.G.A. § 17-10-10, sentences were to be served "concurrently unless otherwise expressly provided therein." Jones v. State, 271 Ga. App. 830, 610 S.E.2d 570 (2005).

Nothing in the record affirmatively indicated that a trial court erroneously believed that the court had no discretion under O.C.G.A. § 17-10-1(a)(1) to suspend or probate a defendant's mandatory consecutive five-year sentence on a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b); thus, the sentence was properly imposed consecutively to the defendant's sentence for trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1). Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50 (2009).

It could not be assumed that the trial court relied on the defendant's prior convictions in sentencing the defendant because although the trial court imposed maximum and consecutive sentences for the defendant's convictions, the record did not indicate that the trial court relied on the prior convictions in any way, and the trial court had the authority to enter those sentences regardless of any prior convictions pursuant to O.C.G.A. §§ 17-10-1(a)(1) and 17-10-10(a). Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011), overruled on other grounds, Nalls v. State, 815 S.E.2d 38, 2018 Ga. LEXIS 396 (Ga. 2018).

Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant's guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial court's discretion. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Any amount of time within statutory limits. — O.C.G.A. § 17-10-1 allows a trial court to sentence a defendant to any amount of time within the limits provided by the legislature. Pendleton v. State, 184 Ga. App. 358, 361 S.E.2d 663, cert. denied, 184 Ga. App. 910, 361 S.E.2d 663 (1987), cert. denied, 484 U.S. 1064, 108 S. Ct. 1025, 98 L. Ed. 2d 989 (1988).

Because the defendant's sentence fell within the statutory range of punishment, the sentence imposed by the trial court was not void and was not subject to post-appeal modification beyond that provided in O.C.G.A. § 17-10-1(f); moreover, the direct appeal authorized by Williams v. State was limited to that taken from a sentencing court's ruling on a pleading which asserted the sentence imposed a punishment which the law did not allow. Guice v. State, 282 Ga. App. 747, 639 S.E.2d 636 (2006).

Multiple maximums imposable. — Imposition of the maximum punishment of life imprisonment for 24 of the offenses of which the defendant was convicted was not error. Jefferson v. State, 209 Ga. App. 859, 434 S.E.2d 814 (1993).

No error in imposing maximum and consecutive sentences. — It could not be assumed that the trial court relied on the defendant's prior convictions in sentencing the defendant because although the trial court imposed maximum and consecutive sentences for the defendant's convictions, the record did not indicate that the trial court relied on the prior

Sentencing Prerogatives of Trial Court (Cont'd)

convictions in any way, and the trial court had the authority to enter those sentences regardless of any prior convictions pursuant to O.C.G.A. §§ 17-10-1(a)(1) and 17-10-10(a). Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011), overruled on other grounds, Nalls v. State, 815 S.E.2d 38, 2018 Ga. LEXIS 396 (Ga. 2018).

Trial court did not err in imposing maximum and consecutive sentences on the second defendant for the burglary and theft by taking convictions as the second defendant's prior convictions for three or more felonies qualified the second defendant to be sentenced as a recidivist, requiring the second defendant to be sentenced to the maximum time allowed; the sentences were within the statutory ranges; and the trial court had the authority to require that the sentences run consecutively. Hamlett v. State, 350 Ga. App. 93, 828 S.E.2d 132 (2019), cert. denied, No. S19C1274, 2019 Ga. LEXIS 860 (Ga. 2019), cert. denied, No. A19C1275, 2019 Ga. LEXIS 890 (Ga. 2019).

Trial judge may properly impose greater sentence upon the defendant after hearing evidence at trial than the judge might have imposed in conjunction with a guilty plea. Arnold v. State, 163 Ga. App. 94, 292 S.E.2d 891 (1982).

Resentencing after term of court at which original sentence imposed. — Since the motion for new sentencing was filed and heard after the term of court at which the original sentence was imposed, the trial court had no jurisdiction to resentence the defendant and the new sentence imposed was void and unenforceable. State v. Hinson, 164 Ga. App. 66, 296 S.E.2d 386 (1982).

Judge may recall defendant for resentencing after error. — There is authority, when there is an error or irregularity in failing to inform the defendant of conditions which the defendant's sentence to confinement imposed, for correction by the court by recalling the defendant and sentencing the defendant as provided by law. Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Defendant's sentence void due to error in sentencing. — Since the defendant was convicted of prior felonies and the offense of rape was also a felony under O.C.G.A. § 16-6-1(b), the trial court's imposition of a suspended sentence under O.C.G.A. § 17-10-1 was void because the trial court was required to give the defendant a life sentence under O.C.G.A. § 17-10-7(a). State v. Scott, 265 Ga. App. 387, 593 S.E.2d 923 (2004).

Once a defendant begins to serve a sentence, the sentence may not be increased. Higdon v. Cooper, 247 Ga. 746, 279 S.E.2d 451 (1981).

Judge may not impose sentence consecutive to intervening sentence upon revoking probation. — Court revoking probation because of a subsequent conviction may not make the revoked sentence consecutive to an intervening sentence. England v. Newton, 238 Ga. 534, 233 S.E.2d 787 (1977).

Power to probate sentence generally. — Wording of this section was plain — a judge can probate a sentence in any case involving a felony except when the punishment is life imprisonment or death. Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979).

Trial court is granted the power and authority under O.C.G.A. § 17-10-1 to probate a sentence under such rules and regulations as the court deems proper, and to revoke that probation during the term of court at which the sentence is imposed. Garland v. State, 160 Ga. App. 97, 286 S.E.2d 330 (1981).

Probation and suspended sentences traditional rehabilitative measures. — Probated and suspended sentences, upon reasonable conditions, have traditionally been used by trial judges in this state as effective tools of rehabilitation and serve a useful purpose in appropriate cases as an alternative to confinement. State v. Collett, 232 Ga. 668, 208 S.E.2d 472 (1974).

Trial court, pursuant to O.C.G.A. § 17-10-1(a)(1), has authority to suspend or probate all or any part of the entire sentence. Kaylor v. State, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

Provision for probation may not be added at subsequent term. — Language of former Code 1933, § 27-2702 (see O.C.G.A. § 42-8-34) seemed to refer to

probation as a part of the original sentence, and the provision for a hearing must, considering the language as a whole, refer to a hearing on the type of sentence to be imposed, and not authorize the court, at a subsequent term, to add to the sentence a provision for probation when the sentence made no provision relating thereto in the first instance. Phillips v. State, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

Convict sentenced to indefinite prison confinement cannot apply for probation at next term. — Trial court has no power to amend and modify a sentence in a criminal case after the term during which the sentence was imposed. Accordingly, if the defendant has been sentenced to an indeterminate term in the penitentiary without any provision for probation, it is proper for the court to refuse to entertain a motion made at a subsequent term that the sentence be modified so as to allow the defendant to serve the sentence on probation. Phillips v. State, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

Probated portion of sentence may be revoked or modified at any time during term of the probated sentence after hearing and finding of probation violation. Logan v. Lee, 247 Ga. 608, 278 S.E.2d 1 (1981).

Probating sentence at later term of court. — Trial court had authority to probate the defendant's sentence to confinement, even though more than four terms of court had passed since conviction and sentence, since the court did not intend the sentence to be the final sentence and probated the confinement after receiving a post-sentence investigator's report. State v. Johnson, 183 Ga. App. 236, 358 S.E.2d 840, cert. denied, 183 Ga. App. 907, 358 S.E.2d 840 (1987).

Reasonable conditions for probation or suspension usually approved. — In the absence of express authority to the contrary, there is no logical reason why any reasonable condition imposed for probation or suspension of a sentence by a trial court should not be approved. State v. Collett, 232 Ga. 668, 208 S.E.2d 472 (1974).

Good cause shown for extended period of supervised probation. — Trial court did not err in sentencing the defendant to more than two years' supervised probation after a jury convicted the defendant of child molestation because the defendant's sentence to an extended period of supervised probation was pronounced after notice and hearing and for good cause shown as required by O.C.G.A. § 17-10-1(a)(2); the "good cause shown" was to protect children. O'Neal v. State, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Banishment from parts of state as sentence suspension condition. — Banishment of a defendant from specified areas in Georgia, imposed as a condition for suspension of a sentence by a trial court, does not violate the public policy of the state. State v. Collett, 232 Ga. 668, 208 S.E.2d 472 (1974).

Condition that defendant have no contact with victim. — Because the defendant's sentence, including a condition that the defendant have no contact with the defendant's stepdaughter whom the defendant had molested and their son, born as a result of the molestation, O.C.G.A. § 42-8-35, was not indeterminate and was not illegal, the defendant's motion to modify the sentence under O.C.G.A. § 17-10-1 was barred by a waiver in the defendant's plea agreement. Jones v. State, 348 Ga. App. 653, 824 S.E.2d 575 (2019).

Court-ordered restitution may be imposed as a reasonable condition of probation. Morrison v. State, 181 Ga. App. 440, 352 S.E.2d 622 (1987).

Suspension of defendant's hunting and fishing privileges during the probation period imposed upon conviction of a violation of O.C.G.A. § 27-3-9, unlawful enticement of game, was not an abuse of discretion. Quintrell v. State, 231 Ga. App. 268, 499 S.E.2d 117 (1998).

Judge may suspend or probate sentence, but not both. Jones v. State, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

Since probation could defeat purpose of conditional suspension. — If a sentence could be simultaneously probated and suspended, an underlying purpose of the conditional suspension would be defeated. Jones v. State, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

Condition for suspension that defendant obey all laws (state, federal,

Sentencing Prerogatives of Trial Court (Cont'd)

and municipal) is not so vague, indefinite, ambiguous, and uncertain as to be unenforceable. Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973) (decided under former Code 1933, § 27-2502).

Suspended sentence, once served, cannot exceed maximum which could have been imposed. — Once service of a suspended sentence begins, either by incarceration or probation, it cannot exceed the maximum sentence of confinement which could have been imposed. Turnipseed v. State, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

First offender treatment. — Sentence of the defendant based on first offender treatment to five years' probation conditioned upon successive periods of confinement in a detention center, a diversion center, and in the defendant's house under intensive supervision was authorized and such does not constitute incarceration, which refers to continuous and uninterrupted custody in a jail or penitentiary. Penaherrera v. State, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

Trial court did not err by sentencing the defendant to both confinement and probation in violation of the First Offender Act, under O.C.G.A. § 42-8-60(a), as the statute did not mandate a sentence of either confinement or probation, and the defendant's probation was not conditioned upon the defendant spending some specified time incarcerated; O.C.G.A. § 17-10-1(a)(1) granted to the sentencing judge the power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper. Johanson v. State, 260 Ga. App. 181, 581 S.E.2d 564 (2003).

Trial court did not err in denying the defendant's motions seeking to correct the defendant's sentence to consecutive 15-year terms for two convictions of armed robbery as: (1) the trial court's statement that "it would probably normally be my inclination to let you hold two life sentences" did not indicate that the trial court had adopted an inflexible and impermissible sentencing formula or that the trial court had a policy of refusing to consider first offender treatment for certain crimes; and (2) the defendant did not request that the trial court consider sentencing the defendant as a first offender. Green v. State, 265 Ga. App. 126, 592 S.E.2d 901 (2004).

After the defendant was found guilty of arson and sentenced, the sentence could not be modified pursuant to O.C.G.A. § 17-10-1(f) to grant the defendant first offender treatment because the plain language of the first offender statute, O.C.G.A. § 42-8-60 et seq., specifically prohibited such a modification after sentencing. Burchette v. State, 274 Ga. App. 873, 619 S.E.2d 323 (2005).

Trial court may grant probation of sentence of second offender. — Although O.C.G.A. § 17-10-7 mandates that a second offender must be sentenced to the maximum punishment for the offense of which convicted, there is no limitation on the trial court's authority under O.C.G.A. § 17-10-1 to grant probation of such a sentence. Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981); Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983).

Fourth-offender recidivists. — There is no limitation on the trial court's authority under O.C.G.A. § 17-10-1 to grant probation of sentence to a fourth-offender recidivist who under O.C.G.A. § 17-10-7 is not eligible for parole until the maximum sentence has been served since probation is not parole. Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983).

Remand to consider probating portion of mandatory sentence. — Since the trial court did not exercise the court's discretion to consider probating appellant's sentence for theft by taking, the sentence for that offense was reversed and remanded so the trial court could determine whether any portion of the appellant's mandatory sentence should be probated. Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983).

Consecutive sentences for multiple offenses authorized. — Consecutive sentences for defendant indicted and convicted of two counts of forgery in the first degree and one count of financial transac-

tion card theft was not error. Harris v. State, 166 Ga. App. 202, 303 S.E.2d 534 (1983).

Sentence indeterminate when controlled by federal authorities. — Since the defendant's state prison sentence was concurrent with, and not to be longer than, a federal prison sentence, it was an indeterminate sentence in violation of O.C.G.A. § 17-10-1(a)(1) as the sentence was variable based on factors entirely within the control of the federal authorities. State v. Hart, 263 Ga. App. 8, 587 S.E.2d 164 (2003).

Defendant may both appeal and make motion to modify conviction. — There is nothing to prevent a defendant from both appealing and making a motion to modify the conviction. Porterfield v. State, 139 Ga. App. 553, 228 S.E.2d 722 (1976).

Appellate court may not modify legal sentence. — Appellate court is not empowered to modify a sentence which is within the statutory limits and lawfully imposed. Thomas v. State, 139 Ga. App. 364, 228 S.E.2d 386 (1976).

If appellate court affirms, trial judge cannot alter sentence. — When the judgment of the trial court is appealed, and thereafter affirmed by an appellate court, the trial court is without authority at a subsequent term, upon making the judgment of the appellate court the judgment of the trial court, to modify and change the sentence formerly imposed. Smith v. State, 146 Ga. App. 727, 247 S.E.2d 503 (1978).

Stricter sentence after retrial constitutional. — It is not a denial of equal protection of law guaranteed by U.S. Const., amend. 14 to impose a harsher sentence upon a defendant following a successful appeal and award of a new trial. Salisbury v. Grimes, 223 Ga. 776, 158 S.E.2d 412 (1967) (decided under former Code 1933, § 27-2502).

Sentence after new trial must not be vindictive. — Vindictiveness against a defendant for having successfully attacked the defendant's first conviction must play no part in the sentence the defendant receives after a new trial. Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Record must state reasons for harsher penalty upon resentencing. — Court must include in the record an affirmative statement of the reasons underlying the decision to increase punishment upon resentencing, and those reasons should in fact support the imposition of the harsher penalty. Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Appeal of lawful sentence should be addressed to sentence review panel. — If the sentence imposed upon the defendant was within the statutory limits prescribed by law, the defendant's complaint that the defendant's sentence was excessive should be addressed to the appropriate sentence review panel. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Motivation of judge and guilty plea. — Although the judge did not indicate the judge's reasoning for sentencing the defendant to the maximum penalty for the defendant's crime, there was no evidence that the judge was motivated to do so merely because the defendant refused to enter a guilty plea, and the sentence was within the minimum and maximum sentences prescribed by law. West v. State, 241 Ga. App. 877, 528 S.E.2d 287 (2000).

Court's authority to modify plea agreement. — When the defendant and the state agreed to a reduced charge of voluntary manslaughter and the state would recommend a 20-year sentence, the trial court did not have the authority, over the state's objection, to accept a guilty plea to voluntary manslaughter and sentence the defendant to a term of only ten years, with five to be served. State v. Kelley, 298 Ga. 527, 783 S.E.2d 124 (2016).

Modification of Sentence

When sentence may be amended. — Judgments of a court are within the court's breast until the end of the term, and the sentence may be amended at any time during the term and before execution has begun. Schamber v. State, 152 Ga. App. 196, 262 S.E.2d 533 (1979).

Defendant was sentenced to 27 months in prison to be served concurrently with a federal prison term, but the defendant was scheduled for early release from fed-

Modification of Sentence (Cont'd)

eral prison, and the transcript from the sentencing hearing indicated that the defendant was not to serve any time in state court in addition to that served in federal court, thus, the trial court did not err in modifying the sentence to conform to the court's original intent 22 months after the sentence was imposed; O.C.G.A. § 17-10-1(f) did not abrogate a court's power to correct an erroneous recording of a sentence. State v. Hart, 263 Ga. App. 8, 587 S.E.2d 164 (2003).

Trial court has no jurisdiction to modify a sentence after the term of court ends or 60 days pass, but if a sentence is void, the trial court may resentence the defendant at any time; a sentence is void if the court imposes punishment that the law does not allow. Copeland v. State, 264 Ga. App. 905, 592 S.E.2d 540 (2003).

Trial court erred in holding that because the term of court in which a defendant's sentence was imposed had expired, the court lacked jurisdiction to modify the sentence. Under O.C.G.A. § 17-10-1(f), the trial court had jurisdiction to rule upon the merits of the motion within the 120-day period following the court's receipt of a remittitur from a prior appeal. Davis v. State, 291 Ga. App. 252, 661 S.E.2d 872 (2008).

Trial court erred by denying the defendant's motion to vacate the defendant's amended sentence on drug-related charges as the trial court had no jurisdiction to amend the defendant's sentence since, at the time it was undertaken, over two years had passed since the sentence was originally pronounced; thus, under O.C.G.A. § 17-10-1(f), there was no jurisdiction to amend the sentence. Hall v. State, 291 Ga. App. 649, 662 S.E.2d 753 (2008).

Section restricts authority to modify sentence. — Former Code 1933, § 27-2702 (see O.C.G.A. § 42-8-34), which provides that the court shall not lose jurisdiction over a defendant during the term of a probated sentence but shall have power to change or modify the sentence during the period of time originally described for the probated sentence to run, had been modified by former Code 1933, § 27-2502 (see O.C.G.A. § 17-10-1), which provided that after the term of court at which a sentence is imposed by a judge, the judge shall have no authority to suspend, probate, modify, or change the sentence of the prisoner, except as otherwise provided. Entrekin v. State, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

Defendant's motion to modify sentence was properly denied wherein the defendant asserted that the defendant's convictions should have merged for sentencing purposes because O.C.G.A. § 17-10-1(f) was not a proper procedural mechanism for asserting such a claim since the defendant pled guilty. Patterson v. State, 347 Ga. App. 105, 817 S.E.2d 557 (2018).

Motion to vacate, void, or correct illegal sentence denied. — Trial court did not err in denying the defendant's motion to vacate, void, or correct an illegal sentence several years after the defendant's sentence was imposed because the alleged errors in the defendant's case clearly went to the validity of the judgment of conviction entered on the defendant's guilty plea, not the validity of the defendant's sentence; Georgia law authorized the concurrent sentences of 10 years in prison for false imprisonment, and 20 years, with 13 years to be served in prison and the remainder on probation, for trafficking of persons for sexual servitude. Jones v. State, 354 Ga. App. 29, 840 S.E.2d 117 (2020).

No error in modification of sentence. — Trial court did not err in modifying the appellant's sentence pursuant to O.C.G.A. § 17-10-1(f) because the record showed that prior to entering the modified sentence, the trial court provided timely notice and an opportunity to the state for a hearing under § 17-10-1(f). Cade v. State, 351 Ga. App. 637, 832 S.E.2d 453 (2019).

Judge can modify sentence only during term. — Superior court judge cannot modify a sentence after the expiration of the term of court at which the sentence was imposed, unless the sentence imposed was a void sentence, in which case a new and valid sentence can be imposed by the trial judge at any time. Wade v. State, 231 Ga. 131, 200 S.E.2d 271 (1973).

Motion to reduce sentence filed by the defendant was untimely since the defendant filed the motion after expiration of the term of court in which the defendant's sentence was entered. Levell v. State, 247 Ga. App. 615, 544 S.E.2d 523 (2001).

Judge can modify if sentence void. — If it appears on the face of the record that a valid verdict has been returned, a sentence not in accord with the verdict, though a nullity, may be corrected to conform to the verdict. This may be done after the expiration of the term at which the sentence was imposed. Heard v. Gill, 204 Ga. 261, 49 S.E.2d 656 (1948).

Because the trial court was authorized to impose concurrent ten year sentences to serve after the defendant entered guilty pleas to child molestation and aggravated child molestation, the judgment was not void and the court properly denied the defendant's petition to correct the void judgment. Barber v. State, 240 Ga. App. 56, 522 S.E.2d 238 (1999).

Trial court erred in dismissing the defendant's motion to withdraw a guilty plea as the defendant retained a statutory right to withdrawal under O.C.G.A. § 17-7-93(b) because the sentence imposed as a result of the guilty plea was void and the defendant had a right to withdrawal until a legal sentence was imposed. Kaiser v. State, 285 Ga. App. 63, 646 S.E.2d 84 (2007), cert. denied, No. S07C1275, 2007 Ga. LEXIS 696 (Ga. 2007).

Because O.C.G.A. § 16-13-31(f)(1) required a mandatory minimum sentence for trafficking in methamphetamine of ten years and a $200,000 fine, and the sentence imposed by the trial court failed to include the fine, the trial court's resentencing to add the fine after the defendant began serving the sentence was valid and did not violate the defendant's double jeopardy rights. The suspended sentence provisions of O.C.G.A. § 17-10-1(a) were inapplicable to the mandatory sentence provisions of § 16-13-31, and there was no indication that the trial court intended to suspend the fine portion. Strickland v. State, 301 Ga. App. 272, 687 S.E.2d 221 (2009).

It was not erroneous for the trial court to impose a sentence of 20 years for aggravated battery, O.C.G.A. § 16-5-24, because after the defendant's kidnapping conviction was voided, the trial court was authorized under O.C.G.A. § 17-10-1 to sentence the defendant to a term of years on the aggravated battery count, which could consist of up to 20 years. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Trial court's sua sponte order setting aside a modification of the defendant's sentence was proper because under O.C.G.A. § 17-10-1(f) the modification order itself was void because the trial court lacked jurisdiction to enter that order more than one year after the original sentencing. Gray v. State, 351 Ga. App. 703, 832 S.E.2d 857 (2019).

Failure to assert sentence was not allowed by law within required statutory time period. — Defendant's appeal was dismissed as the time period set forth in O.C.G.A. § 17-10-1(f) had passed and the defendant did not assert that the sentence was not one that the law allowed, but only took issue with the procedure employed in imposing the sentence or questioned the fairness of the sentence; defendant did not challenge any rulings on whether the sentence was void and was not entitled to a direct appeal. Hughes v. State, 273 Ga. App. 705, 615 S.E.2d 819 (2005).

Defendant could not appeal the denial of a motion to correct a void sentence as the motion was filed in 2007, more than 12 years after the defendant's conviction for armed robbery was affirmed and outside the statutory period in O.C.G.A. § 17-10-1(f), and the defendant's sentence of life imprisonment was not void as the sentence was within the range set out in former O.C.G.A. § 16-8-41(b). Brown v. State, 295 Ga. App. 66, 670 S.E.2d 867 (2008).

Motion filed five years after sentence not timely. — Trial court did not err by denying the appellant's motion to modify the sentence for a robbery conviction because the motion was filed more than five years after the appellant filed the motion to withdraw the guilty plea; therefore, the appellant filed the motion to modify outside the statutory period set forth in O.C.G.A. § 17-10-1(f). Williams v.

Modification of Sentence (Cont'd)

State, 331 Ga. App. 46, 769 S.E.2d 760 (2015).

Motion filed 16 years after sentencing not timely. — To the extent the defendant's motion to modify sought resentencing based on the merger of certain counts in the indictment as well as a change from consecutive to concurrent sentences, the trial court was without jurisdiction to grant such relief and properly denied the motion because the defendant's motion to modify the sentence was filed over 16 years after the defendant's guilty plea and sentencing. Rooney v. State, 318 Ga. App. 385, 734 S.E.2d 104 (2012).

No authority to modify sentence if sentence not void. — Defendant's claim that the trial court misapprehended the applicable sentencing ranges before sentencing the defendant did not constitute a claim that the sentence was void and was not a means for a post-appeal, post-O.C.G.A. § 17-10-1(f) sentence modification; thus, the trial court lacked jurisdiction to modify the defendant's sentence, the trial court's ruling on the pleading was not subject to direct appeal, and the appeal was dismissed. Reynolds v. State, 272 Ga. App. 91, 611 S.E.2d 750 (2005).

Appellant's motion for sentence modification, asserting that the sentences imposed for armed robbery and burglary were void because the sentences had been imposed without a presentence hearing having been held, was properly denied; rulings on pleadings asserting erroneous procedure or unfair treatment were not subject to direct appeal because those rulings were not rulings on whether the sentence was void, and inasmuch as the assertions contained in the appellant's post-appeal seeking sentence modification did not allege the sentences imposed were void (appellant acknowledged that the sentences were within the statutory range), appellant was not entitled to a direct appeal from the trial court's adverse ruling. Jones v. State, 278 Ga. 669, 604 S.E.2d 483 (2004).

Because O.C.G.A. § 16-8-41(b) is not ambiguous in its provision for a maximum sentence of life imprisonment, and because the defendant's sentence of life imprisonment fell within the statutory range of punishment, the defendant's sentence was not void. Hudson v. State, 334 Ga. App. 166, 778 S.E.2d 406 (2015).

Inmate's claim that two prior convictions that caused the inmate to be considered a recidivist under former O.C.G.A. § 17-10-7 and were used to sentence the inmate to life in prison without parole should not have been so used because the inmate had been pardoned, resulting in a void sentence, was properly dismissed because the inmate failed to produce evidence of a pardon. Prince v. State, 299 Ga. 888, 793 S.E.2d 38 (2016).

No power to vacate conviction. — Trial court properly held that the court lacked jurisdiction to entertain a defendant's motion to withdraw a guilty plea because the term of court at which the guilty plea was entered had expired; moreover, authority to modify sentences under O.C.G.A. § 17-10-1(f) did not include power to vacate conviction on which the sentence was based. Ellison v. State, 283 Ga. 461, 660 S.E.2d 373 (2008).

Motion during term extends trial judge's power to modify. — While a trial judge loses the inherent right to modify a judgment after the term expires, a motion made during the term serves to extend the power to modify. Porterfield v. State, 139 Ga. App. 553, 228 S.E.2d 722 (1976); State v. Bradbury, 167 Ga. App. 390, 306 S.E.2d 346 (1983); Doby v. Evans, 258 Ga. 777, 373 S.E.2d 757 (1988).

Motion to set aside sentence not timely. — Regardless of whether O.C.G.A. § 17-10-1(f) applied to the defendant's December 2003 motion to set aside the sentence, that motion, filed four-and-one-half years after the sentence was imposed, was far too late; the motion was not filed in the term in which the sentence was entered, within a year of the date upon which the sentence was imposed, nor within 120 days of the trial court's receipt of a direct appeal remittitur. Reynolds v. State, 272 Ga. App. 91, 611 S.E.2d 750 (2005).

Trial court had no authority to reduce defendant's life sentence to 20 years and the defendant had no cause for

complaint that the trial court vacated the void sentence-reduction order, when the express consideration for the reduction in sentence was the waiver of the defendant's appeal, and since the defendant pursued and secured an appellate review on the merits, no reversible error occurred, and the defendant must serve the life sentence that is statutorily mandated for the defendant's crime. Chandler v. State, 204 Ga. App. 512, 419 S.E.2d 751 (1992).

Trial court cannot increase sentence originally passed. — While under former Code 1933, § 27-2702 (see O.C.G.A. § 42-8-34) the trial court had jurisdiction to change or modify the terms of the original sentence, the court cannot, under Ga. L. 1966, p. 440 § 1 (see O.C.G.A. § 42-8-38) and former Code 1933, 27-2502 (see O.C.G.A. § 17-10-1), increase the sentence originally passed. Turnipseed v. State, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

Oral sentence may not be increased once commenced. — While it is true that an oral sentence is not a binding judgment of the court, the law is also clear that once a person has entered upon the execution of the person's sentence, the court is without power to change the sentence by increasing the punishment. This is considered a violation of the prohibition under U.S. Const., amend. 5 against double punishment or jeopardy. Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Failure of trial court to provide conditions of probation. — Since the imposition of the terms and conditions of probation is a matter for the trial judge pursuant to O.C.G.A. § 17-10-1(a), if no such conditions have been provided by the trial court, the case is not one in which the panel may appropriately reduce a prison sentence by partial conversion of the prison sentence to probation. Warren v. State, 204 Ga. App. 191, 418 S.E.2d 783 (1992).

Modification of conditions of probation. — Order modifying the trial court's prior banishment order imposed as a condition of the defendant's probation was upheld on appeal as was the denial of the defendant's motion to withdraw a negotiated plea because: (1) the defendant's sentence was independent and, thus, not part of the negotiated plea agreement; and (2) the trial court adequately considered that the defendant's crimes were likely motivated by the relationship the defendant had with the victim, the defendant's ex-spouse, where the ex-spouse resided and worked, as well as where the ex-spouse's immediate family lived, by determining that the banishment order was issued to protect those affected, but also served a rehabilitative purpose by removing a temptation by the defendant to re-offend. Hallford v. State, 289 Ga. App. 350, 657 S.E.2d 10 (2008).

Trial court did not err in denying the defendant's motion to vacate the defendant's sentence because the probation modification did not constitute punishment since the trial court retained jurisdiction to modify or change the probated sentence and changing the no violent contact order to no contact was not punishment but, rather, was for the purpose of protecting the victim. Bell v. State, 323 Ga. App. 751, 748 S.E.2d 114 (2013).

Defendant's appeal was dismissed as defendant failed to raise valid allegation of void sentence. — Defendant's claim that multiple counts of the controlled substance and communications facility offenses were the same offense did not raise a valid allegation that the sentence was void and the trial court lacked jurisdiction to modify the sentence; therefore, the defendant's appeal was dismissed; the denial of the defendant's motion to vacate void counts of the conviction were not subject to direct appeal. Green v. State, 273 Ga. App. 654, 615 S.E.2d 818 (2005).

Because the defendant waived an error reciting the wrong date in the indictment on the record and failed to challenge the indictment by filing a timely written demurrer, a challenge to the indictment pursuant to a motion to vacate what the defendant termed a void and illegal conviction and sentence was rejected and an appeal from the denial of that motion was dismissed for lack of jurisdiction. Guice v. State, 282 Ga. App. 747, 639 S.E.2d 636 (2006).

Defendant's appeal of an order denying

Modification of Sentence (Cont'd)

a motion to correct a void sentence was dismissed because the motion was well outside the statutory time period during which a court could correct or reduce a sentence pursuant to O.C.G.A. § 17-10-1(f); because the assertions contained in the defendant's post-O.C.G.A. § 17-10-1(f) motion seeking sentence modification did not allege that the sentences imposed were void, the defendant was not entitled to a direct appeal from the trial court's adverse ruling, and the trial court sentenced the defendant according to the state's recommendation pursuant to the plea negotiations. Jones v. State, 303 Ga. App. 319, 693 S.E.2d 499 (2010).

Because there was no showing that sentence was void, denial of defendant's motion for modification was not subject to direct appeal. — Because the defendant failed to show that a sentence to two 20-year terms for child molestation was void as vindictive, pursuant to O.C.G.A. § 17-10-1(f), the denial of the defendant's motion for modification was not subject to a direct appeal. Frazier v. State, 302 Ga. App. 346, 691 S.E.2d 247 (2010).

Resentencing on affirmed conviction if other reversed. — If a defendant was sentenced on two different charges, and one was affirmed on appeal while the other was reversed, the trial court had no authority to resentence the defendant on the conviction which had been affirmed. Dover v. State, 195 Ga. App. 507, 393 S.E.2d 760 (1990).

Defendant's agreement to change in negotiated plea. — Trial court's sua sponte declaration that a probation condition barring the defendant's practice of medicine was to persist forever was not a part of the negotiated plea and sentence, and the defendant did not agree to this modification of the sentence; the trial court's modification to the agreed upon sentence violated O.C.G.A. § 17-10-1(a)(1). Kaiser v. State, 275 Ga. App. 684, 621 S.E.2d 802 (2005).

Sentencing court could consider defendant's illegal alien status. — Trial court did not violate the defendant's constitutional rights by considering the defendant's illegal alien status a relevant factor in formulating an appropriate sentence within the statutory range for burglary under O.C.G.A. § 16-7-1(a); the trial court properly considered that the court could not order the defendant to work as a condition of probation. Trujillo v. State, 304 Ga. App. 849, 698 S.E.2d 350 (2010).

Trial court not vindictive in imposing new sentence. — Because the defendant's final sentence of 60 years to serve was not longer than the original sentence of life followed by additional terms of years, the trial court was not vindictive in imposing the new sentence as the court did. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Revocation of Probation or Suspension

No retroactive application of statute. — Legislature did not dictate that O.C.G.A. § 17-10-1(a) applies retroactively to limit probation sentences imposed before its effective date (May 8, 1992). Department of Cors. v. Hicks, 209 Ga. App. 165, 433 S.E.2d 64 (1993).

Effect of subsection (a) on probation revocation. — O.C.G.A. § 17-10-1(a)(3)(A) deals exclusively with the type of facility or program to which a court may order a defendant whose probation is revoked; the statute does not speak to the length of detention and did not authorize revocation of the balance of the defendant's probation for the commission of two new violent misdemeanors. Lawrence v. State, 228 Ga. App. 745, 492 S.E.2d 727 (1997).

Probation may be revoked for committing subsequent crime. Layson v. Montgomery, 251 Ga. 359, 306 S.E.2d 245 (1983).

Warden of a county Department of Corrections was entitled to qualified immunity on a former inmate's unlawful detention claims; the warden acted within the warden's discretionary authority when the warden revoked the inmate's work release for escape and transferred the inmate to full-time incarceration, and the inmate did not show a violation of clearly established law because the inmate made no showing that the inmate was clearly

entitled to be released at the end of a probation revocation sentence. Coons v. Gwinnett Cnty., 657 Fed. Appx. 856 (11th Cir. 2016) (Unpublished).

Judge can revoke probated sentence that is to begin in the future. — By reading former Code 1933, §§ 27-2502 and 27-2702 (see O.C.G.A. §§ 17-10-1 and 42-8-34), a trial judge can revoke a probated sentence that was to begin at a future date. Parrish v. Ault, 237 Ga. 401, 228 S.E.2d 808 (1976); Roberts v. State, 148 Ga. App. 708, 252 S.E.2d 209 (1979).

Court may revoke probation after minimum period served. — There is no merit in the contention that a court, or a judge thereof, loses jurisdiction of the defendant's case after the defendant has served a minimum sentence since a probated sentence is served under the supervision of the judge imposing the probation and the judge may after a hearing revoke the probation at any time during the maximum period covered thereby if the defendant violates any of the rules and regulations upon which the probation was granted. Balkom v. Johnson, 211 Ga. 314, 85 S.E.2d 762 (1955).

Habeas court violated separation of powers by revoking sentence while peititoner in custody of parole board. — Habeas court erred by revoking the petitioner's remaining portion of the original sentence while the petitioner was in the legal custody of the Georgia Board of Pardons and Paroles as such action was in violation of the separation of powers provision of Ga. Const. 1983, Art. I, Sec. II, Para. III. Hayward v. Danforth, 299 Ga. 261, 787 S.E.2d 709 (2016).

Revoke suspension and require rest of sentence in confinement. — Suspended sentence is perhaps undefinable, but the court may provide rules and regulations in connection therewith and may, on violation of such rules and after notice and opportunity to be heard, during the time such sentence runs in accordance with its own terms, revoke the suspension and require that the remainder be served within a penal institution. Cross v. State, 128 Ga. App. 744, 197 S.E.2d 853 (1973).

Judge may revoke suspension or probation only if rules or regulations violated. — Judge only has authority to revoke the suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court. Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Revocation violates due process if no conditions imposed. — To deprive a defendant of liberty upon the theory that the defendant violated rules and regulations prescribed in the defendant's sentence, when no rules, regulations, conditions, limitations, or restrictions were imposed by such sentence, would deprive the defendant of "due process of law." Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Defendant discharged if unaware of conditions set only in later order. — If a condition in the sentence for obedience of laws is reflected only in a later written order, knowledge of such condition not being imputable to the defendant, the effect of such a sentence is an unconditional discharge. Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Proof required to revoke suspension. — Evidence required to revoke a suspension is only some evidence that the defendant has violated the conditions of the probation which satisfies the trial court hearing the evidence in the exercise of a very wide discretion. It is not necessary to show that the defendant has been convicted of the act constituting the violation of the probation. Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Revocation of suspended sentence not criminal proceeding. — Petition by county officials to revoke a bankruptcy debtor's suspended sentence to coerce payment of child support was not criminal in character and, thus, was not excepted from automatic stay as a continuation of a criminal proceeding under the bankruptcy law. Rollins v. Campbell, 200 Bankr. 427 (Bankr. N.D. Ga. 1996).

Revocation of multiple probated sentences based on one probation violation valid. — If a probated future consecutive sentence is imposed by the same judge who imposed prior probated sentences, and the conditions of probation for all the sentences are essentially the same, the trial court, upon a violation thereof, is empowered to revoke the defen-

Revocation of Probation or Suspension (Cont'd)

dant's probation as to all sentences. Dasher v. State, 166 Ga. App. 237, 304 S.E.2d 87 (1983).

Drug test evidence insufficient for revocation. — Revocation of probation based on the defendant's failure of a drug test was error because the test result lacked probative value since no expert testimony was offered by the state to prove the scientific reliability of the ontrack system as used for the purpose of drug detection. Bowen v. State, 242 Ga. App. 631, 531 S.E.2d 104 (2000).

Revocation did not cause ex post facto violation. — Use of the amended version of O.C.G.A. § 42-8-34.1 when an appellant's probation was revoked due, in part, to the appellant's failure to abide by a special condition of the probation, did not implicate ex post facto concerns inasmuch as the imposition of a probated sentence is within the discretion of the sentencing court and the appellant did not have a substantial right to receive probation, much less to receive probation that could not be revoked in its entirety upon violation of a special condition of probation. Walker v. Brown, 281 Ga. 468, 639 S.E.2d 470 (2007).

Revocation reversed based on ground different than alleged in petition. — Trial court erred in revoking defendant's probation on a basis that was not alleged in the state's revocation petition as the state's petition to revoke sought to do so on the ground that the defendant committed a new offense of misdemeanor stalking, but the trial court's order provided that it was revoking probation on the ground that the defendant committed a new felony offense, presumably the offense of aggravated stalking mentioned by the state during the revocation hearing. Ponder v. State, 341 Ga. App. 276, 800 S.E.2d 19 (2017).

Defendant's probation may not be revoked when there is no evidence that the defendant violated its terms in the manner charged in the notice, even though there was evidence at the hearing that the defendant violated the terms of probation in some other manner as to which there was no notice given; thus, if a judgment was based upon an offense not charged in the petition for revocation, it must be reversed. Ponder v. State, 341 Ga. App. 276, 800 S.E.2d 19 (2017).

OPINIONS OF THE ATTORNEY GENERAL

Analysis

General Consideration
Correction of Sentencing Errors
Modification of Sentence

General Consideration

Probation supervision fee. — Trial courts are authorized under O.C.G.A. § 17-10-1(a) to require, as a condition of probation, the payment of a monthly $10 probation supervision fee. 1985 Op. Att'y Gen. No. U85-4.

No probation unless explicitly provided for in court's order. — Unless the judge expressly states in the order that the judge is placing the defendant on probation, the defendant receives the sentence which is prescribed. 1968 Op. Att'y Gen. No. 68-398.

Custody of convicted felons. — All convicted felons sentenced to a term of incarceration serve the felons' sentences under the jurisdiction of the Georgia Department of Corrections. Judges of the superior courts lack the authority to sentence the inmate to the custody of any other person or entity. 1993 Op. Att'y Gen. No. 93-17.

Court not to specify place of confinement. — All felons and misdemeanants, other than those misdemeanants committed directly to a county public works camp (now county correctional institute), must be committed directly and exclusively to the State Board of Corrections (now Board of Offender Rehabilitation). Only the director of corrections (now commissioner of offender

rehabilitation) is authorized to prescribe the place of confinement; so the portion of a sentence committing an inmate to a term of penal servitude in the state prison system which commits the inmate to an institution of the Department of Human Resources is surplusage and should not be relied upon by the officials of the hospital or the Board of Corrections (now Board of Offender Rehabilitation) as authority for the retention of custody of the inmate at the hospital. 1970 Op. Att'y Gen. No. 70-133.

Restitution required for unemployment fraud. — Employment Security Act, O.C.G.A. § 34-8-1 et seq., does not authorize the imposition of a criminal sentence for unemployment fraud that permits community service in lieu of restitution of overpaid benefits to the Department of Labor. 1993 Op. Att'y Gen. No. 93-15.

Agreement to pay restitution exceeding victim's damages. — Sentencing court may not require an offender to make restitution on those counts of a multi-count indictment which are dismissed pursuant to a negotiated plea agreement; however, if an offender voluntarily agrees to make restitution in a certain amount, even if such amount exceeds the victim's "damages," the sentencing court may incorporate that agreement into the court's restitution order. 1995 Op. Att'y Gen. No. 95-19.

Confinement of misdemeanants. — While misdemeanants may only be referred to probation centers upon initial sentencing pursuant to O.C.G.A. § 42-8-35.4, misdemeanants may also be referred to such facilities pursuant to probation revocation proceedings under O.C.G.A. § 42-8-34.1 and after a probation revocation proceeding pursuant to O.C.G.A. § 17-10-1(a)(3)(A). 1999 Op. Att'y Gen. No. 99-14.

Correction of Sentencing Errors

Judge may correct void sentence or clerical errors. — Although a judge is prohibited from modifying a sentence, the court possesses the inherent power to change or correct a judgment or sentence handed down if there are clerical errors appearing on the face of the judgment or the original sentence was void. 1979 Op. Att'y Gen. No. 79-42.

Even after court term expires. — Court, after the term of court in which the judgment was rendered has expired, may change the judgment rendered if clerical errors appear in the sentence or the initial sentence was void. 1979 Op. Att'y Gen. No. 79-42.

Any modification of a sentence after a term of court in which the sentence was rendered is void with the exception of sentences for misdemeanors under former Code 1933, 27-2506 (see O.C.G.A. § 17-10-3(a)(1)), or unless the court bases the court's modification of an existing sentence on the premise that a clerical error was made or that a motion to modify the sentence was made during the term of court in which the sentence was filed. 1980 Op. Att'y Gen. No. 80-43.

After defendant satisfies judgment. — After the term of court in which the judgment was rendered, a court may only change or modify the judgment imposed to the extent necessary to correct clerical errors appearing on the face of the judgment. Such modifications may be made even though the judgment imposed has already been satisfied by the defendant. 1979 Op. Att'y Gen. No. 79-42.

District attorney is proper party to question amended sentences. — District attorney represents the state in the prosecution of cases and is the most appropriate party, not the State Board of Pardons and Paroles, to question the validity of amended sentences. 1980 Op. Att'y Gen. No. 80-43.

Changes beneficial to defendant. — Whether the sentence has been served or the fine has been paid does not affect the ability of a court to modify or change a sentence of the court if such change is beneficial to the defendant. 1979 Op. Att'y Gen. No. 79-42.

Probationary sentence fines suspended during appeal. — Execution of a probated sentence, involving payment of fines and restitution as conditions of probation, is suspended during the pendency of an appeal. 1975 Op. Att'y Gen. No. 75-30.

Modification of Sentence

Judge may not reserve right to alter sentence after court term. — Court may not reserve the right to change or modify a sentence after the expiration of the term at which the sentence was rendered. 1945-47 Op. Att'y Gen. p. 112.

Judge may not change sentence to run concurrently during prisoner's incarceration. — Sentencing judge may not alter a person's sentence to run concurrently rather than consecutively after the person has served a number of years on that sentence. 1963-65 Op. Att'y Gen. p. 309.

RESEARCH REFERENCES

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, §§ 2183 et seq., 2282 et seq.

ALR. — Reduction by appellate court of punishment imposed by trial court, 29 A.L.R. 313; 89 A.L.R. 295.

Necessity and sufficiency of adjudication of guilt, or of recital of or reference to verdict in judgment pronouncing sentence in criminal case, 69 A.L.R. 792.

Sentence for new offense committed while accused was on parole or conditional release, as concurrent or consecutive, 116 A.L.R. 811.

What constitutes commencement of service of sentence, depriving court of power to change sentence, 159 A.L.R. 161.

Voluntary absence of accused when sentence is pronounced, 6 A.L.R.2d 997; 59 A.L.R.5th 135.

Validity, under indeterminate sentence law, of sentence fixing identical minimum and maximum terms of imprisonment, 29 A.L.R.2d 1344.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him, 96 A.L.R.2d 1292.

Propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

State court's power to place defendant on probation without imposition of sentence, 56 A.L.R.3d 932.

Court's presentence inquiry as to, or consideration of, accused's intention to appeal, as error, 64 A.L.R.3d 1226.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 A.L.R.3d 474.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Power of state court, during same term, to increase severity of lawful sentence — modern status, 26 A.L.R.4th 905.

Power of court to increase severity of unlawful sentence — modern status, 28 A.L.R.4th 147.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial, 34 A.L.R.4th 888.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

Vulnerability of victim as aggravating factor under state sentencing guidelines, 73 A.L.R.5th 383.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 99 A.L.R.5th 557.

Downward departure under state sentencing guidelines based on extraordinary family circumstances, 106 A.L.R.5th 377.

Downward departure under state sentencing guidelines permitting downward departure for defendants with significantly reduced mental capacity, including alcohol or drug dependency, 113 A.L.R.5th 597.

Validity of condition of probation, supervised release, or parole restricting computer use or internet access, 4 A.L.R.6th 1.

Validity, construction, and application of conditions of probation or supervised release prohibiting contact with minors or frequenting places where minors congregate — state cases, 4 A.L.R.7th 3.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 A.L.R. Fed. 619.

Downward departure from United States Sentencing Guidelines (USSG § 1A1.1 et seq.) based on extraordinary family circumstances, 145 A.L.R. Fed. 559.

Downward departure from United States Sentencing Guidelines (USSG § 1A1.1 et seq.) based on vulnerability to abuse in prison, 155 A.L.R. Fed. 327.

Downward departure from United States Sentencing Guidelines (U.S.S.G. § 1A1.1 et seq.) based on aberrant behavior, 164 A.L.R. Fed. 61.

Construction and application of United States sentencing guideline § 2a2.1(b)(1), 18 U.S.C.A., providing enhancement for attempted murder or assault with intent to commit murder dependent upon nature or degree of injury, 30 A.L.R. Fed. 2d 385.

Construction and application of U.S.S.G. § 5g1.3(b), requiring federal sentence to run concurrently to undischarged state sentence when state sentence has been fully taken into account in determining offense level for federal offense — particular events preceding federal sentence and sentencing credit, 32 A.L.R. Fed. 2d 191.

Construction and application of "official victim" sentencing enhancement of U.S.S.G. § 3a1.2(c) concerning law enforcement officers and prison officials, 32 A.L.R. Fed. 2d 371.

Construction and application of U.S.S.G. § 3b1.1(s) providing sentencing enhancement for organizer or leader of criminal activity — fraud offenses, 32 A.L.R. Fed. 2d 445.

Downward adjustment for acceptance of responsibility under U.S.S.G. § 3e1.1, 18 USCS — fraud offenses, 33 A.L.R. Fed. 2d 477.

Construction and application of U.S.S.G. § 5h1.3, concerning mental and emotional conditions as ground for sentencing departure, 34 A.L.R. Fed. 2d 457.

Construction and application of U.S.S.G. § 3b1.1(b) providing sentencing enhancement for manager or supervisor of criminal activity — drug offenses — cocaine, 35 A.L.R. Fed. 2d 467.

Validity, construction, and application of U.S.S.G. § 5k2.8, providing for upward sentence departure for extreme conduct, 36 A.L.R. Fed. 2d 95.

Construction and application of U.S.S.G. § 2x1.1, providing sentencing guideline for conspiracy not covered by specific offense guideline, 37 A.L.R. Fed. 2d 449.

Construction and application of U.S.S.G., § 3b1.1(a), 18 USCS, providing sentencing enhancement for organizer or leader of criminal activity — drug offenses, 43 A.L.R. Fed. 2d 365.

Validity, construction, and application of conditions of probation or supervised release prohibiting contact with minors or frequenting places where minors congregate — federal cases, 83 A.L.R. Fed. 2d 51.

Am. Jur. Trials. — Representing Criminal Defendants at Sentencing Hearings, 44 Am. Jur. Trials 459.

17-10-1.1. Judicial consideration of victim impact statement; form document; manner of rebuttal; effect of noncompliance; no creation of cause of action or right of appeal.

(a) A prosecuting attorney bringing charges against a defendant shall notify, where practical, the alleged victim or, when the victim is no longer living, a member of the victim's family of his or her right to submit a victim impact form.

(b)(1) A victim impact form shall identify the victim of the offense and the perpetrator.

(2) A victim impact form may itemize any economic loss suffered by the victim as a result of the offense and may:

(A) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(B) Describe any change in the victim's personal welfare or familial relationships as a result of the offense; and

(C) Contain any other information related to the impact of the offense upon the victim or the victim's family that the victim wishes to include.

(c) The Prosecuting Attorneys' Council of Georgia shall establish forms which are designed to obtain the information specified by subsection (b) of this Code section. The Prosecuting Attorneys' Council of Georgia shall make copies of such form available to prosecuting attorneys in the state. It shall be the duty of the prosecuting attorney or his or her designee to make such forms available to crime victims.

(d) The victim may complete a victim impact form and submit such form to the appropriate prosecuting attorney charged with the prosecution of the case. If the victim is unable to do so because of such victim's mental, emotional, or physical incapacity, or because of such victim's age, the victim's attorney or a family member may complete the victim impact form on behalf of the victim.

(e)(1) If, prior to trial, the defendant engages in discussion with the prosecuting attorney for the purpose of reaching a plea agreement or other pretrial disposition of his or her case, the prosecuting attorney shall, upon the request of the defendant, provide the defendant with a copy of the victim impact form relating to the defendant's case within a reasonable time prior to such discussions.

(2) If the prosecuting attorney intends to present information from a victim impact form to the court at any hearing at which sentencing or a determination of restitution will be considered by the court, the prosecuting attorney shall furnish a copy of the victim impact form to the defendant not less than five days prior to any such hearing. The defendant shall have the right to rebut the information contained in the victim impact form.

(3) The court shall consider the victim impact form that is presented to the court prior to imposing a sentence or making a determination as to the amount of restitution.

(f) If for any reason a victim was not allowed an opportunity to make a written victim impact statement, the victim may submit a victim impact statement to the State Board of Pardons and Paroles in any case prior to consideration of parole.

(g) No sentence shall be invalidated because of failure to comply with the provisions of this Code section. This Code section shall not be construed to create any cause of action or any right of appeal on behalf of any person.

History. — Code 1981, § 17-10-1.1, enacted by Ga. L. 1985, p. 739, § 1; Ga. L. 1992, p. 2419, § 2; Ga. L. 1993, p. 1660, § 1; Ga. L. 2005, p. 88, § 3/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Law reviews. — For article, "The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative," see 37 Mercer L. Rev. 981 (1986).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 113 (1993).

For case comment, "Booth v. Maryland: Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials," see 21 Ga. L. Rev. 1191 (1987).

JUDICIAL DECISIONS

Resentencing not required for reference to bitterness. — Fact that the mother of the victim felt that she was not bitter but that the defendant should serve some time does not constitute an instance of witness' testimony or prosecutor's remarks "so infect[ing] the sentencing proceeding as to render it fundamentally unfair" as to require resentencing. Bell v. State, 203 Ga. App. 109, 416 S.E.2d 344, cert. denied, 203 Ga. App. 905, 416 S.E.2d 344 (1992).

Prosecutor failed to disclose statement. — Although the prosecutor failed to disclose the statement of the victim's mother to the defendant prior to the hearing, this will not invalidate the sentence. Bell v. State, 203 Ga. App. 109, 416 S.E.2d 344, cert. denied, 203 Ga. App. 905, 416 S.E.2d 344 (1992).

Harmless error to discuss medical care of victim's daughter. — Prosecutor's comments during closing argument regarding the victim's family and the fact that the victim's daughter no longer had a father to provide the daughter with medical care may have amounted to impermissible victim impact evidence, but the reviewing court found it highly improbable that the challenged argument contributed to the judgment; the reviewing court found that particularly true in view of the fact that evidence that the victim had moved to the U.S. to procure better medical treatment for the daughter who had flat feet was admitted without objection at trial. Anaya-Plasencia v. State, 283 Ga. App. 728, 642 S.E.2d 401 (2007).

RESEARCH REFERENCES

ALR. — Victim impact evidence in capital sentencing hearings — post-Payne v. Tennessee, 79 A.L.R.5th 33.

Admissibility of victim impact evidence in noncapital state proceedings, 8 A.L.R.7th 6.

17-10-1.2. Oral victim impact statement; presentation of evidence; cross-examination and rebuttal by defendant; effect of noncompliance; no creation of cause of action or right of appeal.

(a)(1) In all cases in which the death penalty may be imposed, subsequent to an adjudication of guilt and in conjunction with the

procedures in Code Section 17-10-30, the court shall allow evidence from the family of the victim, or such other witness having personal knowledge of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community. Except as provided in paragraph (4) of this subsection, such evidence shall be given in the presence of the defendant and of the jury and shall be subject to cross-examination.

(2) The admissibility of the evidence described in paragraph (1) of this subsection and the number of witnesses other than immediate family who may testify shall be in the sole discretion of the judge and in any event shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury. As used in this paragraph, the term "immediate family" means the victim's spouse, child, parent, stepparent, grandparent, grandchild, sibling, stepbrother, stepsister, mother-in-law, father-in-law, sister-in-law, or brother-in-law and the spouses of any such individuals.

(3) In all cases other than those in which the death penalty may be imposed, prior to fixing of the sentence as provided for in Code Section 17-10-1 or the imposing of life imprisonment as mandated by law, and before rendering the appropriate sentence, including any order of restitution, the court shall allow the victim, as such term is defined in Code Section 17-17-3, the family of the victim, or such other witness having personal knowledge of the crime to testify about the impact of the crime on the victim, the family of the victim, or the community. Except as provided in paragraph (4) of this subsection, such evidence shall be given in the presence of the defendant and shall be subject to cross-examination. The admissibility of the testimony and evidence in support of such testimony shall be in the sole discretion of the judge and in any event shall be permitted only in such a manner as to allow for cross-examination by the defendant and to such a degree as not to unduly prejudice the defendant. If the judge excludes the testimony or evidence in support of such testimony, the state shall be allowed to make a proffer of such testimony or evidence.

(4) Upon a finding by the court specific to the case and the witness that the witness would not be able to testify in person without showing undue emotion or that testifying in person will cause the witness severe physical or emotional distress or trauma, evidence presented pursuant to this subsection may be in the form of, but not limited to, a written statement or a prerecorded audio or video statement, provided that such witness is subject to cross-examination and the evidence itself will not be available to the jury during deliberations. Photographs of the victim may be included with any evidence presented pursuant to this subsection.

(5) If the accused has been convicted of a serious violent felony as defined in Code Section 17-10-6.1, attempted murder or attempted kidnapping, or any violation of Code Section 16-5-90, 16-5-91, 16-7-82, 16-7-84, or 16-7-86, and the victim or a representative of the victim is not present at the presentence hearing, it shall be the duty of the court to inquire of the prosecuting attorney whether or not the victim has been notified of the presentence hearing as provided in Code Section 17-17-5. If the court finds that the prosecuting attorney has not made a reasonable attempt to notify the victim, the presentence hearing shall be recessed in order to provide the victim the opportunity to attend prior to sentence being imposed; provided, however, that prior to recessing the presentence hearing, the court shall allow the state or the accused to call any witnesses who were subpoenaed and are present at such presentence hearing. Following any such testimony, the presentence hearing shall be recessed and the victim shall be notified of the date, time, and location when the presentence hearing shall resume.

(b) In presenting such evidence, the victim, the family of the victim, or such other witness having personal knowledge of the impact of the crime on the victim, the victim's family, or the community shall, if applicable:

(1) Describe the nature of the offense;

(2) Itemize any economic loss suffered by the victim or the family of the victim, if restitution is sought;

(3) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(4) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(5) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(6) Include any other information related to the impact of the offense upon the victim, the victim's family, or the community that the court inquires of.

(c) The court shall allow the defendant the opportunity to cross-examine and rebut the evidence presented of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community, and such cross-examination and rebuttal evidence shall be subject to the same discretion set forth in paragraph (1) of subsection (a) of this Code section.

(d) No sentence shall be invalidated because of failure to comply with the provisions of this Code section. This Code section shall not be

construed to create any cause of action or any right of appeal on behalf of the victim, the state, or the accused; provided, however, that if the court intentionally fails to comply with this Code section, the victim may file a complaint with the Judicial Qualifications Commission.

History. — Code 1981, § 17-10-1.2, enacted by Ga. L. 1985, p. 739, § 1; Ga. L. 1993, p. 1660, § 2; Ga. L. 2009, p. 192, § 1/SB 151; Ga. L. 2010, p. 214, § 4/HB 567.

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006). For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010). For article, "Criminal Procedure," see 27 Ga. St. U.L. Rev. 29 (2011).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 113 (1993).

For case comment, "Booth v. Maryland: Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials," see 21 Ga. L. Rev. 1191 (1987).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 17-10-1.2 contains sufficient safeguards within the statute to ensure that victim impact evidence will not be admitted which reflects on factors which the court has found constitutionally irrelevant to death penalty sentencing and which could result in the arbitrary and unconstitutional imposition of the death penalty. Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994).

O.C.G.A. § 17-10-1.2 is not an unconstitutional ex post facto law. Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994).

O.C.G.A. § 17-10-1.2 is not unconstitutional and it is not an ex post facto law violation to apply the statute to a crime that was committed before the statute was enacted. Speed v. State, 270 Ga. 688, 512 S.E.2d 896 (1999).

O.C.G.A. § 17-10-1.2 is not unconstitutional as written and the trial court properly reviewed the state's victim impact testimony prior to trial and did not admit unduly inflammatory or prejudicial evidence. Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000).

Trial court did not err by denying a defendant's motion to declare as unconstitutional the statute allowing victim impact evidence during sentencing as the Georgia Supreme Court found O.C.G.A. § 17-10-1.2 to be constitutional. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Scope of victim impact testimony. — Evidence is limited to the impact of the specific crime on the community and does not extend to testimony concerning anger in the community about increasing lawlessness or crime in general. McClain v. State, 267 Ga. 378, 477 S.E.2d 814 (1996), cert. denied, 521 U.S. 1106, 118 S. Ct. 2485, 138 L. Ed. 2d 993 (1997).

Victim impact statements were proper which focused on the witnesses' relationship with the victim and how the victim's death had affected the witness personally, and which did not focus on the victim's social status, nor provide a detailed narration of the emotional and economic suffering of the victim's family. Turner v. State, 268 Ga. 213, 486 S.E.2d 839 (1997).

Psychiatrist testimony on impact to child. — Victim impact testimony of a psychiatrist who had treated the victim's child both before and after the murder was not improper. Carruthers v. State, 272 Ga. 306, 528 S.E.2d 217, cert. denied, 531 U.S. 934, 121 S. Ct. 321, 148 L. Ed. 2d 258 (2000), overruled on other grounds, Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Silent videotape depicting murder victim admissible. — Silent videotape depicting a murder victim that was killed during an armed robbery of an armored car that showed the victim alive in various settings and which was narrated by the victim's oldest daughter at trial was within the statutory description of admis-

sible victim impact evidence permitted by O.C.G.A. § 17-10-1.2 and the trial court did not err by allowing the videotape to be played at the defendant's trial. Tollette v. State, 280 Ga. 100, 621 S.E.2d 742 (2005).

Testimony from non-family members. — Testimony about the emotional impact of the crime on the community may include testimony by witnesses who are not family members regarding the impact the crime had on witnesses personally. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Opinions about defendant and murders inadmissible. — Trial court abused the discretion granted by O.C.G.A. § 17-10-1.2 in allowing murder victims' family members to testify by offering opinions about the defendant and the murders because such victim impact evidence unduly prejudiced the jury; the witnesses testified that the victims were "shot and left in a patch of kudzu as if they were a piece of trash on the side of the road," that the victims were "left under trash and branches, left to die," and that the crimes were "a senseless, selfish act of nothing but wickedness and evil." While some of the witnesses' characterizations may have been supported by the evidence presented at trial, the witnesses did not have personal knowledge of many of the facts to which the witnesses testified, and the statements, even if supported by the evidence, were particularly inflammatory and prejudicial coming from members of the victims' families; further, the witnesses were also improperly allowed to present the witnesses' own unduly prejudicial characterizations and opinions of the defendant. Bryant v. State, 288 Ga. 876, 708 S.E.2d 362 (2011).

Discretion of court. — Introduction of oral victim impact testimony is controlled by O.C.G.A. § 17-10-1.2, and the introduction of such evidence is solely within the discretion of the trial court. Cronan v. State, 236 Ga. App. 374, 511 S.E.2d 899 (1999).

Failure to allow defendant to cross examine the victim pursuant to O.C.G.A. § 17-10-1.2 was not a basis for invalidating the sentence. Williams v. State, 226 Ga. App. 720, 487 S.E.2d 470 (1997).

No basis for invalidating sentence. — Failure to comply with O.C.G.A. § 17-10-1.2 does not provide a basis for the invalidation of a sentence. Brantley v. State, 268 Ga. 151, 486 S.E.2d 169, cert. denied, 522 U.S. 985, 118 S. Ct. 449, 139 L. Ed. 2d 384 (1997).

Testimony of spouse of murder victim admissible. — Testimony of the spouse of a murder victim, who sobbed while testifying, was not improper because the questions asked had been approved by the trial court prior to trial and there was no indication that the spouse's testimony was prolonged or that the spouse's display of emotion disrupted the trial. Jones v. State, 267 Ga. 592, 481 S.E.2d 821, cert. denied, 522 U.S. 953, 118 S. Ct. 376, 139 L. Ed. 2d 293 (1997).

Religious references in victim impact statements were permissible since the references were an essential part of a glimpse into the victim's life and did not comprise an unduly large portion of the statements. Pickren v. State, 269 Ga. 453, 500 S.E.2d 566 (1998).

Permitting the sole surviving victim of the defendant's crimes to testify during the sentencing phase regarding the impact on the witness regarding the murder of the witness's child was not erroneous. Henry v. State, 278 Ga. 617, 604 S.E.2d 826 (2004).

Trial court did not err by allowing emotional victim impact evidence during sentencing as O.C.G.A. § 17-10-1.2 allowed evidence of the impact of the crime upon the victim, and the victim gave a short and limited statement. Paige v. State, 277 Ga. App. 687, 627 S.E.2d 370 (2006).

Testimony from parents admissible without reading statements. — Victim impact evidence was properly admitted through the testimony of a child murder victim's father that, since the crimes, he had suffered depression, nightmares, had trouble sleeping, and had seen a psychiatrist, and the testimony of the child's mother that her sadness, crying, and being in a "dazed state" had spurred her to visit a psychologist for three months and a counselor for six months. It was not re-

quired that the victims read their statements. Foster v. State, 288 Ga. 98, 701 S.E.2d 189 (2010).

Counsel was not deficient in failing to object to the prosecutor's victim impact argument during opening statement because negative characterizations of the victim were proper since the characterizations were relevant to evidence later offered to explain the context in which the drug-related crimes occurred, and the prosecutor's allusion to the fact that the victim was no longer alive was relevant to the murder charge; a witness's testimony and photographs of the witness's injuries were directly relevant and admissible to prove the charge against the defendant of committing aggravated assault on the witness. Lacey v. State, 288 Ga. 341, 703 S.E.2d 617 (2010).

Counsel not ineffective for failing to object to impact statement from sibling. — Trial counsel was not ineffective for failing to object to the victim's sibling giving impact testimony during sentencing on the ground that the defense had no prior notice of the sibling's testimony because the defendant failed to explain how the sibling's testimony prejudiced the defendant, given that the trial court had already heard the victim's testimony that the victim had been hospitalized for over a month as a result of the knife attack, that the attack had paralyzed the victim, that the victim could not live with the victim's spouse because of the victim's disability, and the victim's only income was social security disability payments. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Testimony held not victim impact evidence. — Testimony that was given by the child of a person who was killed in a multi-car collision caused by a juvenile, which provided the child's personal observations of teen driving habits in the area where the collision occurred and was offered by the state to show that it was in the interests of the community for the juvenile to be treated as an adult, was not victim impact evidence, but the juvenile court did not err by admitting the testimony. In the Interest of W.N.J., 268 Ga. App. 637, 602 S.E.2d 173 (2004).

Leading questions authorized. — Trial court acted within the court's discretion in allowing the prosecutor to ask leading questions of the victim's spouse in order to ensure that the spouse's testimony remained within the parameters outlined in O.C.G.A. § 17-10-1.2. Jones v. State, 267 Ga. 592, 481 S.E.2d 821, cert. denied, 522 U.S. 953, 118 S. Ct. 376, 139 L. Ed. 2d 293 (1997).

Procedural irregularity does not constitute reversible error absent a constitutional violation. McClain v. State, 267 Ga. 378, 477 S.E.2d 814 (1996), cert. denied, 521 U.S. 1106, 118 S. Ct. 2485, 138 L. Ed. 2d 993 (1997).

Although the trial court erred in overruling defendant's objections to victim impact references in the state's opening statement and in the testimony of two witnesses, the appellate court did not need to reverse the defendant's convictions and sentences because the error was harmless beyond a reasonable doubt as the comments and testimony would have been admissible in the sentencing phase and as the defendant had confessed both to a friend, who testified at trial, and to law enforcement officers in a videotaped confession that was played for the jury. Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001), cert. denied, 537 U.S. 840, 123 S. Ct. 163, 154 L. Ed. 2d 62 (2002).

Proper procedures. — Procedure best comported with requirements of O.C.G.A. § 17-10-1.2 whereby witnesses prepared written statements, a pretrial hearing provided defendant the opportunity to challenge the content of the statements, and, at trial, the state asked the witnesses to read their statements and the witnesses were then available for cross-examination. Turner v. State, 268 Ga. 213, 486 S.E.2d 839 (1997).

Jury instructions. — When victim impact evidence is given in the sentencing phase of a death penalty or life without parole case, the trial court should instruct the jury regarding the purpose of the evidence. Turner v. State, 268 Ga. 213, 486 S.E.2d 839 (1997).

Harmless error. — Although some of the victim impact testimony admitted over the defendant's objection was improper, the testimony did not require reversal of the defendant's death sentence because the admission was harmless be-

yond a reasonable doubt. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Cited in Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997); Taylor v. State, 264 Ga. App. 665, 592 S.E.2d 148 (2003).

RESEARCH REFERENCES

ALR. — Victim impact evidence in capital sentencing hearings — post-Payne v. Tennessee, 79 A.L.R.5th 33.

Admissibility of victim impact evidence in noncapital state proceedings, 8 A.L.R.7th 6.

17-10-1.3. Factoring into sentencing determinations citizenship status of convict.

(a) In determining whether to probate all or any part of any sentence of confinement in any felony, misdemeanor, or ordinance violation case, the sentencing court shall be authorized to make inquiry into whether the person to be sentenced is lawfully present in the United States under federal law.

(b) If the court determines that the person to be sentenced is not lawfully present in the United States, the court shall be authorized to make inquiry into whether the person to be sentenced would be legally subject to deportation from the United States while serving a probated sentence.

(c) If the court determines that the person to be sentenced would be legally subject to deportation from the United States while serving a probated sentence, the court may:

(1) Consider the interest of the state in securing certain and complete execution of its judicial sentences in criminal and quasi-criminal cases;

(2) Consider the likelihood that deportation may intervene to frustrate that state interest if probation is granted; and

(3) Where appropriate, decline to probate a sentence in furtherance of the state interest in certain and complete execution of sentences.

(d) This Code section shall apply with respect to a judicial determination as to whether to suspend all or any part of a sentence of confinement in the same manner as this Code section applies to determinations with respect to probation.

History. — Code 1981, § 17-10-1.3, enacted by Ga. L. 2007, p. 34, § 1/SB 23; Ga. L. 2008, p. 324, § 17/SB 455.

Editor's notes. — Ga. L. 2007, p. 34, § 3/SB 23, not codified by the General Assembly, provides: "The General Assembly finds that this Act states factors for consideration in discretionary decision-making processes within the criminal justice system. The General Assembly finds that such factors could have been considered prior to or without the enactment of

this Act. Accordingly, it is the intention of the General Assembly that this Act may be applied with respect to offenses committed prior to its effective date as well as offenses committed on or after its effective date. However, if there should be a judicial determination that retrospective application is prohibited, it is the intention of the General Assembly that retrospective application should be severable." This Act became effective May 11, 2007.

RESEARCH REFERENCES

Am. Jur. 2d. — 3C Am. Jur. 2d, Aliens and Citizens, §§ 2580, 2581.

C.J.S. — 3 C.J.S., Aliens, §§ 111 et seq., 146 et seq.

17-10-1.4. Split sentence.

(a) As used in this Code section, the term "split sentence" means any felony sentence that includes a term of imprisonment followed by a term of probation.

(b) In any case where a judge on or after July 1, 2015, sentences a defendant to a split sentence, post-incarceration supervision of the defendant shall be conducted exclusively by the Department of Community Supervision and not by the State Board of Pardons and Paroles, regardless of whether the defendant has served the full period of incarceration ordered in the sentence or has been released prior to the full period of incarceration by parole, conditional release, or other action of the State Board of Pardons and Paroles.

History. — Code 1981, § 17-10-1.4, enacted by Ga. L. 2015, p. 422, § 5-31/HB 310.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2015, and shall apply to sentences entered on or after such date."

Law reviews. — For article on the 2015 enactment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

17-10-2. Conduct of presentence hearings in felony cases; effect of reversal for error in presentence hearing.

(a)(1) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the accused, or the absence of any prior conviction and pleas.

(2) The judge shall also hear argument by the accused or the accused's counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. Except in cases where the

death penalty may be imposed, the prosecuting attorney shall open and conclude the argument. In cases where the death penalty may be imposed, the prosecuting attorney shall open and the accused or the accused's counsel shall conclude the argument.

(3) Upon the conclusion of the evidence and arguments, the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law.

(b) In cases in which the death penalty may be imposed, the judge, when sitting without a jury, in addition to the procedure set forth in subsection (a) of this Code section, shall follow the procedures provided for in Code Section 17-10-30.

(c) In all cases tried by a jury in which the death penalty may be imposed, upon a return of a verdict of "guilty" by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. The hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided for in subsection (a) of this Code section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Section 17-10-30, exist and whether to recommend mercy for the accused. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(d) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

History. — Code 1933, § 27-2503, enacted by Ga. L. 1974, p. 352, § 7; Ga. L. 1990, p. 8, § 17; Ga. L. 1993, p. 1654, § 2; Ga. L. 2005, p. 20, § 11/HB 170; Ga. L. 2009, p. 223, § 2/SB 13.

Cross references. — General rules regarding order of argument after presentation of evidence, § 17-8-71.

Editor's notes. — Ga. L. 1993, p. 1654, § 7, not codified by the General Assembly, and effective May 1, 1993, provides: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, a defendant whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act provided that: (1) jeopardy for the offense charged has not attached and the state has filed with the trial court notice of its intention to seek the death penalty or (2) the defendant has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking the death penalty after remand."

Ga. L. 1993, p. 1654, § 8, not codified by the General Assembly, and effective May 1, 1993, provides: "Except as provided in Section 6 of this Act [Code Section 17-10-32.1], the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act nor shall this Act be construed as repealing Code Sections 17-10-30, 17-10-31, or 17-10-32 of the Official Code of Georgia Annotated."

Ga. L. 1993, p. 1654, § 9, not codified by the General Assembly, and effective May

1, 1993, provides: "No person shall be sentenced to life without parole unless such person could have received the death penalty under the laws of this state as such laws have been interpreted by the United States Supreme Court and the Supreme Court of Georgia."

Ga. L. 2005, p. 20, § 1/HB170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB170, not codified by the General Assembly, provides that the 2005 amendment applies to all trials which commence on or after July 1, 2005.

Ga. L. 2009, p. 223, § 8/SB 13, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand."

Ga. L. 2009, p. 223, § 9/SB 13, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10/SB 13, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a)/SB 13, not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b)/SB 13, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Law reviews. — For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For article on recidivism and convictions based on nolo contendere pleas, see 13 Ga. L. Rev. 723 (1979). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For survey of 1986 Eleventh Circuit cases on constitutional criminal procedure, see 38 Mercer L. Rev. 1141 (1987).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 183 (1993). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

For comment on Todd v. State, 228 Ga. 746, 187 S.E.2d 831 (1972), see 24 Mercer L. Rev. 491 (1973).

JUDICIAL DECISIONS

Analysis

General Consideration
Judicial Sentencing for Felonies
Jury Sentencing for Capital Cases
Appellate Review

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1971, p. 902, § 1, and Ga. L. 1973, p. 159, § 1 are included in the annotations for this Code section.

Constitutionality of death penalty. — Claim that the death penalty statute in Georgia is unconstitutional as applied to the defendants who are black is without merit. Stephens v. Kemp, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Language of former Code 1933, § 27-2503 (see O.C.G.A. § 17-10-2) was mandatory. DeLoach v. State, 142 Ga. App. 666, 236 S.E.2d 904 (1977).

Failure to follow the mandate of O.C.G.A. § 17-10-2 is neither harmless nor waived by failure to object to procedure. Jefferson v. State, 205 Ga. App. 687, 423 S.E.2d 425 (1992); Eason v. State, 215 Ga. App. 614, 451 S.E.2d 820 (1994), overruled on other grounds, Turner v. State, 259 Ga. App. 902 (2003), recons. denied; overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019); Martin v. State, 228 Ga. App. 59, 491 S.E.2d 142 (1997).

Language of O.C.G.A. § 17-10-2 was directory. — Language instructing the court to dismiss the jury during a presentence hearing is directory and only for the purpose of the jury's convenience. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

Applicability of subsection (a). — O.C.G.A. § 17-10-2(a) is not applicable to sentences imposed pursuant to a hearing on a guilty plea. Burruss v. State, 242 Ga. App. 241, 529 S.E.2d 375 (2000).

Failure to hold hearing. — Question whether a trial court's failure to hold a presentence hearing can be waived or held harmless only becomes an issue if the failure to hold a presentence hearing renders the defendant's sentence void. Williams v. State, 271 Ga. 686, 523 S.E.2d 857 (1999).

Sentence imposed by a trial court in a non-death penalty case is not rendered void by the court's failure to conduct a presentence hearing under O.C.G.A. § 17-10-2. Williams v. State, 271 Ga. 686, 523 S.E.2d 857 (1999).

Failure to complete hearing not justified. — Defendant's profane tirade and physical agitation following return of the jury's verdict did not justify the failure to complete a presentence hearing. Hayes v. State, 211 Ga. App. 801, 440 S.E.2d 539 (1994).

Purpose of bifurcated trial. — Two-step felony procedure was devised and enacted for the express purpose of prohibiting disclosure of prior convictions to the jury during the first phase of the trial. The General Assembly intended that any prior convictions be disclosed to the jury only at the second or sentencing phase of the trial. Riggins v. Stynchcombe, 231 Ga. 589, 203 S.E.2d 208 (1974).

Bifurcated trial was created to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue had been determined. Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), vacated on other grounds, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977).

Purpose of notice requirement. — Intention of the General Assembly in requiring that the defendant be notified prior to the trial was to give the convicted defendant enough time to rebut or explain any conviction record. Queen v. State, 131 Ga. App. 370, 205 S.E.2d 921 (1974).

Notice of intent as to sentence not required. — O.C.G.A. § 17-10-2 does not require that the state notify the defendant of the sentence the state intends to seek; rather, the statute simply requires that the state notify the defendant of the evidence the state intends to use in aggravation of sentencing. Hightower v. State, 210 Ga. App. 216, 436 S.E.2d 31 (1993).

If the state filed notice of the state's intent to seek recidivist punishment approximately 80 minutes before the trial was scheduled to begin and the jury selected the previous day was to be sworn, timely notice was given to the defendant. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

Notice requirement of O.C.G.A. § 17-10-2 would not apply to preclude a trial court from considering a defendant's violent conduct which occurred during the trial or after the trial and prior to sentencing. Demetrios v. State, 246 Ga. App. 506, 541 S.E.2d 83 (2000), overruled on other

General Consideration (Cont'd)

grounds, White v. State, 2019 Ga. LEXIS 66 (Ga. 2019).

Presentence hearing was not required if the court imposed the statutory minimum sentence for cocaine trafficking under O.C.G.A. § 16-13-31(a)(1)(C). Edwards v. State, 219 Ga. App. 239, 464 S.E.2d 851 (1995).

Defendant was convicted of kidnapping with bodily injury, which carries a minimum life sentence; thus, the trial court did not err when the court denied the defendant's oral request for a presentence investigation prior to sentencing. Bolick v. State, 244 Ga. App. 567, 536 S.E.2d 242 (2000).

Notice of prior offenses used for recidivist purposes. — Although it is not essential that the indictment set forth the prior offenses, if the indictment does not set forth prior offenses it is necessary that the record contain an "affirmative notice to defendant that his prior felony offenses would be used against him for recidivist purposes during sentencing." Ross v. State, 210 Ga. App. 455, 436 S.E.2d 496 (1993).

Even though the state failed to provide the defendant with the required notice, error in the imposition of a recidivist sentence was waived because at the presentence hearing the defendant's counsel did not object to the admission of the convictions and affirmatively stated that the defendant did not contest the convictions' admission. Hatcher v. State, 224 Ga. App. 747, 482 S.E.2d 443 (1997).

Defendant acknowledged in open court that the prosecution had disclosed the defendant's prior record and discussed with defense counsel "where defendant fell in the tier of a recidivist statute," thus, the defendant received adequate and clear notice as required by O.C.G.A. § 17-10-2. Mullinax v. State, 242 Ga. App. 561, 530 S.E.2d 255 (2000).

Defendant received sufficient notice of the state's intent to seek recidivist punishment when the defendant received notice of intent to introduce evidence of similar transactions, attached to which was a copy of the defendant's previous conviction for armed robbery. Herrington v. State, 243 Ga. App. 265, 533 S.E.2d 133 (2000), appeal dismissed, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

Notice received prior to the swearing of the jury is sufficient to satisfy the requirement of O.C.G.A. § 17-10-2. Davis v. State, 244 Ga. App. 715, 536 S.E.2d 603 (2000); Davis v. State, 246 Ga. App. 877, 542 S.E.2d 626 (2000).

Defendant received proper notice of the state's intent to seek recidivist punishment because the disclosure certificate included defendant's GCIC criminal history, including convictions for armed robbery, and stated that all convictions would be used in aggravation of punishment pursuant to O.C.G.A. § 17-10-2. Young v. State, 245 Ga. App. 684, 538 S.E.2d 760 (2000).

State indicated service of process to the defendant's attorney, by mail and by fax, of the state's intent to introduce evidence in aggravation of punishment and therefore notice was sufficient. Follow up letter outlining plea negotiations and citing recidivist statute provided clear notice of same intent. Cabell v. State, 250 Ga. App. 530, 551 S.E.2d 386 (2001).

Clear notice required by O.C.G.A. § 17-10-2 was given when defense counsel stated at trial that counsel was aware of the state's intent to seek recidivism punishment and that notice of such intent had been received; further, no objection was made to the introduction of the defendant's felony convictions, and defense counsel stated that the documentation appeared to be proper certified copies of convictions of the client. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Although the state's original notice to defendant's counsel of the state's intention to admit prior felony convictions as aggravators for sentencing purposes was amended on the day of trial to include new convictions that were not previously listed, the court found that defendant's counsel was timely served with notice of the prior convictions pursuant to O.C.G.A. §§ 17-10-2(a) and 17-10-7(b) because the defendant had time to review the convictions prior to the commencement of the trial; it was accordingly proper that the trial court considered the convictions in determining the appropriate sentence.

Howard v. State, 262 Ga. App. 198, 585 S.E.2d 164 (2003).

Prior convictions listed on an attached GCIC as aggravation evidence for a defendant's sentencing for theft by deception were sufficient notice that the state intended to seek sentencing as a recidivist under O.C.G.A. §§ 17-10-2 and 17-10-7. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

With regard to a defendant's convictions for aggravated assault, false imprisonment, and other crimes, the trial court did not err in sentencing the defendant as a recidivist despite the state serving notice of the state's intent to seek recidivism treatment until the morning of trial as, under O.C.G.A. § 17-10-2(a), such notice was timely and sufficient. Daniels v. State, 296 Ga. App. 795, 676 S.E.2d 13 (2009).

Waiver of notice. — Defendant waived notice after defense counsel did not object to admission of the defendant's prior convictions and affirmatively stated that counsel did not contest admission of the convictions. Howard v. State, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003); Strange v. State, 244 Ga. App. 635, 535 S.E.2d 315 (2000).

Examination of the transcript of the sentencing hearing did not reveal whether the trial court considered the defendant's prior conviction in determining the sentence, although the court probated a portion of the sentence; however, the defendant waived any error by failing to object to the court's examination of the defendant's criminal history on the ground that the defendant received no notice. Adams v. State, 263 Ga. App. 694, 589 S.E.2d 269 (2003).

Defendant waived the defendant's objection to the use of evidence in aggravation of punishment under O.C.G.A. § 17-10-2 as the defendant failed to object at the presentencing hearing to the lack of notice. Ingram v. State, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

Defendant waived any error in the state's notice of the state's intention to request that the defendant be sentenced as a recidivist under O.C.G.A. § 17-10-2(a) as the defendant failed to object to the introduction of the certificates of conviction at the presentencing hearing; defendant's pro se status did not relieve the defendant of the obligation to make timely objections and to comply with the procedural and substantive requirements of the law. Sims v. State, 265 Ga. App. 476, 594 S.E.2d 693 (2004).

Certified copies of prior convictions not required for notice. — Notice of state's intent to present evidence upon sentencing of the defendant's previous convictions was sufficient even though certified copies of prior convictions were not included. Wynn v. State, 228 Ga. App. 124, 491 S.E.2d 149 (1997).

Notice not required. — State was not required to notify a defendant who pled guilty of the state's intent to use in aggravation of punishment evidence that every other participant in the criminal enterprise who pled guilty had received jail time; the notice requirement of O.C.G.A. § 17-10-2(a) had been deleted, and the statute did not apply to sentencing following guilty pleas. McIntosh v. State, 287 Ga. App. 293, 651 S.E.2d 207 (2007).

Prior convictions need not be in indictment. — Since 1974, when Georgia adopted judge sentencing, it is not required that the prior convictions be included in the indictment but only that the accused receive notice of the state's intention to seek recidivist punishment and of the identity of the prior convictions. Wainwright v. State, 208 Ga. App. 777, 432 S.E.2d 555 (1993).

When the prior convictions do no more than subject the defendant to a greater risk of the maximum sentence (O.C.G.A. § 17-10-7(a)) or even to a certainty of the maximum sentence (O.C.G.A. § 17-10-7(b)) for the crime as indicted, the prior convictions need not be alleged in the indictment; imposition of the maximum sentence has already been authorized by the grand jury's action, and adequate advance notice to defendant is assured by O.C.G.A. § 17-10-2(a). Wainwright v. State, 208 Ga. App. 777, 432 S.E.2d 555 (1993).

Indictment not used in aggravation of punishment. — Mere rumors concerning the conduct of the defendant were not admissible, and although an indictment is

General Consideration (Cont'd)

more than mere rumor, an indictment is much less than a conclusive determination of guilt to permit the indictment's use in aggravation of punishment. Sinkfield v. State, 262 Ga. 239, 416 S.E.2d 288 (1992).

Evidence of events after trial. — Since the witnesses' evidence was relevant to the question of sentence, including the defendant's moral character and predisposition to commit other crimes, the fact that it occurred after trial did not make it any less relevant. Pearce v. State, 256 Ga. App. 889, 570 S.E.2d 74 (2002).

Evidence of unproven criminal charges. — Evidence of unproven criminal charges is admissible during the sentencing phase if the state timely notifies the defendant of the state's intention to introduce such evidence; however, the notice of unproven charges must be described with enough particularity to alert the defendant as to what the defendant must defend against. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994).

Pending charges considered. — Trial court did not err in considering the pending charges as aggravating circumstances of the pre-sentence hearing when the state did not provide the requisite notice to the defendant pursuant to O.C.G.A. § 17-10-2 since it was the defendant personally who introduced the topic of these charges on direct, subject to the prosecution's permissible follow-up cross-examinations. Andrews v. State, 207 Ga. App. 352, 427 S.E.2d 841 (1993).

Similar transaction evidence insufficient. — Providing notice of intent to prevent similar transaction evidence does not vitiate the state's need to give notice that the state plans to use a prior conviction in aggravation of punishment. The purpose of O.C.G.A. § 17-10-2 is to give the defendant a chance to examine the defendant's record to determine if the convictions are in fact defendant's, if the defendant was represented by counsel, and any other defect which would render such documents inadmissible during the presentencing phase of the trial. This purpose is not served by the similar transaction notice. Armstrong v. State, 264 Ga. 237, 442 S.E.2d 759 (1994); Boyd v. State, 230 Ga. App. 314, 497 S.E.2d 3 (1998).

Notifying defendant of evidence to be presented. — State need not provide written notice, prior to trial, of which statutory aggravating circumstances the state intends to rely upon. Roberts v. State, 252 Ga. 227, 314 S.E.2d 83, cert. denied, 469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984).

Notification of admission of driving record. — Record revealed that the Department of Public Safety records of the defendant's driving record were properly authenticated and unaltered, and that the defendant was given notice a week prior to trial that the state intended to introduce evidence of several of defendant's prior convictions for the offense of driving while under the influence of alcohol, the trial court's admission into evidence of defendant's driving record was not error. Evans v. State, 190 Ga. App. 302, 378 S.E.2d 903 (1989).

Since the state told the defendant's attorney that the attorney's client had a criminal record and gave counsel the opportunity to review that record and at the sentencing hearing offered to continue the sentencing hearing so that the defendant's attorney could review the record, the defendant did receive clear notice of the convictions and the opportunity to examine the record. Bass v. State, 208 Ga. App. 859, 432 S.E.2d 602 (1993).

Service of notice of the state's intention to introduce evidence in aggravation of punishment was timely given that the defendant was served with a copy of the notice while the jury was being selected but before the jury were sworn. Payne v. State, 219 Ga. App. 318, 464 S.E.2d 884 (1995); Thomas v. State, 224 Ga. App. 816, 482 S.E.2d 472 (1997).

Court did not err in imposing a life sentence since it was shown that the state provided the defendant with pretrial notice that the state would use evidence of prior convictions in aggravation of the defendant's sentence, and the defendant was afforded the opportunity to investigate and rebut the validity of the convictions. Woods v. State, 224 Ga. App. 52, 479 S.E.2d 414 (1996).

Defendant's contention that the defendant did not receive timely notice of the

state's intention to use prior convictions was without merit since the defendant conceded that the day before trial began the state gave the defendant copies of the prior convictions the state intended to use in aggravation. Anthony v. State, 236 Ga. App. 257, 511 S.E.2d 612 (1999).

One month before trial, the state filed a notice of the state's intent to present nonstatutory aggravating circumstances involving several incidents that occurred while the defendant was in jail awaiting trial; this notice and the supplement to the witness list were not untimely. Brannan v. State, 275 Ga. 70, 561 S.E.2d 414, cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002).

Since the state served the defendant's counsel with the state's notice of intent to use a previous conviction after the jury was selected but before the jury was impaneled, the state provided clear notice of the state's intent to use the defendant's prior conviction in aggravation of sentencing as required by O.C.G.A. § 17-10-2. Smith v. State, 261 Ga. App. 781, 584 S.E.2d 29 (2003).

Defendant waived appellate review of the defendant's argument that the trial court erred in considering a prior sexual battery charge at the pre-sentencing hearing because at the pre-sentencing hearing, the defendant made no objection to the use of that evidence in aggravation of punishment under O.C.G.A. § 17-10-2; even if the defendant had not waived the objection and did not receive proper notice of the state's intent to introduce the prior conviction at sentencing, the argument failed because in the court's order denying the motion for new trial, the trial court specifically stated that the court did not consider the prior conviction in sentencing the defendant. Andrews v. State, 307 Ga. App. 557, 705 S.E.2d 319 (2011).

Replay of testimony is not additional evidence as contemplated by O.C.G.A. § 17-10-2. Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685, cert. denied, 459 U.S. 981, 103 S. Ct. 317, 74 L. Ed. 2d 293 (1982).

Written notice of prior convictions is not required. Fox v. State, 163 Ga. App. 601, 295 S.E.2d 563 (1982); Moss v. State, 206 Ga. App. 310, 425 S.E.2d 386 (1992).

Defense counsel's awareness of defendant's prior conviction. — Failure of defense counsel to object to the admission of a prior conviction offered in aggravation of sentence without notice to the defendant before trial is reversible error if defense counsel is aware of the conviction. West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000), overruling McDuffie v. Jones, 248 Ga. 544, 283 S.E.2d 601 (1981) and Watkins v. State, 207 Ga. App. 766, 430 S.E.2d 105 (1993).

Prosecution's obligation under O.C.G.A. § 17-10-2(a) to give the defendant notice of the prosecution's intention to introduce the defendant's criminal history at sentencing to seek aggravation of the sentence was fulfilled when the defendant's criminal history was discussed with counsel during plea negotiations. Ogle v. State, 256 Ga. App. 26, 567 S.E.2d 700 (2002).

Although the state introduced evidence of the defendant's prior conviction as an aggravation in considering the appropriate sentence to impose on the defendant, who was convicted of various drug charges and bribery, the defendant's counsel was not ineffective for failing to object to the introduction of such prior conviction because the state provided the requisite prior notice pursuant to O.C.G.A. § 17-10-2(a) and the defendant chose not to mention to the defendant's counsel that the history was somewhat inaccurate; because the notice was sufficient, defendant's counsel was not ineffective. Hester v. State, 261 Ga. App. 614, 583 S.E.2d 274 (2003).

Statutory notice to defense attorney held sufficient. — Trial court did not err in imposing a life sentence against the defendant as: (1) the state satisfied the notice requirement under O.C.G.A. § 17-10-2(a) by providing notice to the defendant's attorney; (2) the appeals court presumed that such information was communicated to the defendant; and (3) the defendant failed to contend otherwise. Blevins v. State, 283 Ga. App. 694, 642 S.E.2d 373 (2007).

Defendant had notice thus no ineffective assistance. — Counsel's alleged failure to show the defendant a copy of the prior conviction the state used to enhance the conviction or in not asking the defen-

General Consideration (Cont'd)

dant to verify the conviction was not ineffective assistance as the record showed that the defendant was aware the state planned to use the prior conviction and that the defendant was given the relevant information about the conviction. Mayo v. State, 277 Ga. App. 282, 626 S.E.2d 245 (2006).

Counsel's failure to object to use of prior conviction to fix length of sentence. — When the trial court used the defendant's prior conviction to fix the length of the defendant's sentence for a violation of the Georgia Controlled Substances Act (Act), O.C.G.A. § 16-13-20 et seq., the defendant's failure to object to such evidence waived the trial court's error; however, as the defendant's attorney failed to object to the trial court's use of the defendant's prior conviction, the defendant received ineffective assistance of counsel and was entitled to a new trial. Turner v. State, 259 Ga. App. 902, 578 S.E.2d 570 (2003).

Intent to use defendant's prior conviction at sentencing. — Because the trial court excluded defendant's prior conviction based upon a belief that the court had no discretion based on the state's failure to give notice of the state's intent to use the prior conviction as required by O.C.G.A. § 17-16-4(a)(5), the trial court could consider the court's options under O.C.G.A. § 17-16-6 before re-sentencing. Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

Since defendant's counsel spoke for defendant at the sentencing hearing, O.C.G.A. § 17-10-2 was satisfied, and a trial court's admonition of the defendant was not a denial of the defendant's right of allocution. Blue v. State, 275 Ga. App. 671, 621 S.E.2d 616 (2005).

Trial court did not commit reversible error by failing to inform the defendant of the defendant's right to sentence review, although, this is the better procedure. Moreover, the defendant was not denied the defendant's right to speak on the defendant's own behalf during sentencing since the record showed that while the defendant's counsel spoke on the defendant's behalf during sentencing, neither the defendant nor defense counsel requested that the defendant be allowed to speak personally prior to sentencing, and after the sentence was imposed, the defendant spoke freely with the court regarding obtaining court-appointed appellate counsel. Fraser v. State, 283 Ga. App. 477, 642 S.E.2d 129 (2007), overruled in part by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Trial court did not violate the defendant's right of allocution when the trial court instructed the defendant not to interrupt its pronouncement of sentence; the requirements of O.C.G.A. § 17-10-2 were met when the defendant's counsel spoke on the defendant's behalf at the sentencing hearing. Habersham v. State, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Provision as to prior notice of prior convictions not applicable to misdemeanor conviction. — As O.C.G.A. § 17-10-2 relates to the conduct of the presentence hearing in felony cases, if appellants were convicted of a misdemeanor, the assertion that the state's presenting of certified copies of appellant's prior convictions without prior notice to the appellant is without merit. Whisenhunt v. State, 172 Ga. App. 742, 324 S.E.2d 570 (1984).

Questioning character witnesses about offenses of which notice not given. — If the defendant objects to the district attorney's questions to the defendant's character witnesses about offenses of which the state has not given notice, the district attorney is required to demonstrate that the attorney's questions were asked in good faith, and based on reliable information that can be supported by admissible evidence. Christenson v. State, 261 Ga. 80, 402 S.E.2d 41, cert. denied, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991); Wellons v. State, 266 Ga. 77, 463 S.E.2d 868 (1995), cert. denied, 519 U.S. 830, 117 S. Ct. 97, 136 L. Ed. 2d 52 (1996).

Questions asked of a character witness about prior convictions were based on National Crime Information Center reports so the state was able to demonstrate that the questions were asked in good faith and were based upon reliable information. Walker v. State, 214 Ga. App. 777, 449 S.E.2d 322 (1994).

O.C.G.A. § 17-10-2 is not applicable to juvenile disposition hearings. C.P. v. State, 167 Ga. App. 374, 306 S.E.2d 688 (1983); Moody v. State, 206 Ga. App. 387, 425 S.E.2d 397 (1992).

Misdemeanor cases. — O.C.G.A. § 17-10-2 applies only to felony cases, not misdemeanor cases. Wyatt v. State, 179 Ga. App. 327, 346 S.E.2d 387 (1986).

State was not required to give the defendant pretrial notice of evidence in aggravation of punishment in a misdemeanor prosecution for driving under the influence. Trotter v. State, 179 Ga. App. 314, 346 S.E.2d 390 (1986).

Whether a jury is hopelessly deadlocked is an evaluation committed to the sound discretion of the trial court, subject to appellate review for an abuse of discretion. Romine v. State, 256 Ga. 521, 350 S.E.2d 446 (1986), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Court can require that defendant be sworn. — When the defendant, during a presentence hearing, offers oneself as a witness, the trial court can properly require that the defendant be sworn. Banks v. State, 131 Ga. App. 215, 205 S.E.2d 520 (1974).

Right of allocution. — Defendant was not denied the right of allocution because counsel spoke on the defendant's behalf regarding mitigation and punishment, and neither the defendant nor counsel requested that the defendant personally speak. Nash v. State, 225 Ga. App. 10, 482 S.E.2d 520 (1997).

Even assuming that the defendant had a constitutional right of allocution, the defendant was not denied such right if the defendant was afforded an opportunity to argue to the sentencing court. Murray v. State, 269 Ga. 871, 505 S.E.2d 746 (1998).

Trial court did not violate the defendant's right of allocution when the trial court instructed the defendant not to interrupt its pronouncement of sentence; the requirements of O.C.G.A. § 17-10-2 were met when the defendant's counsel spoke on the defendant's behalf at the sentencing hearing. Habersham v. State, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Trial counsel was not ineffective in failing to object to the denial of the right to allocution as the defendant's right was not denied because, during sentencing, defense counsel made a brief statement on the defendant's behalf, describing the defendant's difficult life and upbringing, before the defendant directly addressed the trial court by informing the court of the time the defendant had already served with regard to the charges; and the trial court did not err in prohibiting the defendant from interrupting the court when the trial court was prepared to announce the court's sentence. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015), cert. denied, No. S15C1105, 2015 Ga. LEXIS 412 (Ga. 2015).

In a non-negotiated guilty plea to aggravated assault, aggravated battery, and reckless driving, the trial court properly denied the defendant's motion to withdraw the defendant's guilty plea because the trial court complied with the statutory right to allocution when the court gave counsel the opportunity to speak on behalf of the defendant; and the supreme court had rejected the argument that the right to allocution was personal and could not be satisfied by counsel's speaking on the defendant's behalf. Seagraves v. State, 339 Ga. App. 258, 793 S.E.2d 164 (2016).

Victim impact consequences. — State is not precluded from introducing evidence that is admissible for purposes other than demonstrating victim impact if that evidence also incidentally conveys that the defendant's crime had victim impact consequences. Sermons v. State, 262 Ga. 286, 417 S.E.2d 144 (1992).

Oral victim impact testimony is not controlled by the notice provision of O.C.G.A. § 17-10-2(a) and is not the type of evidence "in aggravation of sentence" contemplated by that statute. Cronan v. State, 236 Ga. App. 374, 511 S.E.2d 899 (1999).

Section does not authorize sentence greater than prescribed by law. — Even under the two-step felony procedure set forth in this section, an accused cannot receive a sentence greater than that prescribed by law for the crime for which the accused was indicted and convicted. Riggins v. Stynchcombe, 231 Ga. 589, 203 S.E.2d 208 (1974).

General Consideration (Cont'd)

Maximum punishment may not be increased at election of prosecuting officers. — One cannot be indicted by a grand jury for only one offense carrying a maximum punishment, and then have that maximum punishment increased at the election of the state's prosecuting officers. Riggins v. Stynchcombe, 231 Ga. 589, 203 S.E.2d 208 (1974).

Trial under this section for crime committed before effective date. — Trial of the defendant in accordance with the provisions of this section, although the date the alleged crime was committed was prior to the effective date of that section, is not a proper ground to set aside a conviction upon a petition for writ of habeas corpus. Coleman v. Caldwell, 229 Ga. 656, 193 S.E.2d 846 (1972).

Failure to conduct presentence investigation excused. — Court did not fail to conduct a presentence investigation pursuant to O.C.G.A. § 17-10-2(a), since the record revealed that the court did inquire of the defendant and defense counsel, after the jury had been excused, whether they were ready to proceed with sentencing, counsel responded in the affirmative and the court gave every available opportunity to introduce evidence. Willey v. State, 209 Ga. App. 398, 433 S.E.2d 674 (1993).

Trial court did not err in failing to conduct a presentence investigation since the defendant was given the opportunity for an investigation and such opportunity was declined. Davis v. State, 214 Ga. App. 360, 448 S.E.2d 26 (1994); Evans v. State, 240 Ga. App. 297, 523 S.E.2d 103 (1999).

Defendant not provided a presentence report. — Failure to provide the defense with a presentence report showing the defendant's criminal record did not violate O.C.G.A. § 17-10-2 since there was no evidence that the trial court relied on the report to determine the length of the sentence. Denny v. State, 226 Ga. App. 432, 486 S.E.2d 417 (1997).

Providing only summary of presentence report. — Since O.C.G.A. § 17-10-2 gave the trial court discretion whether to reveal the content of the presentence report to defense counsel and the state, the trial court did not err by making available to the defendant only a summary of the defendant's prior convictions, which appeared to be the basis for the sentence, rather than the whole presentence report. Williams v. State, 254 Ga. App. 836, 563 S.E.2d 914 (2002).

Consideration of foreign pleas. — Trial court's consideration of guilty pleas and probated sentence entered into in another state jurisdiction was proper. Potts v. State, 207 Ga. App. 863, 429 S.E.2d 526 (1993).

Nolo contendere plea. — Previous plea of nolo contendere was not improperly considered in sentencing a defendant; such a plea could be considered in aggravation of punishment, and even if the plea had been improperly introduced into evidence, there was no indication that the trial court was influenced by the plea. McIntosh v. State, 287 Ga. App. 293, 651 S.E.2d 207 (2007).

Defective notice does not void sentence. — When the defendant, whose conviction had been affirmed on direct appeal, later filed a motion to correct sentence on the ground that the defendant had not received notice under O.C.G.A. § 17-10-2 of the state's intent to use prior convictions to seek recidivist punishment, the court lacked jurisdiction over the appeal from the denial of the motion. Defective notice did not void the sentence; rather, it was a procedural defect. Ward v. State, 299 Ga. App. 63, 682 S.E.2d 128 (2009).

Waiver of notice required for life term. — Error by the trial court in imposing a life sentence when the defendant was not given formal notice prior to trial of the state's intent to demand recidivist punishment was waived by the defendant's failure to object at the time the state introduced the defendant's prior drug conviction into evidence during the presentencing phase of the trial. Tillman v. State, 217 Ga. App. 269, 457 S.E.2d 228 (1995).

Notice requirement in seeking life sentence. — Written notice that the state intends to present evidence of prior convictions, coupled with oral notice that the state intends to seek a life sentence, satisfies the notice requirement. Washington

v. State, 238 Ga. App. 561, 519 S.E.2d 234 (1999).

Admission of any lawful evidence in penalty phase. — During the penalty phase, any lawful evidence which tends to show the motive of the defendant, the defendant's lack of remorse, the defendant's general moral character, and the defendant's predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of O.C.G.A. § 17-10-2. Sears v. State, 270 Ga. 834, 514 S.E.2d 426 (1999).

For purposes of an ineffective assistance of counsel claim, the defendant did not show the defendant was harmed by the failure of defense counsel to request a formal presentence investigation when, at sentencing, counsel informed the court as to the defendant's lack of a prior criminal record and the defendant's exemplary behavior since the offenses. Jones v. State, 226 Ga. App. 619, 487 S.E.2d 371 (1997).

In order to prevail on a claim that the defendant's attorney rendered ineffective assistance by failing to object to the introduction of evidence in aggravation of sentencing, the defendant was required to show prejudice; because the trial court did not rely upon such evidence, the defendant was unable to establish prejudice, and the defendant's claim of error presented no basis for reversal. Autry v. State, 250 Ga. App. 107, 549 S.E.2d 769 (2001).

Mitigation evidence sufficient. — Counsel's argument that the injuries suffered by the defendant were far worse than those suffered by the victim was a sufficient argument concerning mitigation. Cross v. State, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, No. S07C1479, 2007 Ga. LEXIS 680 (Ga. 2007).

Bench conference on sentencing in presence of jury. — There was no error in the trial court's failure to dismiss the jury during a bench conference on sentencing since the order of argument outlined in O.C.G.A. § 17-10-2 was followed. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

No error on part of trial court in prohibiting defendant's remarks at inappropriate time. — With regard to a defendant's convictions on three counts of aggravated assault with intent to rob, the trial court did not err by refusing to allow the defendant to speak and to offer evidence in mitigation of the punishment at sentencing as, to the contrary, the record revealed that the trial court heard evidence in mitigation from two of the defendant's relatives, heard the arguments of defense counsel, and when the trial court asked the defendant directly if the defendant had anything to say, the defendant responded in the negative. After the trial court began to pronounce sentence, the defendant interrupted, indicating a desire to make a statement, and there was no error on the part of the trial court finding that it was too late; further, the trial court did not violate the defendant's right of allocution when the court instructed the defendant not to interrupt the court's pronouncement of sentence. Pilkington v. State, 298 Ga. App. 317, 680 S.E.2d 164 (2009), cert. denied, No. S09C1717, 2010 Ga. LEXIS 54 (Ga. 2010).

Cited in Ballard v. State, 131 Ga. App. 847, 207 S.E.2d 246 (1974); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975); Shepherd v. State, 234 Ga. 75, 214 S.E.2d 535 (1975); Adkins v. State, 134 Ga. App. 507, 215 S.E.2d 270 (1975); Arnold v. State, 134 Ga. App. 853, 216 S.E.2d 373 (1975); Ingram v. State, 134 Ga. App. 935, 216 S.E.2d 608 (1975); Heard v. State, 135 Ga. App. 685, 218 S.E.2d 866 (1975); Bradley v. State, 135 Ga. App. 865, 219 S.E.2d 451 (1975); Smokes v. State, 136 Ga. App. 8, 220 S.E.2d 39 (1975); Moss v. State, 136 Ga. App. 241, 220 S.E.2d 761 (1975); Cloud v. State, 136 Ga. App. 244, 220 S.E.2d 763 (1975); Stanley v. State, 136 Ga. App. 385, 221 S.E.2d 242 (1975); Davis v. State, 136 Ga. App. 749, 222 S.E.2d 188 (1975); Pounds v. State, 136 Ga. App. 852, 222 S.E.2d 629 (1975); Glisson v. State, 136 Ga. App. 864, 222 S.E.2d 680 (1975); McNeese v. State, 236 Ga. 26, 222 S.E.2d 318 (1976); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976); David v. State, 137 Ga. App. 425, 224 S.E.2d 83 (1976); Heyward v. State, 236 Ga. 526, 224 S.E.2d 383 (1976); Carter v. State, 137 Ga. App. 824, 225 S.E.2d 73 (1976); Herrin v. State, 138 Ga. App. 729, 227 S.E.2d 498 (1976); Hamby v.

General Consideration (Cont'd)

State, 237 Ga. 373, 228 S.E.2d 787 (1976); Hewell v. State, 139 Ga. App. 622, 229 S.E.2d 92 (1976); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976); Byrd v. Hopper, 537 F.2d 1303 (5th Cir. 1976); Chaplin v. State, 141 Ga. App. 788, 234 S.E.2d 330 (1977); Gill v. State, 141 Ga. App. 823, 234 S.E.2d 665 (1977); Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977); Stewart v. State, 239 Ga. 588, 238 S.E.2d 540 (1977); Lewis v. State, 239 Ga. 732, 238 S.E.2d 892 (1977); Boyer v. State, 240 Ga. 170, 240 S.E.2d 68 (1977); Richardson v. State, 144 Ga. App. 416, 240 S.E.2d 917 (1977); Brown v. State, 144 Ga. App. 509, 241 S.E.2d 621 (1978); Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Thomas v. State, 145 Ga. App. 69, 243 S.E.2d 250 (1978); Bradshaw v. State, 145 Ga. App. 664, 244 S.E.2d 600 (1978); Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902 (1978); Ramsey v. State, 241 Ga. 426, 246 S.E.2d 190 (1978); Thomas v. State, 146 Ga. App. 501, 246 S.E.2d 498 (1978); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978); Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979); Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979); Melton v. State, 149 Ga. App. 506, 254 S.E.2d 732 (1979); Amerson v. Zant, 243 Ga. 509, 255 S.E.2d 34 (1979); Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979); Corn v. Hopper, 244 Ga. 28, 257 S.E.2d 533 (1979); Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979); Turner v. State, 151 Ga. App. 631, 260 S.E.2d 756 (1979); Almon v. State, 151 Ga. App. 863, 261 S.E.2d 772 (1979); Newton v. State, 154 Ga. App. 98, 267 S.E.2d 641 (1980); Moret v. State, 246 Ga. 5, 268 S.E.2d 635 (1980); Morrison v. State, 155 Ga. App. 234, 270 S.E.2d 397 (1980); Brown v. State, 246 Ga. 251, 271 S.E.2d 163 (1980); Goodrum v. State, 158 Ga. App. 602, 281 S.E.2d 254 (1981); Jackson v. State, 158 Ga. App. 702, 282 S.E.2d 181 (1981); Peavy v. State, 159 Ga. App. 280, 283 S.E.2d 346 (1981); Varnes v. State, 159 Ga. App. 452, 283 S.E.2d 673 (1981); Fowler v. State, 159 Ga. App. 496, 283 S.E.2d 710 (1981); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); Garland v. State, 160 Ga. App. 97, 286 S.E.2d 330 (1981); Hall v. State, 160 Ga. App. 508, 287 S.E.2d 223 (1981); Richards v. State, 160 Ga. App. 489, 287 S.E.2d 394 (1981); Wooten v. State, 160 Ga. App. 747, 288 S.E.2d 94 (1981); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981); Howard v. State, 161 Ga. App. 743, 289 S.E.2d 815 (1982); Williams v. State, 162 Ga. App. 120, 290 S.E.2d 341 (1982); Arnold v. State, 163 Ga. App. 94, 292 S.E.2d 891 (1982); Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Arnold v. State, 163 Ga. App. 10, 293 S.E.2d 501 (1982); Monroe v. State, 249 Ga. 832, 295 S.E.2d 512 (1982); Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982); Lewis v. State, 164 Ga. App. 339, 297 S.E.2d 303 (1982); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982); Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983); Raymond v. State, 168 Ga. App. 487, 309 S.E.2d 669 (1983); Moore v. Zant, 722 F.2d 640 (11th Cir. 1983); Mitchell v. Hopper, 564 F. Supp. 780 (S.D. Ga. 1983); Parker v. State, 170 Ga. App. 295, 316 S.E.2d 855 (1984); Saine v. State, 170 Ga. App. 610, 317 S.E.2d 650 (1984); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984); Johnson v. Kemp, 585 F. Supp. 1496 (S.D. Ga. 1984); Devier v. State, 253 Ga. 604, 323 S.E.2d 150 (1984); Ross v. State, 254 Ga. 22, 326 S.E.2d 194 (1985); Walker v. State, 254 Ga. 149, 327 S.E.2d 475 (1985); Wright v. State, 255 Ga. 109, 335 S.E.2d 857 (1985); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985); Rielli v. State, 174 Ga. App. 220, 330 S.E.2d 104 (1985); Etchison v. State, 175 Ga. App. 723, 334 S.E.2d 324 (1985); Beck v. State, 255 Ga. 483, 340 S.E.2d 9 (1986); Cook v. State, 255 Ga. 565, 340 S.E.2d 843 (1986); Davis v. State, 255 Ga. 598, 340 S.E.2d 869 (1986); Green v. State, 178 Ga. App. 203, 342 S.E.2d 386 (1986); Black v. State, 179 Ga. App. 170, 345 S.E.2d 678 (1986); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987);

Darty v. State, 188 Ga. App. 447, 373 S.E.2d 389 (1988); Nobles v. State, 191 Ga. App. 594, 382 S.E.2d 637 (1989); Hunter v. State, 192 Ga. App. 675, 385 S.E.2d 764 (1989); Giles v. State, 193 Ga. App. 93, 387 S.E.2d 5 (1989); Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989); Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990); Anderson v. State, 199 Ga. App. 559, 405 S.E.2d 558 (1991); Mattarochia v. State, 200 Ga. App. 681, 409 S.E.2d 546 (1991); Franklin v. State, 201 Ga. App. 147, 410 S.E.2d 451 (1991); Mays v. State, 262 Ga. 90, 414 S.E.2d 481 (1992); Hill v. State, 263 Ga. 37, 427 S.E.2d 770 (1993).

Judicial Sentencing for Felonies

Purpose. — Purpose of subsection (a) of this section is to allow a defendant to examine the defendant's record to determine if the convictions are in fact defendant's, if the defendant was represented by counsel, and any other defect which would render such documents inadmissible during the presentencing phase of the trial. Adams v. State, 142 Ga. App. 252, 235 S.E.2d 667 (1977); Herring v. State, 238 Ga. 288, 232 S.E.2d 826 (1977); Black v. State, 146 Ga. App. 226, 246 S.E.2d 133 (1978); Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980); Williams v. State, 162 Ga. App. 680, 292 S.E.2d 560 (1982); Johnson v. State, 171 Ga. App. 851, 321 S.E.2d 402 (1984); Wyatt v. State, 179 Ga. App. 327, 346 S.E.2d 387 (1986); Bacon v. State, 188 Ga. App. 782, 374 S.E.2d 351 (1988).

Recidivism evidence used to enhance sentence. — Trial court may impose a higher degree of punishment for an offense due to evidence in aggravation of the punishment and not have sentenced the defendant under a recidivist statute when the defendant was never indicted under a recidivist statute. Williams v. State, 208 Ga. App. 716, 431 S.E.2d 469 (1993).

Trial court did not err in sentencing the defendant to an eight-year sentence on a burglary offense because the defendant was incorrect that the maximum permissible sentence for that offense was five years as certified copies of prior burglary convictions were presented and the trial court properly sentenced the defendant as a recidivist. Martin v. State, 349 Ga. App. 656, 825 S.E.2d 227 (2019).

"Jury verdict" includes verdict returned by any trier of fact. — Reference to a "jury verdict" in O.C.G.A. § 17-10-2(a) includes a verdict returned by any trier of fact. Thus, in a bench trial, the court has the authority to consider the defendant's prior conviction in aggravation when the state has given the defendant notice before trial of the state's intent to use the conviction in aggravation. Edwards v. State, 260 Ga. 121, 390 S.E.2d 580 (1990).

Use of plea bargain. — O.C.G.A. § 17-10-2(a) did not operate to bar the trial court from relying on one of the cocaine charges to which the defendant pled guilty in a guilty plea hearing in order to impose an enhanced mandatory life sentence pursuant to O.C.G.A. § 16-13-30(d) for the second sale of cocaine charge to which the defendant pled guilty at the same hearing. Plea bargain negotiations can serve the same purpose as the giving of notice under subsection (a) of that section and when plea bargain negotiations are conducted, the defendant can be given "clear notice" of what the state intends to rely upon in aggravation of sentencing at the guilty plea hearing. Martin v. State, 207 Ga. App. 861, 429 S.E.2d 332 (1993).

Defendant's claim that the trial court erred in sentencing the defendant after accepting a negotiated plea in the absence of the presentence hearing required by O.C.G.A. § 17-10-2 lacked merit because the section does not reach sentencing following guilty pleas; the terms of that section apply only in those cases in which sentence is imposed after a jury trial, a bench trial, or probation revocation proceedings for a first offender. Gilbert v. State, 245 Ga. App. 544, 538 S.E.2d 104 (2000).

Discovery in presentence hearings in both capital and noncapital cases is governed by O.C.G.A. § 17-10-2. The Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., does not apply. State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Presentence hearing discovery misconduct. — Trial court did not err in

Judicial Sentencing for Felonies (Cont'd)

denying the defendant's motion for a new trial based on the defendant's trial counsel failing to object to the state failing to provide notice of the state's intent to use a prior conviction in aggravation of sentencing because the defendant could not show that the outcome of sentencing would have been different. Soler v. State, 354 Ga. App. 93, 840 S.E.2d 169 (2020).

No right to jury at presentence hearing. — There was no reason to retain the jury for a presentence hearing since there was no discretion in determining the length of the defendant's sentence, the possibility of parole, or the possibility of probation. Howard v. State, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Trial court did not err in dismissing the jury over the defendant's objection during the sentencing phase of trial because the state presented evidence of the defendant's prior conviction on two counts of armed robbery. Thus, the sentence in the case was mandatory, although the trial judge was given discretion to probate or suspend the sentence, and the trial judge could determine the sentence without a jury. Shields v. State, 264 Ga. App. 232, 590 S.E.2d 217 (2003).

Before this section was enacted, defendants were not absolutely entitled to a sentence imposed by jury. Zarick v. State, 134 Ga. App. 548, 215 S.E.2d 311 (1975).

No right to jury-imposed sentence even if the law at time of offense. — There does not accrue to a defendant a substantial right to have the defendant's sentence imposed by a jury because such was the law at the time of the offense. Jones v. State, 233 Ga. 662, 212 S.E.2d 832 (1975).

Fact that the offenses occurred before July 1, 1974, the date this section became effective, does not entitle the defendant to a jury sentence when the trial was conducted after that date. DeLoach v. State, 142 Ga. App. 666, 236 S.E.2d 904 (1977).

There is no error in trial court, rather than jury, sentencing defendant. Daniel v. State, 248 Ga. 271, 282 S.E.2d 314 (1981).

Judge, not jury, determines sentence under O.C.G.A. § 17-10-2 and failure to give a charge with regard to sentencing matters is not error. Lewis v. State, 158 Ga. App. 575, 281 S.E.2d 318 (1981).

This section made judicial sentencing in noncapital felony cases mandatory. Bailey v. State, 138 Ga. App. 807, 227 S.E.2d 516 (1976).

Section allows judge to fix sentence in noncapital cases. — This section allowed the trial judge to fix the sentence in a case in which the death penalty cannot be given. Fleming v. State, 236 Ga. 434, 224 S.E.2d 15 (1976).

Since trial court was required to fix and impose a sentence on the defendant because the defendant was not being sentenced to death or life imprisonment without parole, the trial court did not err in sentencing the defendant on the defendant's convictions for robbery and aggravated assault; accordingly, the defendant's sentence was not void. Daniel v. State, 262 Ga. App. 474, 585 S.E.2d 752 (2003).

Section repeals provision for recommendation by sentencing jury of misdemeanor punishment. — Enactment of this section, which provided for imposition of punishment by the judge in all cases except those in which the death penalty might be imposed, had been construed to repeal by implication the provisions of Ga. L. 1968, p. 1249, dealing with recommendation of punishment as for misdemeanor by the jury that determines sentence. Tucker v. State, 136 Ga. App. 456, 221 S.E.2d 664 (1975).

No case in which jury imposed sentence in noncapital case. — No cases have been found wherein the jury had been authorized to impose the sentence in a noncapital felony case under this section. Dent v. State, 136 Ga. App. 366, 221 S.E.2d 228 (1975).

In noncapital cases, jury cannot even recommend sentence. — Judge has the sole power to determine the pun-

ishment and there is no provision except in capital cases for a jury that determines the sentence to make any recommendations as to sentence. Winslow v. State, 135 Ga. App. 776, 219 S.E.2d 21 (1975).

Failure to charge jury that jury might recommend punishment not error. — Under this section, it was not error to fail to charge that the jury might recommend that the defendant could be punished as for a misdemeanor. Henderson v. State, 141 Ga. App. 430, 233 S.E.2d 505 (1977).

It is error to instruct jury as to possible sentence in felony case before the jury has determined the question of guilt or innocence. Lewis v. State, 158 Ga. App. 575, 281 S.E.2d 318 (1981).

Recidivism not jury issue. — Since recidivism is an issue only in the sentencing phase of a trial, it follows that the defendant has no right to a jury determination of this issue. LaPalme v. State, 169 Ga. App. 540, 313 S.E.2d 729 (1984); Gary v. State, 186 Ga. App. 231, 366 S.E.2d 833 (1988).

Trial court erred in charging the jury relative to recidivism; the issue of recidivism is considered only in the sentencing phase of a trial. Hanson v. State, 196 Ga. App. 589, 396 S.E.2d 510 (1990).

Prior convictions admissible in sentencing phase. — Trial court did not err when the court allowed the state to introduce evidence of the defendant's prior record of convictions during the sentencing phase of the trial. Wilson v. State, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983).

Defendant was not improperly sentenced under the general recidivist statute, O.C.G.A. § 17-10-7(c), as the defendant was served with notice that certified copies of the defendant's three prior felony convictions would be used against the defendant in sentencing as required by O.C.G.A. § 17-10-2(a); once the convictions were offered, the trial court was authorized to sentence the defendant under § 17-10-7. Walker v. State, 268 Ga. App. 669, 602 S.E.2d 351 (2004).

Since the defendant failed to object to the introduction of the defendant's prior convictions at the presentence hearing, the defendant waived any arguments the defendant may have had as to that evidence on appeal; additionally, while two of the defendant's prior convictions were entered from guilty pleas made on the same day, the convictions arose from distinct offenses charged in two different indictments and, thus, the trial court properly considered the convictions for sentencing purposes. Milton v. State, 272 Ga. App. 908, 614 S.E.2d 140 (2005).

Because defense counsel received oral notice under O.C.G.A. § 17-10-2 months before trial that the state would seek recidivist punishment and counsel reviewed the defendant's prior convictions, the defendant was properly sentenced. Maddox v. State, 278 Ga. App. 191, 628 S.E.2d 625 (2006).

In an action in which the defendant was convicted of shoplifting as a felon in accordance with O.C.G.A. § 16-8-14(b)(1)(C), there was no requirement that the prior convictions upon which the conviction and sentence were based be proved beyond a reasonable doubt, as there was an exception under Apprendi for such prior convictions based upon the general principle that prior convictions were generally already proved beyond a reasonable doubt; further, there was no due process violation under U.S. Const., amend. 14 because the defendant received notice of the state's intent to use the prior convictions for sentencing and the defendant had an opportunity to challenge the convictions pursuant to O.C.G.A. § 17-10-2(a). Redd v. State, 281 Ga. App. 272, 635 S.E.2d 870 (2006).

Admission of the defendant's prior convictions during the sentencing phase was harmless beyond a reasonable doubt because the victim of the prior crimes supported the defense's arguments that the defendant had always been quick to admit the defendant's violent acts and that those acts were the result of the defendant's alcoholism, and it undermined the state's attempt to show that the defendant had exhibited a pattern of committing domestic abuse and of financial dependence on women; there was overwhelming evidence of the statutory aggravating circumstances supporting the death penalty in the case, and the jury was authorized to

Judicial Sentencing for Felonies (Cont'd)

consider the similar transaction evidence at the sentencing phase. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Trial court did not err in sentencing the defendant as a recidivist because the defendant failed to rebut the presumption of regularity and failed to object to the form of the evidence of the prior convictions at the pre-sentence hearing and, thus, failed to preserve the issue for review on appeal; the state served the defendant with a list of evidence in aggravation of sentencing and specifically invoked the statutory recidivist sentencing provisions, and at the pre-sentence hearing, the trial court had copies of the prior convictions, but defense counsel never objected to the consideration of any of the listed offenses or argued that the state was required to introduce the prior convictions into evidence. Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Prior convictions inadmissible. — In sentencing the defendant for child molestation, the trial court erred in considering the defendant's prior misdemeanor convictions for solicitation of sodomy and obscene language. Sanders v. State, 230 Ga. App. 176, 495 S.E.2d 653 (1998).

Dismissal of jury not mandatory and failure to dismiss not error. — Language that the trial judge "shall dismiss the jury" is directory only and is for the sole purpose of permitting the jury to disburse and not require the jury to remain in a jury box during the progress of the presentence hearing. Any failure on the part of the trial judge to dismiss the jury at this stage of the proceeding, if an error, does not in any way affect the indictment, trial, and conviction of the defendant, and if an error, is one of which the defendant has no right to complain. Whitley v. State, 137 Ga. App. 245, 223 S.E.2d 279 (1976); Ellis v. State, 137 Ga. App. 834, 224 S.E.2d 799 (1976).

Error not harmless when sentence review precluded by fact that jury imposed sentence. — When the sentence was for more than five years, it cannot be held harmless error for the defendant to have been denied the right to sentencing by the judge, rather than a jury, in view of the provisions of former Code 1933, § 27-2511.1 (former O.C.G.A. § 17-10-6) for review of the sentence by a three-judge panel. Such review would be denied the appellant unless the appellant is sentenced by the judge in accordance with former Code 1933, § 27-2503 (see O.C.G.A. § 17-10-2). Wheeless v. State, 135 Ga. App. 406, 218 S.E.2d 88 (1975).

Notice of intent to present evidence must be given before trial. — If notice of intent to present evidence was not given until before opening statements to the jury, notice was not given as O.C.G.A. § 17-10-2 requires, before trial, since that section requires that notice be given before trial and jeopardy attaches when the jury is sworn. Sinkfield v. State, 262 Ga. 239, 416 S.E.2d 288 (1992).

Notice of prior felony convictions required. — Notice of prior felony convictions for discretionary sentencing under O.C.G.A. § 17-10-2 is required before the convictions can be admitted in evidence in aggravation of punishment. Armstrong v. State, 209 Ga. App. 796, 434 S.E.2d 560 (1993).

Imposition of life sentence based on prior conviction inappropriate. — In a prosecution for selling a controlled substance, imposition of a life sentence was improper since the state notified the defendant of the state's intent to use previous drug convictions as similar transactions evidence but did not inform the defendant of the state's intent to use the prior convictions in seeking the mandatory life sentence. Miller v. State, 219 Ga. App. 284, 464 S.E.2d 860 (1995).

Disclosure statements contained in the state's notice of the state's intent to seek recidivist punishment in combination with the Georgia Crime Information Center report constituted proper notice of the defendant's prior convictions to be used in aggravation of punishment; thus, the notice at issue was not defective. Defendant's conviction on count one of the indictment was the second conviction for violating O.C.G.A. § 16-13-30(b), selling a controlled substance; therefore, the trial court was not prohibited from sentencing

the defendant under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(c). Johnson v. State, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

If evidence not introduced, counsel not ineffective for not objecting. — In a prosecution for selling marijuana and possessing marijuana with the intent to distribute, given that the state conceded that the state failed to file notice regarding the state's intent to introduce a prior conviction and such evidence was not introduced, defense counsel could not be found ineffective for failing to object to the introduction of the prior conviction. Allen v. State, 280 Ga. App. 663, 634 S.E.2d 831 (2006).

Notice of intent to consider aggravating circumstances ruled inadmissible in determining guilt. — When the trial court intends to consider matters in aggravation that were ruled inadmissible during the guilt-innocence phase of the trial, the court must inform defense counsel and the prosecution of the plans in this regard before the presentence hearing. Absent such notice from the trial court judge, the defense and the prosecution cannot adequately prepare their cases or summon their witnesses for the presentence hearing. Dorsey v. Willis, 242 Ga. 316, 249 S.E.2d 28 (1978).

Commitment to reconsider sentence not equivalent to promise to reduce. — Trial court's commitment to reconsider the defendant's sentence upon consideration of further information was no promise that the defendant's sentence would be reduced, or if the sentence were not, that the plea could be withdrawn. Brooks v. State, 177 Ga. App. 12, 338 S.E.2d 437 (1985).

Presentence probation reports may not be considered in fixing length of sentence. — This section did not permit presentence probation reports to be considered by the trial judge in fixing the length of the sentence. Benefield v. State, 140 Ga. App. 727, 232 S.E.2d 89 (1976); Mills v. State, 244 Ga. 186, 259 S.E.2d 445 (1979).

Presentencing report cannot be used in aggravation in determining sentence; when it is clear from the statements of the trial court that the presentencing report was used to aggravate the sentence, the sentence must be reversed and the case returned for resentencing. Rampley v. State, 166 Ga. App. 521, 304 S.E.2d 574 (1983).

Presentence probation reports are not evidence at presentence hearing. — Information in presentence probation reports cannot be regarded as evidence either in aggravation or in mitigation as such reports are not a part of the evidence introduced at the presentence hearing. Benefield v. State, 140 Ga. App. 727, 232 S.E.2d 89 (1976).

Presentence probation reports may be considered in deciding whether to suspend or probate sentence. Mills v. State, 244 Ga. 186, 259 S.E.2d 445 (1979).

Disclosure of contents of presentence probation report is in court's discretion. — It is in the sound discretion of the trial judge whether to reveal the content of the probation officer's report to counsel for the accused and for the state. Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975).

Since this section did not require the content of a presentence probation report to be shared with counsel, it is in the sound discretion of the trial judge whether to reveal the content of the report to counsel for the accused and for the state. Benefield v. State, 140 Ga. App. 727, 232 S.E.2d 89 (1976).

While nothing in the Code requires the contents of presentence investigative reports to be made known to counsel, the trial court nonetheless should exercise sound discretion as to whether to reveal the contents of such reports to counsel for the defendant and for the state. Dorsey v. Willis, 242 Ga. 316, 249 S.E.2d 28 (1978).

Notice to defense counsel of matters in probation report adverse to defendant. — If a presentence probation officer's report contains any matter adverse to the defendant and likely to influence the decision to suspend or probate the sentence, that information should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975); Benefield v. State, 140 Ga. App. 727, 232

Judicial Sentencing for Felonies (Cont'd)

S.E.2d 89 (1976); Dorsey v. Willis, 242 Ga. 316, 249 S.E.2d 28 (1978).

Whether or not to order a probation report is a matter within the discretion of the trial court. Galloway v. State, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

Evidence brought out without objection. — O.C.G.A. § 17-10-2 does not apply if evidence contained in presentence reports has been brought out without objection during trial, and the appellate court cannot review the procedure used in a presentence hearing if the defendant did not object. Moss v. State, 159 Ga. App. 317, 283 S.E.2d 275 (1981).

Requirement of pretrial notice of evidence inapplicable. — Requirement for pretrial notice of evidence in aggravation did not apply to a sentence of life imprisonment imposed pursuant to a plea agreement. Powell v. State, 229 Ga. App. 52, 494 S.E.2d 200 (1997).

Plea waived pretrial notice of evidence requirement. — Requirement for pretrial notice of evidence in aggravation for purposes of sentencing was waived by the defendant's decision to enter a plea and accept a negotiated sentence. Powell v. State, 229 Ga. App. 52, 494 S.E.2d 200 (1997).

Rescheduling of hearing not required. — Trial judge was not required to reschedule a pre-sentence hearing to allow the defendant an opportunity to possibly present witnesses. Scott v. State, 213 Ga. App. 84, 444 S.E.2d 96 (1994).

Defendant's request for presentence investigation properly denied. — Since the trial court denied the defendant's request for a presentence investigation on the basis that the court had heard character witnesses and testimony as to family conditions and the defendant's work record and, therefore, the court believed that any additional information would be of little help, there was no abuse of discretion in denying the request. Galloway v. State, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

Denial of request for presentence report when mitigating evidence not presented. — If a criminal defendant was present during the sentencing phase of the defendant's trial and was afforded every opportunity to present evidence in extenuation or mitigation of punishment, but did not do so, and the trial judge denied the defendant's request for a presentence investigation there was no abuse of discretion in so doing. Thompson v. State, 195 Ga. App. 18, 392 S.E.2d 732 (1990).

Probation report not admissible to determine length of sentence. — Trial court is authorized under O.C.G.A. §§ 42-8-29 and 42-8-34 to consider investigative reports prepared by probation officers for the purpose of deciding whether to suspend or probate all or part of the defendant's sentence, but the court cannot use the reports to determine the length of the sentence. Williams v. State, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

Use of presentence report to increase sentence not shown. — If the transcript of the trial does not affirmatively show that the trial court used the presentence reports for the unlawful purpose of increasing the sentence, rather than for the lawful purpose of determining whether to grant probation, no cause for reversal is shown. Jones v. State, 165 Ga. App. 180, 300 S.E.2d 534 (1983); White v. State, 179 Ga. App. 526, 347 S.E.2d 6 (1986).

While the trial judge is authorized to consider presentence investigative reports for the limited purpose of determining whether to probate all or part of a defendant's sentence, the judge is not authorized to consider such reports in aggravation of punishment. Jones v. State, 165 Ga. App. 180, 300 S.E.2d 534 (1983).

Comparison of reports under O.C.G.A. § 17-10-2 with reports made for probation purposes. — Reports under O.C.G.A. § 42-8-34 are more diverse in the type of information the reports may contain since the reports are used only in determining the question of suspension or probation of sentence and need not be shown to counsel, but reports under O.C.G.A. § 17-10-2 are more restrictive and must be shown to counsel before trial. Moss v. State, 159 Ga. App. 317, 283 S.E.2d 275 (1981).

Second conviction for sale of cocaine results in sentence of imprisonment for life, even if the prior offense is not set out in the indictment, if the state complies with the requirement of O.C.G.A. § 17-10-2(a), which provides that only such evidence in aggravation as the state has made known to the defendant prior to the defendant's trial shall be admissible. State v. Hendrixson, 251 Ga. 853, 310 S.E.2d 526 (1984).

The notice requirement of O.C.G.A. § 17-10-2(a) applies to mandating life sentences imposed under O.C.G.A. § 16-13-30(d). Moss v. State, 206 Ga. App. 310, 425 S.E.2d 386 (1992).

Crimes part of res gestae may be considered. — Defendant urged that crimes for which the defendant had not been convicted were improperly considered by the trial court in imposing the sentences, but the "other crimes" considered by the trial court were a part of the res gestae of the very crimes for which the defendant was to be sentenced; therefore, there was no error. White v. State, 179 Ga. App. 526, 347 S.E.2d 6 (1986).

Sentencing for noncapital offense prior to trial for capital offense. — Trial court did not err by refusing to sentence the defendant for the noncapital felony offenses of which the defendant was convicted before the commencement of the sentencing phase of the defendant's trial for murder. Holiday v. State, 258 Ga. 393, 369 S.E.2d 241, cert. denied, 488 U.S. 934, 109 S. Ct. 329, 102 L. Ed. 2d 346 (1988).

Date of prior offense not controlling. — Fact that the defendant's prior conviction was for the commission of a crime more than ten years previously did not render the conviction inadmissible in the sentencing hearing since the date that the prior offenses were committed does not control. Day v. State, 188 Ga. App. 648, 374 S.E.2d 87 (1988), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685, 304 Ga. 686, 820 S.E.2d 640 (2018).

Certified copy of prior conviction. — Although a certified copy of the defendant's prior conviction may not have been attached to the pretrial notice, this would not serve to render inadmissible the certified copy that was subsequently tendered at the sentencing hearing. Day v. State, 188 Ga. App. 648, 374 S.E.2d 87 (1988), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685, 304 Ga. 686, 820 S.E.2d 640 (2018).

Timely notice. — Receipt by defendant's counsel, prior to jury selection, of notice of the state's intent to use a prior conviction in aggravation of any sentences imposed in the case was timely notice pursuant to O.C.G.A. § 17-10-2. Day v. State, 188 Ga. App. 648, 374 S.E.2d 87 (1988), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685, 304 Ga. 686, 820 S.E.2d 640 (2018); Godfrey v. State, 227 Ga. App. 576, 489 S.E.2d 364 (1997).

Continuance. — Failure to move for a continuance precluded the defendant from asserting that defense counsel was not afforded ample opportunity to investigate the admissibility of the prior conviction as evidence in aggravation of the sentences imposed. Day v. State, 188 Ga. App. 648, 374 S.E.2d 87 (1988), overruled on other grounds by Willis v. State, 2018 Ga. LEXIS 685, 304 Ga. 686, 820 S.E.2d 640 (2018); Godfrey v. State, 227 Ga. App. 576, 489 S.E.2d 364 (1997).

Multiple life sentences run concurrently if jury does not otherwise specify. — When the jury does not specify that two life sentences are to be served consecutively, the trial court can only provide for the sentences to run concurrently. Anglin v. State, 244 Ga. 1, 257 S.E.2d 513 (1979), overruled on other grounds, Welch v. State, 254 Ga. 603, 331 S.E.2d 573 (1985).

Court may not make sentence run consecutively with other sentence absent jury authorization. — Trial court is not empowered to impose the jury's sentence to run consecutively to any other sentence that the defendant may be serving, absent express authorization to this effect by the jury. McHugh v. State, 134 Ga. App. 758, 216 S.E.2d 351 (1975).

Consecutive sentencing. — Trial judge errs in imposing the jury's sentence to be computed after the expiration of a preexisting sentence in another county since the jury did not provide that such sentences were to run consecutively. McHugh v. State, 134 Ga. App. 758, 216 S.E.2d 351 (1975).

Judicial Sentencing for Felonies (Cont'd)

If the indictment charges murder, but a manslaughter verdict is returned, the court errs if the court leaves the sentence-making feature of the case to a jury. Lindsey v. State, 135 Ga. App. 122, 218 S.E.2d 30 (1975).

New trial as to sentence if sentence reversed on appeal. — New trial on the sentence can be held before a new jury if the jury that convicted the accused also sentenced the accused to death, and the sentence was reversed on appeal because of some error that infected the sentence. In such a situation, there can be a remand for a new trial as to the sentence only. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Evidence relating to guilt or innocence is relevant to sentence. Romine v. State, 256 Ga. 521, 350 S.E.2d 446 (1986), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Court may consider evidence from guilt-innocence phase at presentence hearing. — Although this section required the trial court to conduct a presentence hearing, during which the court was required to hear additional evidence in extenuation, mitigation, and aggravation of punishment, this did not mean that the court must exclude from the court's consideration the facts and circumstances of the crime as revealed to the court by evidence properly admitted during the guilt-innocence phase of the trial. Dorsey v. Willis, 242 Ga. 316, 249 S.E.2d 28 (1978).

Defendant must object when not notified of evidence in aggravation. — Mandatory provision of this section that in presentence hearings only such evidence in aggravation as the state has made known to the defendant prior to the defendant's trial shall be admissible does not apply since the evidence had been brought out without objection during the trial. Mitchell v. State, 136 Ga. App. 390, 221 S.E.2d 465 (1975).

Date of prior conviction, not offense, determines whether judge may consider it. — Date that prior offenses are committed does not control whether the offenses may be considered under O.C.G.A. § 17-10-2(a). The controlling date is the date of entry of the judgment of conviction and sentence, or date of entry of the plea of guilty, or of nolo contendere. Clark v. State, 146 Ga. App. 799, 247 S.E.2d 489 (1978).

Judicial notice of prior conviction in own court. — Trial judge may not judicially note a prior conviction in the judge's own court without compliance with this section. Paschal v. State, 139 Ga. App. 842, 229 S.E.2d 795 (1976); Chandler v. State, 143 Ga. App. 608, 239 S.E.2d 158 (1977); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978).

Sufficiency of notice that previous convictions will be introduced. — Clear notice that previous convictions will be introduced at the trial of an accused is required. A notice given prior to a former trial would not be clear notice that the sentences would be introduced at a subsequent de novo trial. Hewell v. State, 238 Ga. 578, 234 S.E.2d 497 (1977); Collins v. State, 145 Ga. App. 341, 243 S.E.2d 716 (1978); Cline v. State, 178 Ga. App. 470, 343 S.E.2d 506 (1986); Beecher v. State, 240 Ga. App. 457, 523 S.E.2d 54 (1999).

Sentence voided by use of prior convictions absent proof of assistance of counsel or waiver. — Presuming counsel or waiver of counsel from a silent record is impermissible; evidence of prior convictions which fails to disclose assistance of counsel or an intelligent and understanding waiver thereof is illegal, and the admission in evidence at the presentence hearing of such illegal evidence voids the sentence, even in the absence of objection. Harrison v. State, 136 Ga. App. 71, 220 S.E.2d 77 (1975).

Error to consider prior convictions not made known to defendant and obtained without counsel. — It was error for the trial judge to consider prior convictions in aggravation of punishment when the prior convictions were not made known to the defendant prior to trial and when there was no showing that the defendant had the benefit of counsel or had waived the right to counsel. Van Voltenburg v. State, 138 Ga. App. 628, 227 S.E.2d 451 (1976).

Judge may consider crimes committed after arrest and before trial. — Under this section, the trial judge in noncapital cases conducts the presentence hearing and may hear evidence including the record of any prior criminal convictions. Considering that a jury is not involved, this language is broad enough to include the conviction and sentence for a crime committed after the crime for which the defendant is on trial, but prior to the trial in which the sentencing hearing is being conducted. Wallace v. State, 134 Ga. App. 708, 215 S.E.2d 703 (1975).

Court may not consider mere rumors as to defendant's conduct. — Trial court is not authorized by the presentence hearing statute to consider in aggravation mere rumors concerning the conduct of the defendant. Dorsey v. Willis, 242 Ga. 316, 249 S.E.2d 28 (1978).

Trial court may properly consider a defendant's conduct during trial in considering whether to suspend or probate all of the sentence, and such a consideration does not come within the restrictions of O.C.G.A. § 17-10-2. Williams v. State, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

Denial of defendant's right to notice of introduction of aggravating evidence cognizable in habeas corpus proceeding. — Denial of the defendant's right under O.C.G.A. § 17-10-2 to be informed prior to trial that aggravating evidence would be introduced at the sentencing phase of the trial is a denial of the defendant's rights under the laws of this state, albeit not a violation of the defendant's constitutional rights, and is therefore cognizable in a habeas corpus proceeding according to the habeas corpus statute. McDuffie v. Jones, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Use of inadmissible report during sentencing. — When the defendant complained that the state's cross-examination of the defendant's mother at the sentencing phase of the trial incorporated a report from the Department of Family and Children Services that was inadmissible as a consequence of the state's noncompliance with the notice provisions of O.C.G.A. § 17-10-2, it was held that even if the cross-examination was based in part on the report (and not just the defendant's prior terroristic threat conviction), and even if there was not sufficient compliance with that Code section respecting this report to allow the state to use the report in the state's case-in-chief, the state's use of this report to rebut the mother's direct testimony was not barred by that Code section. Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992).

No notice requirement as to evidence introduced by defendant. — Only such evidence in aggravation that the state has made known to the defendant prior to the defendant's trial is admissible. No such limitation is placed on the evidence that the defendant may introduce. Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975).

All aspects of defendant's crime, character, and attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact-finder in determining an appropriate sentence. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Evidence of prior record or other criminal acts. — Under this section, the record of any prior criminal convictions of a defendant, if made known to the defendant prior to the trial, was admissible. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

During the presentence hearing, the state, subject to notice limitations, is allowed to place the defendant's character in issue through the defendant's prior record or other criminal acts. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

In accordance with O.C.G.A. § 17-10-2, the trial court is authorized during the pre-sentence hearing to consider evidence in aggravation of punishment, including the record of any prior criminal convictions provided such evidence has been made known to the defendant prior to the defendant's trial; it was not error to admit

Judicial Sentencing for Felonies (Cont'd)

the defendant's prior conviction since the state provided notice to defense counsel prior to trial of the state's intent to introduce the prior convictions, and the trial court did not consider the prior convictions in imposing the sentence. Rubi v. State, 258 Ga. App. 815, 575 S.E.2d 719 (2002).

Jury may consider record regardless of dates of prior convictions. — Jury was entitled to consider the appellant's record as of the time of sentencing, regardless of when the prior convictions were committed. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979).

Evidence of sentences for prior convictions. — Sentences imposed for prior convictions were admissible into evidence as part of the "convictions" within the meaning of this section. Davis v. State, 241 Ga. 376, 247 S.E.2d 45, cert. denied, 439 U.S. 947, 99 S. Ct. 341, 58 L. Ed. 2d 338 (1978).

Notice must give defendant opportunity to examine prior convictions to be used against defendant. — All this section required was "clear notice" to an accused of all previous convictions that the state intended to introduce at trial so as to allow a defendant to examine the defendant's record to determine if the convictions are in fact the defendant's, if the defendant was represented by counsel, and any other defect which would render such documents inadmissible during the presentencing phase of the trial. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

One day's notice sufficient. — Service of the notice of aggravating circumstances upon the appellant on the day prior to trial, and prior to arraignment and jury selection, was timely under the provision of this section. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979).

Prior convictions are sufficiently proved by certified copies of the convictions. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979).

Although indictments are sometimes relevant, indictments are not a prerequisite to admissibility of prior convictions. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979).

Transcript of prior testimony of state's witnesses, plus cross-examination of witnesses, satisfies section. — In a presentencing hearing in a capital case, the state is not required by O.C.G.A. § 17-10-2 to supply in advance a full prospectus of the expected testimony of every witness to the circumstances of the offense; the requirement of that section is satisfied when the defendant receives not only the names of the witnesses but a transcript of their testimony at the guilt/innocence phase of the proceedings, and when the trial court rules that any testimony as to matters not contained in testimony given at the guilt/innocence phase is admissible but is subject to cross-examination by the defendant. Alderman v. State, 254 Ga. 206, 327 S.E.2d 168, cert. denied, 474 U.S. 911, 106 S. Ct. 282, 88 L. Ed. 2d 245 (1985).

Evidence as to guilt or innocence may be considered at hearing. — Trial court erred in sustaining an objection to the defendant's attempt to testify as to matters occurring at the crime scene since the defendant had not testified at the guilt-innocence phase, but error was harmless as defense made no offer of proof as to what the defendant's testimony would have been and as the trial court gave the defense an opportunity, before the defense rested, to offer any matter that might mitigate the sentence. Blanks v. State, 254 Ga. 420, 330 S.E.2d 575 (1985), cert. denied, 475 U.S. 1090, 106 S. Ct. 1479, 89 L. Ed. 2d 733 (1986).

Testimony of a state psychiatrist who examined the defendant is not irrelevant to the statutory aggravating circumstance of murder committed while the offender was engaged in the commission of another capital felony since the psychiatrist testifies in rebuttal to a defense witness who has previously testified as to the defendant's mental condition. Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S.

945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Presentence hearing may include evidence regarding guilt. — Presentence hearing is for additional evidence and in no way excludes from consideration during sentence the matters heard on the issue of guilt or innocence. Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), vacated on other grounds, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977).

Requirements as to evidence in aggravation. — Essentially this section required that evidence in aggravation cannot be used by the state unless the evidence is made known to the defendant prior to trial, and that such evidence is subject to the laws of evidence. Vandable v. State, 127 Ga. App. 306, 193 S.E.2d 197 (1972).

Evidence of recidivism may be introduced only at sentencing phase. — Under the two-step procedure, one must be indicted as a recidivist in order to impose recidivist punishment, but the recidivism of the accused must not be disclosed during the first phase of the trial and may only be disclosed after conviction at the second phase of the trial. Riggins v. Stynchcombe, 231 Ga. 589, 203 S.E.2d 208 (1974).

Recidivist sentence proper. — Since the state provided the requisite clear notice to the defendant of all previous convictions that the state sought to introduce at trial, the trial court did not err in imposing a recidivist sentence on the defendant. Richardson v. State, 256 Ga. App. 30, 567 S.E.2d 693 (2002).

Disclosure at first phase is reversible error. — Disclosure of prior convictions to the jury during the first phase of trial, absent waiver, is reversible error. Riggins v. Stynchcombe, 231 Ga. 589, 203 S.E.2d 208 (1974).

Clear notice should be given of each specific conviction to be introduced. — This section meant that notice of each specific conviction to be introduced in evidence by the state at the sentencing phase of the trial should be given to the party on trial or the party's attorney. Additionally, the fact that such notice was given should be clear and not cloudy. Gates v. State, 229 Ga. 796, 194 S.E.2d 412 (1972).

Prosecution's notice to defendant of prior convictions the prosecution intended to introduce at sentencing in aggravation of the defendant's punishment by attaching a copy of the defendant's criminal history to a notice was adequate to satisfy the requirements of O.C.G.A. § 17-10-2(a). Greeson v. State, 253 Ga. App. 161, 558 S.E.2d 749 (2002).

Giving of notice of evidence of a conviction record on the day trial commences was not sufficient for the purpose of this section and did not meet the requirement of fair play and sound justice. Queen v. State, 131 Ga. App. 370, 205 S.E.2d 921 (1974).

Offenses in violation of municipal ordinances are admissible in evidence in the sentence hearing. Locklear v. State, 131 Ga. App. 536, 206 S.E.2d 527 (1974).

Record of prior conviction from another state. — To be admissible in evidence, a record of a prior criminal conviction from another state must be authenticated in accordance with former Code 1933, § 38-627 (see O.C.G.A. § 24-9-922). Strong v. State, 232 Ga. 294, 206 S.E.2d 461 (1974).

If illegal evidence of prior convictions is admitted at presentence trial, sentence is void. Hopper v. Thompson, 232 Ga. 417, 207 S.E.2d 57 (1974).

Improper to show offenses for which defendant charged but not convicted. — It is improper in a presentence hearing to show that the defendant has been charged with an offense for which the defendant has not been convicted. Banks v. State, 131 Ga. App. 215, 205 S.E.2d 520 (1974).

Evidence of general bad character. — Nature of the presentence hearing involves the general character of the defendant, and if the state has notified the defendant that such evidence will be admitted, evidence of general bad character may be admitted. Cochran v. State, 144 Ga. App. 820, 242 S.E.2d 735 (1978).

Illegal sentence cannot be rendered valid through waiver. — Defendant agreed to a sentence that included convictions that should have been merged, and

Judicial Sentencing for Felonies (Cont'd)

therefore the sentence was void. Defendant improperly gave up the right to a sentencing presentation and argument under O.C.G.A. § 17-10-2 and therefore the case was remanded for sentencing. Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Jury Sentencing for Capital Cases

Intent. — General Assembly in this section meant to empower jurors to consider anything as mitigating that the jurors find to be mitigating, without limitation or definition. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L. Ed. 2d 699 (1978); Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979).

Mitigating circumstances were referred to in former Code 1933, §§ 27-2503 and 27-2534.1 (see O.C.G.A. §§ 17-10-2 and 17-10-30), but these sections were wholly silent on what those circumstances shall be. The conclusion was thus inescapable that the General Assembly meant to empower the jury to consider as mitigating anything the jury found to be mitigating, without limitation or definition. This was a constitutionally valid procedure. Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Although a habeas corpus petitioner contended that the prosecution misled the jury into believing that the jury's role with regard to the death penalty was merely advisory, no due process violation was shown. The prosecution accurately characterized the jury's death penalty finding as a recommendation in accordance with O.C.G.A. § 17-10-2(c), and the jury was properly advised that the recommendation was binding on the sentencing court in accordance with O.C.G.A. § 17-10-31. Carr v. Schofield, 364 F.3d 1246 (11th Cir. 2004).

Purpose of presentence trial. — This section provided a scheme for presenting defendant's history to the sentencing authority so that the sentencing authority may make the proper decision as to punishment, considering the status of the defendant at the time of sentencing, not the defendant's status at the moment the defendant committed the crimes for which the defendant was tried. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Purpose of a presentence trial is to introduce different evidence from that at trial to determine guilt or innocence. In a presentence trial, the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Consideration of mitigating factors constitutionally required. — United States Const., amends. 8 and 14 require that the sentencing judge or jury must be allowed to consider, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978).

Mitigating factors considered in all but rarest capital cases. — United States Const., amends. 8 and 14 require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980).

Both former Code 1933, §§ 26-3102 and 27-2503 (see O.C.G.A. §§ 17-10-2(b) and 17-10-31) applied only to sentencing phase of capital case. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

No presumption of innocence at presentence hearing. — Defendant stands before the trial court or jury in a presentence trial a convicted felon with no presumption of innocence. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Preservation of right to speak at the presentence hearing. — Requiring that a defendant, in order to tell the defendant's story in mitigation of punishment, must forfeit the defendant's right to remain silent during the guilt or innocence phase of the defendant's trial would violate Ga. Const. 1945, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XIV). Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975).

Consideration by jury of mitigating and aggravating circumstances. — This section did not impose the additional requirement for sentencing that the jury be instructed that mitigating circumstances were to be weighed against aggravating circumstances, but instead allowed the jury to consider both. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Mitigating evidence deals with particular defendant. — Evidence of extenuating or mitigating circumstances allowed by former Code 1933, §§ 27-2503 and 27-2534.1 (see O.C.G.A. §§ 17-10-2 and 17-10-30) relates to evidence about the particular defendant and does not include evidence involving the death penalty in general. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980).

Constitutionality of excluding exculpatory hearsay whether death penalty may be imposed. — During the second trial of a convicted defendant to determine whether the death penalty should be imposed, refusal on hearsay grounds to admit testimony to the effect that the accused did not commit the crime may constitute a violation of the due process clause of U.S. Const., amend. 14. Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

Judge must clearly instruct jury about mitigating circumstances and the option to recommend against death. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978).

Trial court's charge to the jury, which stressed that the jury should consider any mitigating evidence and that the jury could impose a sentence less than death for any or no reason, was an appropriate instruction that sufficiently informed the jury of the jury's relevant duties in deciding the defendant's sentence. King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

Specific mitigating circumstances. — It is not required that specific mitigating circumstances be singled out by the court in giving the court's instructions to the jury. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

This section concerned notice of evidence of aggravating circumstances first admitted at a presentence hearing, and had absolutely nothing to do with giving notice of an attempt to prove aggravating circumstances during the guilt phase of trial. Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979).

Evidence as to aggravating circumstances introduced during the guilt or innocence phase need not be reintroduced in order to authorize the jury to find that one of the statutory aggravating circumstances set forth in former Code 1933, § 27-2534.1 (see O.C.G.A. § 17-10-30) existed. Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975).

Life sentence even if aggravating circumstances present. — This section allowed the jury to impose a life sentence even if there are aggravating circumstances. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Statutes on which convictions based presumed in effect at time of conviction. — It is presumed, absent a contrary showing by the defendant, that statutes on which convictions were based were in effect at the time of convictions. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979).

Procedure if state waives death penalty. — In cases in which the state has waived imposition of the death penalty, the appropriate procedure is for the trial judge to dismiss the jury and conduct a presentence hearing under subsection (a) of this section. Birks v. State, 237 Ga. 861, 230 S.E.2d 294 (1976).

Procedure if death penalty and life sentence both waived. — If the state clearly waives the death penalty as well

Jury Sentencing for Capital Cases (Cont'd)

as the life imprisonment of the defendant, the trial judge can properly dismiss the jury and fix sentence upon completion of the presentence hearing. Jessen v. State, 234 Ga. 791, 218 S.E.2d 52 (1975).

Presentence hearing not required if death penalty not sought in murder prosecution. — Since upon conviction for murder if the death penalty is not sought, the only punishment to be lawfully imposed is that of life imprisonment; thus, there is no necessity to conduct a presentence hearing on the issue of punishment as the trial court possesses no discretion in such an instance. Brown v. State, 246 Ga. 251, 271 S.E.2d 163 (1980).

Charge that jury may recommend mercy when death penalty waived. — If the state waives the death penalty, a charge that the jury could recommend mercy and thus require a life sentence is incorrect, but not necessarily prejudicial. Birks v. State, 237 Ga. 861, 230 S.E.2d 294 (1976).

Charge to continue proper. — Trial court properly instructed the jury in the sentencing phase that the jury's "verdict as to penalty (had to) be unanimous," and subsequently directed the jury to continue the jury's deliberations after the jury informed the trial court that the jury could not reach a unanimous verdict; the jury was expected to consider the evidence and to attempt to reach unanimity "'one way or the other'" on the issue of a sentence and, if possible, to unanimously recommend a sentence. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Jury must decide guilt before judge instructs on sentence. — It is error to instruct the jury as to a possible sentence in a felony case before the jury has determined the question of guilt or innocence. Mayo v. State, 139 Ga. App. 520, 229 S.E.2d 16 (1976); Evans v. State, 146 Ga. App. 480, 246 S.E.2d 482 (1978).

Defendant may conclude argument when death penalty considered. — After the evidence is closed on both sides in a presentence hearing in which the death penalty is being considered, the defendant may conclude the argument to the jury, even if the defendant presents evidence during the hearing. Beck v. State, 254 Ga. 51, 326 S.E.2d 465, cert. denied, 474 U.S. 872, 106 S. Ct. 195, 88 L. Ed. 2d 164 (1985).

Jury that convicted must also impose sentence. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Test of adequacy of jury charge. — In considering the adequacy of a jury charge on the sentencing phase of the trial, the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that the juror should consider all the facts and circumstances of the case as presented during both phases of the trial, which necessarily include any mitigating and aggravating facts, and then, even though the juror might find one or more of the statutory aggravating circumstances to exist, would know that the juror might recommend life imprisonment. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L. Ed. 2d 699 (1978).

If the court does not fail to make clear to the jury that the jury could recommend a life sentence even if the jury found the existence of a statutory aggravating circumstance, the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that the juror should consider all of the facts and circumstances of the case as presented during both phases of the trial which necessarily includes any mitigating and aggravating facts, and then, even though the juror might find one or more of the statutory aggravating circumstances to exist, would know that the juror might recommend life imprisonment. Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978), cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

What constitutes adequate instruction. — If the trial court instructs the jury to consider the facts and circumstances in mitigation and aggravation, explaining to the jury that mitigating circumstances are those which do not excuse the offense, but which in fairness and mercy may reduce the degree of moral culpability or blame, and further instructs the jury that

the jurors are free to recommend mercy even if the jurors find aggravating circumstances, these instructions allow the jury to examine the defendant's individual characteristics in deciding the defendant's fate and the jury is properly instructed as to what the jury is to consider in determining the sentence. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Instructions on mercy and mitigating circumstances adequate. — By instructing jurors that the jurors could consider mitigating evidence and circumstances, that the jurors could return a life sentence for any reason or for no reason, and that the jurors could consider feelings of sympathy or mercy that flow from the evidence, the trial court adequately instructed the jury on mercy and the concept of mitigating circumstances generally. Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502, cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

Suggesting to jury that Georgia Supreme Court would approve death sentence. — Practice of influencing a jury to impose the death penalty by implying that justices of the Georgia Supreme Court would approve such a sentence is error, though sometimes harmless, under the due process clause of U.S. Const., amend. 14. Zant v. Campbell, 245 Ga. 368, 265 S.E.2d 22, cert. denied, 449 U.S. 891, 101 S. Ct. 252, 66 L. Ed. 2d 118 (1980).

Instruction for deadlocked jury to continue not suggestion to return death sentence. — Because a verdict for either death or mercy must be unanimous, and because the jury is not informed of the consequences of the jury's inability to reach a verdict as to sentence, instructions to deliberate further simply do not have the effect of suggesting to a Georgia jury that the jury should return a death sentence. Romine v. State, 256 Ga. 521, 350 S.E.2d 446 (1986), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Instruction as to invalid aggravating circumstance. — Death sentence was not impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance, a "substantial history of serious assaultive criminal convictions," for the underlying evidence was nevertheless fully admissible at the sentencing phase under O.C.G.A. § 17-10-2(a), the instructions did not place particular emphasis on the role of statutory aggravating circumstances in the jury's ultimate decision, and any possible impact could not fairly be regarded as a constitutional defect in the sentencing process, as nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making the jury's sentencing determination, even though the defendant's prior history of noncapital convictions could not by itself provide sufficient justification for imposing the death sentence. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Imposition of sentence by judge, when jury unable to agree. — In a murder case, after conviction, because only two sentences can be imposed, life imprisonment or death, if the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Prior convictions based on pleas may be properly considered in imposing a death sentence. Mathis v. Zant, 744 F. Supp. 272 (N.D. Ga. 1990), vacated in part on other grounds, 975 F.2d 1493 (11th Cir. 1992).

Sentencing authority must have information as to character and circumstances of defendant. — In capital cases, it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Since information is necessary to reasoned sentencing decision. — Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct.

Jury Sentencing for Capital Cases (Cont'd)

2909, 49 L. Ed. 2d 859 (1976).

Consideration of extraneous matters. — Trial judge did not err by permitting the state to introduce court records of prior convictions for burglary and assault since the jury based the jury's death sentence on other proper, specified statutory aggravating circumstances. Green v. Zant, 738 F.2d 1529 (11th Cir.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984).

Putting character at issue. — Conducting a trial on a possession of a firearm charge prior to the sentencing phase and before the same jury that imposed a death sentence on a defendant did not unnecessarily prejudice the jury by impermissibly placing the defendant's character in issue in the sentencing phase since the state could have introduced evidence of the defendant's prior convictions during the sentencing phase. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Appellate Review

Lawful sentence not modifiable on appeal. — Appellate court is not empowered to modify a sentence which is within the statutory limits and lawfully imposed. Thomas v. State, 139 Ga. App. 364, 228 S.E.2d 386 (1976).

No review if no objection to notice at presentence hearing. — If no objection to notice is made at the presentence hearing, a subsequent review of that phase is eliminated. Adams v. State, 142 Ga. App. 252, 235 S.E.2d 667 (1977); Wilcox v. State, 153 Ga. App. 719, 266 S.E.2d 356 (1980).

If no objection is made at the presentence hearing, subsequent review of that phase is eliminated. Chapman v. State, 154 Ga. App. 532, 268 S.E.2d 797 (1980).

If no objections were raised at the presentence hearing, the Court of Appeals is precluded from reviewing the proceedings. Williams v. State, 165 Ga. App. 553, 301 S.E.2d 908 (1983); Evans v. State, 177 Ga. App. 572, 340 S.E.2d 620 (1986).

Any lawful evidence which tends to show the motive of the defendant, defendant's lack of remorse, defendant's general moral character, and defendant's predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of O.C.G.A. § 17-10-2. The defendant's failure to object to any lack of notice waives the defendant's right to raise such objections. Fields v. State, 167 Ga. App. 816, 307 S.E.2d 712 (1983).

Pro se defendant's claim that the defendant was not served with a notice of aggravation as required by O.C.G.A. § 17-10-2(a) and that the trial court improperly took notice of the defendant's criminal history was waived as the defendant never objected during pre-sentencing on the ground that the defendant had received no notice. Swain v. State, 268 Ga. App. 135, 601 S.E.2d 491 (2004).

Waiver can result from the failure to object to the consideration of convictions not shown to have been attended by counsel. Golden v. State, 177 Ga. App. 747, 341 S.E.2d 480 (1986).

Because the defendant failed to raise at the sentencing hearing the argument that the trial court erred by sentencing the defendant as a recidivist, appellate review was precluded. Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Defendant was not denied presentence hearing. — There is no need for remand because the defendant was not denied a presentence hearing since the court inquired if the defendant or defense counsel knew of any reason why the court should not pass sentence and counsel responded that there was no legal reason sentence should not be imposed and no request was made at that time for a continuance to produce witnesses. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992).

Evidence in aggravation without prior notice is grounds for reversal, unless court assures evidence was not used. — Evidence in aggravation, tendered by the state, which is not disclosed to the defendant prior to trial and which is later admitted as evidence at a presentencing hearing will not be grounds for reversal as to the sentence only if the

appellate court is assured that the trial judge did not use such evidence to increase the length of the sentence. Moss v. State, 144 Ga. App. 226, 240 S.E.2d 773 (1977).

If the record shows that prior convictions obtained without benefit of counsel were considered in a presentence hearing, a new trial on the issue of punishment will have to be granted. Knight v. State, 133 Ga. App. 808, 212 S.E.2d 464 (1975).

Presumption as to trial court's sentencing. — There is a presumption that the trial court did not consider improper matters in fixing the sentence, although the presumption can be weakened by the trial court's failure to disavow any reliance thereon. Watkins v. State, 191 Ga. App. 87, 381 S.E.2d 45 (1989).

Sentence is presumed to be correctly imposed, and defendant has the burden of showing error. Jones v. State, 233 Ga. 662, 212 S.E.2d 832 (1975).

Burden of proof that judge's knowledge of prior convictions in judge's court affected sentence. — Burden was upon a defendant asserting error under this section to establish affirmatively by the record that the trial judge's knowledge of the defendant's prior convictions in the judge's own court resulted in an increased sentence. Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978).

Judge sitting without jury presumed to separate legal from illegal evidence. — If the record has shown that illegal evidence has been considered in the presentence hearing, the appellate courts have generally granted a new trial on the issue of punishment. Nevertheless, there is a presumption, in the absence of a strong showing to the contrary, that the trial judge, when sitting without a jury, separates the legal evidence from facts not properly in evidence in reaching the judge's decision. Workman v. State, 137 Ga. App. 746, 224 S.E.2d 757 (1976).

Although prejudicial and illegal evidence is injected in a defendant's sentence hearing and the sentence defendant receives is harsher than that of a codefendant, if the trial judge sustains objections to such evidence whenever such objections are made, the presumption is that the trial court considered only legal evidence. Welborn v. State, 166 Ga. App. 214, 303 S.E.2d 755 (1983).

Although defendant has served term prior to appeal, if results of conviction may persist and subsequent convictions may carry severe penalties and civil rights may be affected, the Court of Appeals will no longer dismiss but will consider such appeals on their merits. Peach v. State, 168 Ga. App. 55, 308 S.E.2d 60 (1983).

No ineffective assistance of counsel. — Defendant's attorney did not render ineffective assistance because defense counsel failed to insist that the defendant be afforded an opportunity to address the trial court personally on the subject of sentencing because defense counsel spoke at the sentencing hearing on the defendant's behalf regarding mitigation and punishment. Guyton v. State, 281 Ga. 789, 642 S.E.2d 67 (2007).

Because the defendant failed to show that defense counsel was ineffective in failing to inquire further into the defendant's confusion regarding the state's intent to seek a recidivist sentence under O.C.G.A. § 17-10-7(c), and the defendant was repeatedly advised of the maximum punishment allowed by law upon conviction of the crimes alleged, the trial court properly denied the defendant a new trial. Smith v. State, 289 Ga. App. 742, 658 S.E.2d 156 (2008).

If the trial court fails to conduct a presentence hearing, the judgment of sentence will be reversed, and the case remanded to the trial court for resentencing. King v. State, 168 Ga. App. 291, 308 S.E.2d 612 (1983); Brinson v. State, 201 Ga. App. 80, 410 S.E.2d 50 (1991); Williams v. State, 225 Ga. App. 319, 483 S.E.2d 874 (1997).

Defendant had a right to file a direct appeal from the denial of a petition contending that the defendant's sentence was void because the trial court failed to hold the presentence hearing required by O.C.G.A. § 17-10-2. Williams v. State, 271 Ga. 686, 523 S.E.2d 857 (1999).

Notice of aggravating circumstances. — Trial court did not abuse the court's discretion in denying the defendant's motion for continuance when a

Appellate Review (Cont'd)

month before defendant's capital murder trial in the shooting of a deputy sheriff, the state gave notice of aggravating circumstances. Brannan v. State, 275 Ga. 70, 561 S.E.2d 414, cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002).

No review of sentence within guidelines. — Appellate court declined to review the defendant's 30-year sentence because the sentence was within the statutory guidelines; the defendant was found guilty of possessing cocaine with the intent to distribute, the state introduced three prior felony convictions in aggravation of sentencing pursuant to O.C.G.A. § 17-10-2(a), and given the defendant's prior drug convictions and the mandate of O.C.G.A. § 17-10-7(c), the defendant faced a maximum punishment of life in prison under O.C.G.A. § 16-13-30(d). Jackson v. State, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 706 et seq., 718 et seq. 21A Am. Jur. 2d, Criminal Law, § 822 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, §§ 2282 et seq., 2383 et seq.

ALR. — Right of court to hear evidence for purpose of determining sentence to be imposed, 77 A.L.R. 1211.

Rule of reasonable doubt as applicable to proof of previous conviction for purpose of enhancing punishment, 79 A.L.R. 1337.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him, 96 A.L.R.2d 1292.

Defendant's right to disclosure of presentence report, 40 A.L.R.3d 681.

Court's presentence inquiry as to, or consideration of, accused's intention to appeal, as error, 64 A.L.R.3d 1226.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 A.L.R.5th 660.

Admissibility of victim impact evidence in noncapital state proceedings, 8 A.L.R.7th 6.

Admissibility of testimony at sentencing, within meaning of U.S.S.G. § 6a1.3, which requires such information be relevant and have "sufficient indicia of reliability to support its probable accuracy", 45 A.L.R. Fed. 2d 457.

Admissibility of evidence, other than testimony given at sentencing, within meaning of U.S.S.G. § 6a1.3, which requires such information be relevant and have "sufficient indicia of reliability to support its probable accuracy" — concerning sworn information, 46 A.L.R. Fed. 2d 151.

17-10-3. Punishment for misdemeanors generally.

(a) Except as otherwise provided by law, every crime declared to be a misdemeanor shall be punished as follows:

(1) By a fine not to exceed $1,000.00 or by confinement in the county or other jail, county correctional institution, or such other

places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both;

(2) By confinement under the jurisdiction of the Board of Corrections in a state probation detention center pursuant to Code Section 42-8-35.4 for a determinate term of months which shall not exceed a total term of 12 months; or

(3) If the crime was committed by an inmate within the confines of a state correctional institution, by confinement under the jurisdiction of the Board of Corrections in a state correctional institution or such other institution as the Department of Corrections may direct for a term which shall not exceed 12 months.

(b) Either the punishment provided in paragraph (1) or (2) of subsection (a) of this Code section, but not both, may be imposed in the discretion of the sentencing judge. Misdemeanor punishment imposed under either paragraph may be subject to suspension or probation. The sentencing courts shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences under paragraph (1) of subsection (a) of this Code section at any time, but in no instance shall any sentence under the paragraph be modified in a manner to place a county inmate under the jurisdiction of the Board of Corrections, except as provided in paragraph (2) of subsection (a) of this Code section.

(c) In all misdemeanor cases in which, upon conviction, a six-month sentence or less is imposed, it is within the authority and discretion of the sentencing judge to allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; provided, however, that the judge shall retain plenary control of the defendant at all times during the sentence period. A weekend term shall be counted as serving two days of the full sentence. Confinement during the nonworking hours of a defendant during any day may be counted as serving a full day of the sentence.

(d) In addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, or punishment of a municipal ordinance involving a traffic offense, with the exception of habitual offenders sentenced under Code Section 17-10-7, a judge may impose any one or more of the following sentences:

(1) Reexamination by the Department of Driver Services when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed;

(2) Satisfactory completion of a defensive driving course or defensive driving program approved by the Department of Driver Services;

(3) Within the limits of the authority of the charter powers of a municipality or the punishment prescribed by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified; or

(4) Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. The conditions may include driving with no further motor vehicle violations during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing, such acts as may be ordered by the judge.

(e) Any sentence imposed under subsection (d) of this Code section shall be reported to the Department of Driver Services as prescribed by law.

(f) The Department of Community Supervision shall lack jurisdiction to supervise misdemeanor offenders, except when the sentence is made concurrent to a probated felony sentence or as provided in Code Section 42-8-109.5. Except as provided in this subsection, the Department of Corrections shall lack jurisdiction to confine misdemeanor offenders.

(g) This Code section will have no effect upon any offender convicted of a misdemeanor offense prior January 1, 2001, and sentenced to confinement under the jurisdiction of the Board of Corrections or to the supervision of the Department of Corrections.

History. — Orig. Code 1863, § 4209; Ga. L. 1865-66, p. 233, § 2; Code 1868, §§ 4245, 4608; Code 1873, §§ 4310, 4705; Ga. L. 1878-79, p. 54, § 1; Code 1882, §§ 4310, 4705; Ga. L. 1895, p. 63, § 2; Penal Code 1895, § 1039; Ga. L. 1908, p. 1119, § 1; Penal Code 1910, § 1065; Code 1933, § 27-2506; Ga. L. 1956, p. 161, § 4; Ga. L. 1957, p. 477, § 5; Ga. L. 1964, p. 485, § 1; Ga. L. 1970, p. 236, § 10; Ga. L. 1972, p. 600, § 1; Ga. L. 1974, p. 361, § 1; Ga. L. 1974, p. 631, § 1; Ga. L. 1976, p. 210, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1992, p. 3221, § 2; Ga. L. 1997, p. 1526, § 1; Ga. L. 2000, p. 1643, § 1; Ga. L. 2001, p. 1030, § 2; Ga. L. 2002, p. 415, § 17; Ga. L. 2005, p. 334, § 7-4/HB 501; Ga. L. 2014, p. 710, § 1-3/SB 298; Ga. L. 2015, p. 422, § 5-32/HB 310; Ga. L. 2016, p. 443, § 13-5/SB 367.

Cross references. — Time limitation on prosecutions for misdemeanors, § 17-3-1. Additional penalties for violations of municipal ordinances, § 36-30-8. Sentences for misdemeanor traffic offenses, § 40-13-26. Jurisdiction of Department of Offender Rehabilitation over misdemeanor offenders generally, § 42-5-51. Alternative provisions for sentencing of offenders between ages 17 and 25, § 42-7-3 et seq. Probation of first offenders, § 42-8-60 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, "or when the sentence is accepted pursuant to Code Section 42-9-71" was deleted following "felony sentence" at the end of the first sentence of subsection (f).

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Administrative rules and regulations. — Offender administration, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Departmental Operations, Chapter 125-2-4.

Law reviews. — For article discussing the constitutionality of imposing harsher sentences upon defendants found guilty in new trial after appeal, see 6 Ga. St. B.J. 183 (1969). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015). For article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 139 (2016).

For note, "Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System," see 48 Ga. L. Rev. 227 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Multiple Offenses
Probation
Sentence Improper
Sentence Proper
Review

General Consideration

Effect of this section was not merely confined to the misdemeanors enumerated in the Code, but had a prospective force. Anderson v. State, 2 Ga. App. 1, 58 S.E. 401 (1907).

What law controls punishment for acts made criminal by statute. — If a statute makes penal certain acts which do not otherwise constitute a crime and prescribes the manner of punishment for such acts, the special statute and not the general law is controlling as to the limits of such punishment. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

Uniform rules of the road violations. — Punishment schemes contemplated by O.C.G.A. § 40-6-1 are: (1) punishment for violations of sections that have not "otherwise declared" their own penalties will be as provided for in O.C.G.A. § 17-10-3; and (2) punishment for violations of sections that have criminalized certain acts and prescribed particular punishments will be controlled by the specific penalties imposed by such sections. Chastain v. State, 231 Ga. App. 225, 498 S.E.2d 792 (1998).

Court may impose less than maximum sentence. — Court, having the power to both pass upon a defendant a sentence of 12 months and to impose a fine of not exceeding $1,000.00, can do less than both, and can do so without giving a defendant any election as to paying or refusing to pay the fine. Dickson v. Officers of Court, 36 Ga. App. 341, 136 S.E. 537, cert. denied, 36 Ga. App. 825, (1927).

Sentence should express full punishment without contingent punishment based on future acts. — Sentence imposed upon a prisoner convicted of a misdemeanor should express the full punishment which the trial judge may, in a wise exercise of the discretion vested in the judge by this section, deem merited by the prisoner because of the offense committed by the prisoner, without regard to what the prisoner's future conduct may be and independently of any contingency which may arise after sentence has been pronounced and the court has lost the power to impose punishment on the prisoner. A penalty to be inflicted upon the prisoner in the event the prisoner shall subsequently apply for relief from sentence to jail imprisonment cannot legally be imposed; nor, if the prisoner be sentenced to a term in jail, can the court legally impose as an additional alternative punishment, in the event the prisoner

General Consideration (Cont'd)

fails to pay a fine, another definite term of imprisonment in jail. Wallace v. State, 126 Ga. 749, 55 S.E. 1042 (1906).

Dividing of total sentence into periods. — Under the terms of this section, the court had authority to impose a sentence confining the defendant in the chain gang for a period of 12 months. The fact that the court divided the sentence into two periods of six months each did not make the total sentence to the chain gang exceed the period fixed by the statute. Scott v. McClelland, 162 Ga. 443, 133 S.E. 923 (1926); Henry v. State, 77 Ga. App. 735, 49 S.E.2d 681 (1948).

Validity of otherwise valid portions of sentence despite invalid contingency terms. — See Roper v. Mallard, 193 Ga. 684, 19 S.E.2d 525 (1942).

Failure to impose sentence. — If the defendant was adjudicated guilty on all counts, the trial court retained authority to correct the court's oversight in failing to impose sentence on one count in the court's initial sentencing order by imposing that sentence after denial of a motion for new trial. Hirjee v. State, 226 Ga. App. 573, 487 S.E.2d 40 (1997).

Once defendant serves defendant's sentence, jurisdiction over the defendant ceases. State v. Mohamed, 203 Ga. App. 21, 416 S.E.2d 358 (1992).

Loss of jurisdiction by sentencing court when defendant placed in state institution. — Under the express terms of this section, the sentencing court's continuing jurisdiction does not apply when a defendant has been sentenced to serve a misdemeanor sentence in a place under the jurisdiction of the State Board of Corrections (now Board of Offender Rehabilitation). Mauldin v. State, 139 Ga. App. 13, 227 S.E.2d 862 (1976).

Limits on modification of sentence. — Trial court's power to rescind, modify, or change a sentence "at any time" is limited by its terms to the sentence itself or its conditions and the court may not go behind the sentence to readdress the merits of a plea which was ruled on in a preceding term. State v. James, 211 Ga. App. 149, 438 S.E.2d 399 (1993).

Time for modification of sentence. — Trial court retained the discretionary authority to grant the defendant's motion to modify any misdemeanor sentences imposed under the statute even after expiration of the term in which the sentences were imposed. Patel v. State, 247 Ga. App. 815, 545 S.E.2d 383 (2001).

Modification of proper sentence of city court. — City Court of Savannah, having jurisdiction to try certain misdemeanors, and upon conviction of the accused to impose any one or all of the penalties specified in this section, within the discretion of the trial judge, the superior court has no power, under the writ of certiorari, to modify a sentence which imposes a punishment not exceeding the maximum punishment prescribed by that law. Brown v. State, 149 Ga. 816, 102 S.E. 449 (1920).

Transfer of custody of one held by private person under illegal contract. — If habeas corpus is brought, the respondent being a person who holds the applicant in custody under an illegal contract with the sheriff of the county, there is no error in ordering that the applicant be remanded to the custody of the jailer of the county in which the conviction took place, there to be held until discharged by law. Russell v. Tatum, 104 Ga. 332, 30 S.E. 812 (1898).

Hiring of misdemeanor convicts to private persons under guard. — It is absurd to hold that the mere appointment by the county of guards, without more, is such an assertion of control, management, and authority by the county as to save the hiring of the county's misdemeanor convicts to private persons. Daniel v. State, 114 Ga. 533, 40 S.E. 805 (1902).

Corporation may be fined but not imprisoned. Southern Ry. v. State, 125 Ga. 287, 54 S.E. 160, 114 Am. St. R. 203, 5 Ann. Cas. 411 (1906).

If court charges as to recommendation of misdemeanor punishment for felony, section need not be charged. — Trial court, having instructed the jury that if the jury find the defendant guilty of the felony charged the jury has the right to recommend misdemeanor punishment, and that thereupon the trial court in the court's discretion might punish the defendant as for a misdemeanor, was not required to charge the provisions of this

section. Allison v. State, 110 Ga. App. 266, 138 S.E.2d 335 (1964).

Equal treatment of offenders. — Georgia law does not require courts to treat both drivers cited for an accident equally. McLeod v. State, 251 Ga. App. 371, 554 S.E.2d 507 (2001).

Cited in McDonald v. State, 6 Ga. App. 339, 64 S.E. 1108 (1909); Harris v. State, 18 Ga. App. 502, 89 S.E. 589 (1916); King v. State, 37 Ga. App. 140, 140 S.E. 513 (1927); Swanson v. State, 38 Ga. App. 386, 144 S.E. 49 (1928); Davis v. State, 53 Ga. App. 325, 185 S.E. 400 (1936); Williams v. City of Atlanta, 61 Ga. App. 606, 7 S.E.2d 82 (1940); Taylor v. Georgia, 315 U.S. 25, 62 S. Ct. 415, 86 L. Ed. 615 (1942); Martin v. State, 75 Ga. App. 807, 44 S.E.2d 562 (1947); Alred v. Celanese Corp. of Am., 205 Ga. 371, 54 S.E.2d 240 (1949); Pedigo v. Celanese Corp. of Am., 205 Ga. 392, 54 S.E.2d 252 (1949); Lancaster v. State, 83 Ga. App. 746, 64 S.E.2d 902 (1951); Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953); Bennett v. State, 101 Ga. App. 99, 112 S.E.2d 796 (1960); Sawyer v. State, 112 Ga. App. 885, 147 S.E.2d 60 (1966); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Morris v. State, 119 Ga. App. 157, 166 S.E.2d 382 (1969); Parks v. State, 230 Ga. 157, 195 S.E.2d 911 (1973); Tischmak v. State, 133 Ga. App. 534, 211 S.E.2d 587 (1974); King v. State, 134 Ga. App. 636, 215 S.E.2d 532 (1975); Heard v. State, 135 Ga. App. 685, 218 S.E.2d 866 (1975); Fountain v. York, 237 Ga. 784, 229 S.E.2d 629 (1976); Ballew v. Georgia, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978); Dorsey v. State, 145 Ga. App. 750, 245 S.E.2d 31 (1978); Taylor v. State, 149 Ga. App. 362, 254 S.E.2d 432 (1979); Sutton v. Garmon, 245 Ga. 685, 266 S.E.2d 497 (1980); Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981); State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151 (1981); Collins v. State, 160 Ga. App. 680, 288 S.E.2d 43 (1981); Tillman v. State, 249 Ga. 792, 294 S.E.2d 516 (1982); Monroe v. State, 250 Ga. 30, 295 S.E.2d 512 (1982); Littlejohn v. State, 165 Ga. App. 562, 301 S.E.2d 917 (1983); Bowles v. State, 168 Ga. App. 763, 310 S.E.2d 250 (1983); Smith v. State, 174 Ga. App. 238, 329 S.E.2d 507 (1985); Billingslea v. State, 177 Ga. App. 775, 341 S.E.2d 305 (1986); Williams v. State, 178 Ga. App. 216, 342 S.E.2d 703 (1986); Branch v. State, 182 Ga. App. 818, 357 S.E.2d 136 (1987); Dover v. State, 195 Ga. App. 507, 393 S.E.2d 760 (1990); Wilburn v. State, 223 Ga. App. 476, 477 S.E.2d 909 (1996); Brison v. State, 248 Ga. App. 168, 545 S.E.2d 345 (2001); Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003); Hirjee v. State, 263 Ga. App. 185, 587 S.E.2d 144 (2003); Cole v. State, 262 Ga. App. 856, 586 S.E.2d 745 (2003); Smith v. State, 270 Ga. App. 759, 608 S.E.2d 35 (2004); Putman v. State, 270 Ga. App. 45, 606 S.E.2d 50 (2004); English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006); State v. Ogilvie, 292 Ga. 6, 734 S.E.2d 50 (2012); Anderson v. Sentinel Offender Servs., LLC, 298 Ga. 854, 784 S.E.2d 791 (2016).

Multiple Offenses

Separate penalties for separate occurrences of same crime. — Same crime which occurred at different times but on the same day constitute separate crimes authorizing a separate penalty as to each. As long as the respective sentences are not greater than the maximum sentence provided by law, the sentences are not excessive. Rucker v. State, 133 Ga. App. 180, 210 S.E.2d 365 (1974).

There may be a cumulative sentence for different misdemeanors charged in one indictment. Bishop v. State, 21 Ga. App. 236, 94 S.E. 49 (1917); Davis v. State, 213 Ga. App. 212, 444 S.E.2d 142 (1994).

Sentence on verdict of guilty rendered on a number of counts. — If a verdict of guilty is rendered on a number of counts, a sentence which does not exceed that which may legally be imposed on any one count is supported by the indictment, if any count is good. Brannon v. State, 21 Ga. App. 328, 94 S.E. 259 (1917).

Probation

Court cannot reserve right to revoke probation without notice or hearing. — If a probation sentence is given, the trial judge is without authority to reserve therein the right to revoke the probation sentence without notice or hearing. Balkcom v. Gunn, 206 Ga. 167, 56 S.E.2d 482 (1949).

Probation (Cont'd)

Credit for time served if probation is revoked. — One serving a sentence on probation is fulfilling that person's sentence as effectually as if confined in jail or on the chain gang and, accordingly, if after a hearing the order granting such probation is revoked, the time served by the defendant before the revocation must be counted in the defendant's favor and deducted from the period of service imposed. Roper v. Mallard, 193 Ga. 684, 19 S.E.2d 525 (1942).

Suspension of defendant's driver's license after conviction of a traffic-related offense was a reasonable condition of probation. Brock v. State, 165 Ga. App. 150, 299 S.E.2d 71 (1983).

Suspension of defendant's hunting and fishing privileges during the probation period imposed upon conviction of a violation of O.C.G.A. § 27-3-9, unlawful enticement of game, was not an abuse of discretion. Quintrell v. State, 231 Ga. App. 268, 499 S.E.2d 117 (1998).

Error in setting length of probated confinement. — When a repeat offender was convicted on two counts of misdemeanor theft and the trial court imposed probated confinement for a period of five years when the maximum period of confinement which could be imposed was for a term of one year, this error was not harmless as both sentences ran consecutively and one of the conditions of the probation was, that in the event probation was revoked, the trial court could order the execution of the sentence originally imposed. Tenney v. State, 194 Ga. App. 820, 392 S.E.2d 294 (1990).

Availability of probated confinement. — O.C.G.A. § 17-10-3 does not extend the option of state probation detention center sentencing to all misdemeanors; a defendant must fit into one of the narrow categories set forth in O.C.G.A. §§ 42-8-35.4 and 42-8-35.5 in order to be eligible to be sentenced in that manner. Anderson v. State, 261 Ga. App. 716, 583 S.E.2d 549 (2003).

Sentence Improper

O.C.G.A. § 17-10-3(a)(1) and (a)(2) are alternative; therefore, the defendant could not lawfully be sentenced to pay a fine and to confinement under the state's jurisdiction. Williams v. State, 221 Ga. App. 291, 470 S.E.2d 922 (1996).

Sentence to probation detention center not authorized. — Trial court lacked authority to order that the defendant, who was given a 12-month misdemeanor sentence for reckless conduct, serve the term of imprisonment in a probation detention center. Brady v. State, 246 Ga. App. 412, 541 S.E.2d 396 (2000).

Hard labor not proper sentence for misdemeanor. — Sentence in a misdemeanor case which provided that the person convicted shall be confined at hard labor for the space of one year at the state farm is not in conformity with this section. Screen v. State, 107 Ga. 715, 33 S.E. 393 (1899); Potter v. State, 35 Ga. App. 248, 132 S.E. 783 (1926).

Sentence of a defendant to hard labor on the chain gang was irregular since the defendant was convicted of a misdemeanor only. Under this section, punishment at hard labor is not provided for such an offense. Kent v. State, 18 Ga. App. 30, 88 S.E. 913 (1916).

Confinement in probation detention center improper. — O.C.G.A. § 17-10-3(a)(2) does not give Georgia courts authority to confine a misdemeanant in a probation detention center and reading O.C.G.A. §§ 17-10-1(a)(3)(A) and 42-8-35.4 together, a court may confine a probation violator in a probation detention center, but not if probation is revoked for any of the reasons enumerated in § 17-10-1(a)(3)(A), and only if the defendant was put on probation previously for a forcible misdemeanor or a misdemeanor of a high and aggravated nature; a defendant who pled guilty to the misdemeanors of habitual violator, driving under the influence, possession of marijuana, and operating a vehicle without proof of insurance did not meet the criteria for confinement in a probation detention center upon revocation of probation under O.C.G.A. § 42-8-35.4, and so confinement in such a facility was unauthorized. Wilson v. Windsor, 280 Ga. 576, 630 S.E.2d 367 (2006).

Maximum misdemeanor punishment inappropriate. — Imposition of

the maximum misdemeanor punishment upon conviction for criminal trespass exceeded constitutional bounds against cruel and unusual punishment since the trespass involved the defendant's trimming of a neighbor's hedge. Haygood v. State, 225 Ga. App. 81, 483 S.E.2d 302 (1997).

Even when conditioned on nonpayment of fine and costs. — Sentence in a misdemeanor case which requires that the person convicted shall, upon failure to pay a given fine and costs, "be imprisoned in the common jail [of a named county] for the space of 12 months, and that during said imprisonment [he] be put to work at hard labor on the chain gang of said county," was not in conformity with this section. If it was intended by this sentence to impose a penalty of imprisonment, the term of imprisonment specified exceeds the limit fixed by law. The law does not authorize in such cases a sentence to hard labor. Screen v. State, 107 Ga. 715, 33 S.E. 393 (1899).

Punishment for failure to carry driver's license. — Legislative intent in reducing the punishment for failure of a licensee to have a driver's license in the licensee's possession when operating a vehicle to a fine of ten dollars precluded imposition of a sentence to a consecutive 12 months' probation. Crain v. State, 197 Ga. App. 729, 399 S.E.2d 289 (1990).

Sentence Proper

Imprisonment of female misdemeanant in state farm. — If a female, under indictment for a misdemeanor, pleads guilty, the judge may in the judge's discretion sentence her to labor and confinement in the woman's prison on the state farm. Conley v. Pope, 161 Ga. 462, 131 S.E. 168 (1925).

Sentence upheld. — Sentence of six months in jail, six months on probation, and a fine of $1,000 for permitting an unlicensed person to drive a car did not constitute cruel and unusual punishment. Means v. State, 255 Ga. 537, 340 S.E.2d 612 (1986).

Sentence imposed was authorized by statute; thus, any remarks made by the court, claimed to be improper, were of no consequence and there was nothing in the record to support the contention that the judge made improper remarks. Addo v. State, 212 Ga. App. 163, 441 S.E.2d 486 (1994).

Defendant's sentence to three consecutive twelve month terms for three simple battery convictions, with eight months to serve in confinement and the rest on probation, did not constitute cruel and unusual punishment. Dudley v. State, 242 Ga. App. 53, 527 S.E.2d 912 (2000).

In light of the defendant's failure to demonstrate an increase in punishment or alteration of the defendant's situation to the defendant's disadvantage when the defendant was sentenced to confinement in a probation detention center for misdemeanor offenses, the defendant's sentence was not improper and did not violate the ex post facto clauses of the Georgia or United States Constitutions. Yates v. State, 263 Ga. App. 29, 587 S.E.2d 180 (2003).

Defendant's sentence to ten years for false imprisonment, 12 months for sexual battery, and 12 months for simple battery, to run concurrently, provided that upon service of four years in custody, the defendant could serve the remaining six years on probation, was not void as the sentence fell within the allowable sentencing ranges of no less than one nor more than ten years for false imprisonment, and up to 12 months each for sexual battery and simple battery. Rehberger v. State, 267 Ga. App. 778, 600 S.E.2d 635 (2004).

It was not an abuse of discretion to deny the defendant's motion for a new trial, requested to facilitate the defendant's efforts to become a naturalized citizen, because the trial court considered that the defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims that the defendant's guilty plea was not voluntary were of no avail as the defendant failed to move to withdraw the plea or to appeal, and the times for doing so had expired. Elias v. State, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

When the defendant was convicted of speeding and failure to maintain lane,

Sentence Proper (Cont'd)

defendant was properly sentenced to a fine of $650 plus court costs, 12 months of probation, 40 hours of community service, and the completion of a defensive driver course, despite the prosecutor's recommendation of fewer community service hours, because the sentence was authorized by O.C.G.A. § 17-10-3(a)(1), (d)(2), and (d)(4) as well as O.C.G.A. § 42-8-72(a)(1). Harris v. State, 272 Ga. App. 650, 613 S.E.2d 170 (2005).

As the defendant's sentence of 365 days, one day to serve and 364 on probation, did not exceed 12 months, it was a valid misdemeanor sentence. Stripling v. State, 279 Ga. App. 856, 632 S.E.2d 747 (2006).

Defendant's sentence was not excessive because the trial court orally sentenced the defendant to a combination of 100 days of confinement, 60 days of house arrest, and 12 months of probation for misdemeanor driving under the influence; an oral declaration of a sentence was not the sentence of the court and the sentence signed by the trial court properly sentenced the defendant to confinement for 12 months (to serve 100 days) and the remainder probated (60 days thereof in house arrest). Kimbrell v. State, 280 Ga. App. 867, 635 S.E.2d 237 (2006).

While a defendant provided no statutory or legal authority for a claim that the sentence for the defendant's conviction for harassing phone calls under O.C.G.A. § 16-11-39.1(a) was excessive and thus abandoned the claim under Ga. Ct. App. R. 25(c)(2), the defendant's sentence of 12 months probated, 240 hours of community service, completion of an anger management counseling program, no contact with the victim, and a $500 fine was within the range provided in O.C.G.A. § 17-10-3(a)(1). Williams v. State, 296 Ga. App. 707, 675 S.E.2d 596 (2009).

Defendant's sentence to serve 12 months for speeding in violation of O.C.G.A. § 40-6-181(b)(2) was within authorized limits; O.C.G.A. § 40-6-1(b) simply sets limits on fines that can be imposed as punishment for a first offense of speeding and the statute does not restrict the available punishment for speeding to a fine. Jones v. State, 308 Ga. App. 99, 706 S.E.2d 593 (2011).

Defendant's sentence for violating O.C.G.A. § 40-6-271 would not be set aside on the ground that the sentence was excessive and the punishment cruel and unusual because the sentence was within the limits of the law, O.C.G.A. § 17-10-3(a)(1) and (b). Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333, cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Defendant's challenge to the sentence imposed failed as the sentence was within the appropriate range of punishment for the misdemeanor at issue and the trial court did not abuse the court's discretion in imposing general conditions of probation, such as that the defendant violate no criminal laws, report to the defendant's probation officer, and not leave the state without permission. Oduok v. State, 347 Ga. App. 178, 817 S.E.2d 145 (2018), cert. dismissed, No. S19C0145, 2019 Ga. LEXIS 360 (Ga. 2019).

Twelve months' confinement for fornication is not cruel and unusual. — Sentence, upon conviction of fornication, of the defendant to 12 months' confinement in a work camp of the state, without the privilege of paying a fine, is not excessive, cruel, and unjust punishment. Bowman v. State, 91 Ga. App. 52, 85 S.E.2d 66 (1954).

Additional fines. — State and county statutorily mandated assessments calculated based on the amount of the fine may be added to the maximum allowable fine under O.C.G.A. § 17-10-3 and no offer of proof is necessary. Williams v. State, 221 Ga. App. 291, 470 S.E.2d 922 (1996).

Review

Hearing of further evidence after verdict for punishment purposes. — Action of a trial judge in a criminal case, after a verdict of guilty is returned, in hearing further evidence in order to determine the character of punishment to be imposed can never be made the subject matter of review in the Court of Appeals. Gaskins v. State, 12 Ga. App. 97, 76 S.E. 777 (1912); Cason v. State, 16 Ga. App. 820, 86 S.E. 644 (1914); Elzie v. State, 21 Ga. App. 501, 94 S.E. 627 (1917).

If sentence erroneous, remedy is resentence, not retrial. — Judgment of

conviction will not be reversed and a new trial granted because of an error or irregularity in the manner of sentencing under former Code 1933, § 27-2506 (see O.C.G.A. § 17-10-3). The remedy was for the court to recall the defendant and sentence the defendant as provided by law. Sherman v. State, 142 Ga. App. 691, 237 S.E.2d 5 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Purpose. — One of the evils sought to be remedied by this section was the placing of individuals in prisons who are not of the same caliber as felons or misdemeanants who warrant maximum periods of confinement. A second and equally important purpose of that section was to prevent our prison system from being crowded by minor offenders, thereby prohibiting effective rehabilitative treatment for either the misdemeanants or the felons. 1963-65 Op. Att'y Gen. p. 512.

Sentence must be satisfied by actual confinement, not probation. — Misdemeanant must be sentenced to a term of seven months (now twelve months) in actual imprisonment before a sentence could be construed as placing such individual under state jurisdiction. This would preclude state jurisdiction when a misdemeanant is given a sentence of 12 months, to serve one month, with the balance probated. However, a sentence of 12 months, seven months to be served, with the balance probated, would be a state sentence as it fulfills the minimum requirement of seven months in confinement. 1963-65 Op. Att'y Gen. p. 512.

Conviction controls basis on which punishment computed. — Conviction controls the question of whether the specific punishment is to be computed on the basis of its being a felony or a misdemeanor sentence. A prisoner is either a misdemeanant or a felon, depending on the crime for which the prisoner was convicted. 1970 Op. Att'y Gen. No. 70-49.

Sentence cannot shift between misdemeanor and felony. — Sentence does not have a shifting quality, allowing the sentence to vacillate between misdemeanor and felony status at different times or for different purposes. 1970 Op. Att'y Gen. No. 70-49.

When the sentence itself contains a reduction of an offense from a felony to a misdemeanor, the sentence should be computed as a misdemeanor because those authorized to fix the sentence have elected to so treat it. 1970 Op. Att'y Gen. No. 70-49.

Alternative sentences permissible. — It was evident from this section that sentence alternatives within bounds are permissible. 1948-49 Op. Att'y Gen. p. 81.

Alteration from county sentence to state sentence. — Court may alter a misdemeanor sentence after the passage of approximately two months so as to change the sentence from a county sentence to a state sentence to be served under the jurisdiction of the Board of Offender Rehabilitation. 1965-66 Op. Att'y Gen. No. 66-53.

Any modification of a sentence after term of court in which sentence was rendered is void with the exception of sentences for misdemeanors under paragraph (a)(1) of this section or unless the court bases the court's modification of an existing sentence on the premise that a clerical error was made or that a motion to modify the sentence was made during the term of court in which the sentence was filed. 1980 Op. Att'y Gen. No. 80-43.

Sentence may not be altered after term to provide for fine. — Original sentence imposed pursuant to this section, regardless of whether the sentence contained a probation provision, may not be altered after the term at which the sentence was imposed so as to include the payment of a fine. 1967 Op. Att'y Gen. No. 67-185.

Sentence provided by General Assembly. — Trial court has no authority to alter a sentence at a term of court other than the term in which the sentence was imposed, except in those instances in which the General Assembly has expressly provided for such modification. 1967 Op. Att'y Gen. No. 67-185.

Trial court cannot correct an erroneous sentence. 1967 Op. Att'y Gen. No. 67-185.

Court may impose a sentence of a certain number of days or a term of months plus an odd number of days under this section. 1963-65 Op. Att'y Gen. p. 512.

Misdemeanor prisoners confined in county installations are under the jurisdiction of the county and not the State Board of Corrections (now Board of Offender Rehabilitation). 1970 Op. Att'y Gen. No. U70-134.

When misdemeanant may be placed under Board of Offender Rehabilitation. — This section can be fairly interpreted to mean that for each misdemeanor of which a person is convicted, if the misdemeanor's sentence is greater than six months and no more than 12 months, then the misdemeanor's can be placed under the jurisdiction of the Board of Corrections (now Board of Offender Rehabilitation). 1971 Op. Att'y Gen. No. 71-95.

All sentences which include fines must be served under county jurisdiction. — If a fine is made part of a misdemeanor sentence, regardless of the length of incarceration prescribed by the sentence, the prisoner must serve under county jurisdiction. 1965-66 Op. Att'y Gen. No. 65-66.

If general sentence ordered for multiple counts, defendant may not be placed under board's jurisdiction. — If a general sentence is ordered for two or more misdemeanor counts, then the Board of Corrections (now Board of Offender Rehabilitation) has no way of knowing how many months of the general sentence are attributable to any specific misdemeanor. Any action the board would take under such a circumstance would be but speculation. Since any ambiguity in a sentence has to be interpreted in favor of the prisoner, the prisoner could not be placed under the jurisdiction of the Board of Corrections (now Board of Offender Rehabilitation) on the basis of speculation as to the composition of the prisoner's general sentence. 1971 Op. Att'y Gen. No. 71-95.

Exceptions to reception and assignment by Board of Offender Rehabilitation of misdemeanants and felons. — As a general rule, the General Assembly has designated the Board of Offender Rehabilitation as the sole agency for the reception and assignment of all convicted misdemeanants and felons. Notable exceptions to this general provision concern individuals convicted of misdemeanors who, under certain conditions, must be placed in a county institution and, under other conditions, may be placed in such facilities in the discretion of the trial court. The final notable exception provides that the Division for Children and Youth (now Department of Offender Rehabilitation) is designated the exclusive state agency for the acceptance and incarceration of all misdemeanants and felons under the age of 17 years; provided, however, those felons convicted of a capital felony shall only be sentenced into the custody of the Department of Offender Rehabilitation. 1972 Op. Att'y Gen. No. 72-3.

Language of sentence which commits defendant to Central State Hospital is surplusage. — All felons and misdemeanants, other than those misdemeanants committed directly to a county correctional institution, must be committed directly and exclusively to the State Board of Corrections (now Board of Offender Rehabilitation). Only the commissioner of offender rehabilitation is authorized to prescribe the place of confinement. So much of the language of a sentence committing an inmate to a term of penal servitude in the state prison system as purports to commit the inmate to Central State Hospital is surplusage and should not be relied upon by the officials of the hospital or the Board of Corrections (now Board of Offender Rehabilitation) as authority for the retention of custody of the inmate at the hospital. 1970 Op. Att'y Gen. No. 70-133.

Punishment illegal to the extent punishment is excessive. — One convicted of a misdemeanor may be sentenced to any authorized punishments, but any one punishment which exceeds the amount or time authorized is illegal with respect to such excess. 1948-49 Op. Att'y Gen. p. 81.

Consideration of parole for misdemeanants sentenced to county institution. — State Board of Pardons and Paroles is not obligated to consider parole for those misdemeanor inmates sentenced under O.C.G.A. § 17-10-3(a)(1)

to serve their confinement as county inmates, although the board may have an obligation to articulate some reason for refusing consideration of these individuals. 1984 Op. Att'y Gen. No. 84-25.

Confinement of persons aged 18, 19, or 20. — Those individuals who are 18, 19, or 20 years of age may be confined in a county facility under O.C.G.A. § 17-10-3(a)(1) and (e)(3) even after their first adjudication of guilt. 1984 Op. Att'y Gen. No. U84-11.

Confinement of persons aged 16 or 17. — Those individuals who have been adjudicated guilty of a traffic misdemeanor for the first time, and who were 16 or 17 years old at the time the offense was committed, if sentenced to a term of confinement, must be confined under the jurisdiction of the Board of Offender Rehabilitation (now Department of Corrections), but if the individuals are sentenced to serve time upon a second or any succeeding adjudication of guilt, there is no requirement that confinement be under the jurisdiction of the Department of Offender Rehabilitation (now Department of Corrections), and in that instance, the sentence could be served in the county correctional institution, the county jail, or such other place as may be provided for the confinement of county inmates. 1984 Op. Att'y Gen. No. U84-11.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 706 et seq., 729 et seq. 21A Am. Jur. 2d, Criminal Law, §§ 843 et seq., 851 et seq.

ALR. — Habeas corpus in case of sentence which is excessive because of imposing both fine and imprisonment, 49 A.L.R. 494.

Power of court to impose sentence providing for intermittent incarceration, 39 A.L.R.2d 985.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine, 35 A.L.R.4th 192.

17-10-3.1. Punishment for violations of Code Section 40-6-391.

(a) In any case where a person is sentenced to a period of imprisonment under Code Section 40-6-391 upon conviction for violating subsection (k) of said Code section, it is within the authority and discretion of the sentencing judge in cases involving the first such violation to allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; provided, however, that the judge shall retain plenary control of the defendant at all times during the sentence period. Confinement during the nonworking hours of a defendant during any day may be counted as serving a full day of the sentence.

(b) Any confinement of a person pursuant to a sentence to a period of imprisonment under Code Section 40-6-391 upon conviction for violating subsection (k) of said Code section shall be served in a county jail, provided that for the first such violation such person shall be kept segregated from all offenders other than those confined for violating subsection (k) of Code Section 40-6-391.

History. — Code 1981, § 17-10-3.1, enacted by Ga. L. 1997, p. 760, § 2; Ga. L. 1999, p. 391, § 4.

Editor's notes. — Ga. L. 1997, p. 760, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Teenage and Adult Driver Responsibility Act.'"

Ga. L. 1997, p. 760, § 27, not codified by the General Assembly, provides that this Code section applies to all offenses committed on or after July 1, 1997.

Ga. L. 1999, p. 391, §§ 1 and 2, not codified by the General Assembly, provides in part that the memory of all victims of drunken driving and Heidi Marie Flye, Cathryn Nicole Flye, and Audrey Marie Flye should be honored and that this Act shall be known and may be cited as "Heidi's Law".

Law reviews. — For article commenting on the 1997 enactment of this Code section, see 14 Ga. St. U.L. Rev. 203 (1997).

For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 200 (1999).

JUDICIAL DECISIONS

Driving under the influence sentence improper. — Sentence of ten days in jail followed by 12 months probation for conviction of driving under the influence was improper. Kovacs v. State, 227 Ga. App. 870, 490 S.E.2d 539 (1997).

Driving under the influence sentence not excessive. — Sentence of 30 days in custody, 11 months probation, 40 hours of community service, and fines totaling $2,000 on conviction of driving under the influence of alcohol, driving with an unlawful alcohol concentration, and failure to maintain lane was not excessive. Gidey v. State, 228 Ga. App. 250, 491 S.E.2d 406 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Probation and suspension of sentences under § 40-6-391, relating to driving under the influence. — Although not authorized under former Code 1933, § 68A-902 (see O.C.G.A. § 40-6-391) or former Code 1933, § 27-2506 (see O.C.G.A. § 17-10-3) to suspend or cancel licenses of those convicted of driving under the influence of drugs or intoxicants, a judge may sentence a defendant to either, but not both, a suspended or probated sentence which may be properly conditioned upon payment of a fine. 1974 Op. Att'y Gen. No. U74-78.

That portion of former Code 1933, § 68A-902 (see O.C.G.A. § 40-6-391), which uses the word "shall" authorizing the imposition of a 90-day penalty is mandatory and cannot be construed to mean that the court is vested with discretion in imposing the minimum 90-day sentence. However, former Code 1933, § 68A-902 (see O.C.G.A. § 17-10-3), relating to punishment of misdemeanors, permits a judge to impose in addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. Therefore, a judge imposing sentence pursuant to former Code 1933, § 68A-902 (see O.C.G.A. § 40-6-391) may probate either the fine or the sentence as well as both the fine and the sentence. 1974 Op. Att'y Gen. No. U74-102.

17-10-4. Punishment for misdemeanors of a high and aggravated nature.

(a) A person who is convicted of a misdemeanor of a high and aggravated nature shall be punished by a fine not to exceed $5,000.00 or by confinement in the county or other jail, county correctional institution, or such other places as counties may provide for mainte-

nance of county inmates, for a term not to exceed 12 months, or both; provided, however, that a person convicted of a misdemeanor of a high and aggravated nature which was committed by an inmate within the confines of a state correctional institution and sentenced to confinement as a result of such offense shall be sentenced to confinement under the jurisdiction of the Board of Corrections in a state correctional institution or such other institution as the Department of Corrections may direct for a term which shall not exceed 12 months. In all cases of a conviction of a misdemeanor of a high and aggravated nature, the sentencing court shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences imposed under this Code section at any time; but in no instance shall a sentence imposed under this Code section be modified in such a manner as to increase the amount of fine or the term of confinement.

(b) Notwithstanding any laws to the contrary, a person sentenced for a misdemeanor of a high and aggravated nature may earn no more than four days per month earned time allowance.

History. — Code 1933, § 27-2506.1, enacted by Ga. L. 1970, p. 236, § 11; Ga. L. 1985, p. 283, § 1; Ga. L. 1997, p. 1526, § 2; Ga. L. 2000, p. 1111, § 1.

Administrative rules and regulations. — Offender administration, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Departmental Operations, Chapter 125-2-4.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Section not repealed. — Ga. L. 1978, p. 985 did not repeal this section by implication. Sutton v. Garmon, 245 Ga. 685, 266 S.E.2d 497 (1980).

Section deals with imposition, not effect, of suspended sentence. — Ga. L. 1965, p. 413, § 4 dealt with the effect of suspended sentences while former Code 1933, §§ 27-2502 and 27-2506.1 (see O.C.G.A. §§ 17-10-1 and 17-10-4) dealt with the authority to impose sentences. Cross v. State, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

Earned time allowance not a denial of equal protection. — Party is not denied equal protection of the law because the party is limited to four days earned time each month while certain other prisoners may earn 15 days each month. Sutton v. Garmon, 245 Ga. 685, 266 S.E.2d 497 (1980).

Rules and regulations for suspended sentence and revocation upon their violation. — Exactly what is a suspended sentence is perhaps indefinite, but the court may provide rules and regulations in connection therewith and may, on violation of such rules and after notice and opportunity to be heard, during the time such sentence runs in accordance with the sentence's own terms, revoke the suspension and require that the remainder be served within a penal institution. Cross v. State, 128 Ga. App. 744, 197 S.E.2d 853 (1973).

Sentence to state penal system improper. — Defendant's third conviction within five years for driving under the influence was classified as a high and aggravated misdemeanor; therefore, the defendant could not be sentenced to imprisonment in the state penal system.

Floyd v. State, 227 Ga. App. 873, 490 S.E.2d 542 (1997).

Cited in Taylor v. State, 149 Ga. App. 362, 254 S.E.2d 432 (1979); Adult Bookmart, Inc. v. State, 152 Ga. App. 838, 264 S.E.2d 273 (1979); Arnold v. State, 163 Ga. App. 10, 293 S.E.2d 501 (1982); Smith v. State, 174 Ga. App. 238, 329 S.E.2d 507 (1985); Tenney v. State, 194 Ga. App. 820, 392 S.E.2d 294 (1990); State v. Phillips, 206 Ga. App. 421, 425 S.E.2d 412 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 843 et seq.

ALR. — Necessity of charging matter of aggravation in indictment or information, to justify imposition of higher punishment under a statute which varies punishment according to enormity of offense, 125 A.L.R. 605.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine, 35 A.L.R.4th 192.

17-10-5. Imposition of misdemeanor punishment for felonies punishable by imprisonment for term of ten years or less.

When a defendant is found guilty of a felony punishable by imprisonment for a maximum term of ten years or less, the judge may, in his discretion, impose punishment as for a misdemeanor.

History. — Code 1933, § 26-3101, enacted by Ga. L. 1968, p. 1249, § 1.

JUDICIAL DECISIONS

Only punishment reduced, not crime. — General Assembly apparently intends that only the punishment, and not the class of crime, is subject to reduction by the court. Thus, the judge will not reduce a felony conviction to a misdemeanor, but will merely punish as for a misdemeanor. Ramsey v. Powell, 244 Ga. 745, 262 S.E.2d 61 (1979).

Punishment that may be imposed characterizes crime. — It is not the punishment imposed in a given case but the punishment that may be imposed that characterizes the crime. Ramsey v. Powell, 244 Ga. 745, 262 S.E.2d 61 (1979).

Determining punishment in honoring recommendation for misdemeanor punishment. — Determination of what punishment is to be imposed in honoring a recommendation that punishment as for a misdemeanor in connection with a felony conviction is exclusively for the court and is not within the province of the jury. Webb v. State, 136 Ga. App. 90, 220 S.E.2d 27 (1975).

Judge need not charge that jury can recommend misdemeanor punishment. — There is no error in a trial court's failure to charge a jury that the jury might recommend a misdemeanor punishment. Boatright v. State, 150 Ga. App. 283, 257 S.E.2d 314 (1979).

Judge does not have to charge section. — Since the jury no longer determines the sentence, it is not necessary that the trial judge charge this section. Stanley v. State, 136 Ga. App. 385, 221 S.E.2d 242 (1975).

Defendant failed to show deportable status and ineffective assistance. — Judgment finding that the defendant was rendered ineffective assistance of counsel for counsel's alleged failure to advise of deportation consequences for a destruction of property offense was reversed because the defendant's date of admission was not within five years of the date of the commission of the crime in 2002; thus, the defendant failed to prove

that the defendant was deportable by virtue of having committed a crime of moral turpitude. State v. Addaquay, 302 Ga. 412, 807 S.E.2d 413 (2017).

Cited in McGregor v. State, 119 Ga. App. 40, 165 S.E.2d 915 (1969); Bearden v. State, 122 Ga. App. 25, 176 S.E.2d 243 (1970); Estevez v. State, 130 Ga. App. 215, 202 S.E.2d 686 (1973); Golson v. State, 130 Ga. App. 577, 203 S.E.2d 917 (1974); Staggers v. Hopper, 232 Ga. 153, 205 S.E.2d 300 (1974); Lewis v. State, 134 Ga. App. 231, 214 S.E.2d 8 (1975); Smokes v. State, 136 Ga. App. 8, 220 S.E.2d 39 (1975); Dunkum v. State, 138 Ga. App. 321, 226 S.E.2d 133 (1976); Richardson v. State, 144 Ga. App. 416, 240 S.E.2d 917 (1977); Goodrum v. State, 158 Ga. App. 602, 281 S.E.2d 254 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Applicability of statutory restrictions on misdemeanor sentences. — Any active sentence imposed pursuant to O.C.G.A. § 17-10-5 would necessarily fall within any statutory restrictions on misdemeanor sentences. 1982 Op. Att'y Gen. No. U82-47.

Mandatory language of former O.C.G.A. § 42-5-100(d), which governed the crediting of earned time to misdemeanants confined to county correctional facilities, applied when a felon was sentenced to confinement in a county jail as a condition of probation. 1982 Op. Att'y Gen. No. U82-47 (decided prior to 1983 amendment of § 42-5-100).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 831 et seq.

17-10-6. Review of sentences of imprisonment for period exceeding 12 years by three-judge panel.

Reserved. Repealed by Ga. L. 2007, p. 595, § 2/HB 197, effective July 1, 2007.

Editor's notes. — This Code section was based on Code 1933, § 27-2511.1, enacted by Ga. L. 1974, p. 352, § 8; Ga. L. 1977, p. 1098, § 6; Ga. L. 1982, p. 1271, §§ 1, 2; Ga. L. 1993, p. 705, § 1; Ga. L. 1994, p. 1959, § 10.

Ga. L. 2007, p. 595, § 5/HB 197, not codified by the General Assembly, provides that the repeal of this Code section shall apply to all trials which occur on or after July 1, 2007.

17-10-6.1. Punishment for serious violent offenders; authorization for reduction in mandatory minimum sentencing.

(a) As used in this Code section, the term "serious violent felony" means:

(1) Murder or felony murder, as defined in Code Section 16-5-1;

(2) Armed robbery, as defined in Code Section 16-8-41;

(3) Kidnapping, as defined in Code Section 16-5-40;

(4) Rape, as defined in Code Section 16-6-1;

(5) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(6) Aggravated sodomy, as defined in Code Section 16-6-2; or

(7) Aggravated sexual battery, as defined in Code Section 16-6-22.2.

(b)(1) Except as provided in subsection (e) of this Code section, any person convicted of the serious violent felony of kidnapping involving a victim who is 14 years of age or older or armed robbery shall be sentenced to a mandatory minimum term of imprisonment of ten years, and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.

(2) Except as provided in subsection (e) of this Code section, the sentence of any person convicted of the serious violent felony of:

(A) Kidnapping involving a victim who is less than 14 years of age;

(B) Rape;

(C) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(D) Aggravated sodomy, as defined in Code Section 16-6-2; or

(E) Aggravated sexual battery, as defined in Code Section 16-6-22.2

shall, unless sentenced to life imprisonment, be a split sentence which shall include a mandatory minimum term of imprisonment of 25 years, followed by probation for life, and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.

(3) No person convicted of a serious violent felony shall be sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42, relating to probation for first offenders, or any other provision of Georgia law relating to the sentencing of first offenders. The State of Georgia shall have the right to appeal any sentence which is imposed by the superior court which does not conform to the provisions of this subsection in the same manner as is provided for other appeals by the state in accordance with Chapter 7 of Title 5, relating to appeals or certiorari by the state.

(c)(1) Except as otherwise provided in subsection (c) of Code Section 42-9-39, for a first conviction of a serious violent felony in which the

accused has been sentenced to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(2) For a first conviction of a serious violent felony in which the accused has been sentenced to death but the sentence of death has been commuted to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(3) For a first conviction of a serious violent felony in which the accused has been sentenced to imprisonment for life without parole, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(4) Except as otherwise provided in this subsection, any sentence imposed for the first conviction of any serious violent felony shall be served in its entirety as imposed by the sentencing court and shall not be reduced by any form of parole or early release administered by the State Board of Pardons and Paroles or by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the period of incarceration ordered by the sentencing court; provided, however, that during the final year of incarceration an offender so sentenced shall be eligible to be considered for participation in a department administered transitional center or work release program.

(d) For purposes of this Code section, a first conviction of any serious violent felony means that the person has never been convicted of a serious violent felony under the laws of this state or of an offense under the laws of any other state or of the United States, which offense if committed in this state would be a serious violent felony. Conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) In the court's discretion, the judge may depart from the mandatory minimum sentence specified in this Code section for a person who

is convicted of a serious violent felony when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum.

(f) Any sentence imposed pursuant to this Code section shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the period of incarceration ordered by the sentencing court or any form of pardon, parole, or commutation of sentence by the State Board of Pardons and Paroles; provided, however, that during the final year of incarceration, a defendant so sentenced shall be eligible to be considered for participation in a Department of Corrections administered transitional center or work release program.

History. — Code 1981, § 17-10-6.1, enacted by Ga. L. 1994, p. 1959, § 11; Ga. L. 1998, p. 180, § 2; Ga. L. 2006, p. 379, § 20/HB 1059; Ga. L. 2009, p. 64, § 1/SB 193; Ga. L. 2009, p. 223, § 3/SB 13; Ga. L. 2011, p. 752, § 17/HB 142; Ga. L. 2013, p. 222, § 8/HB 349; Ga. L. 2014, p. 866, § 17/SB 340.

Editor's notes. — Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act." This Act became effective January 1, 1995.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in State v. Allmond, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in State v. Allmond, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical

violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c)/HB 1059, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment." This Act became effective July 1, 2006.

Ga. L. 2009, p. 223, § 8/SB 13, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand."

Ga. L. 2009, p. 223, § 9/SB 13, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act." This Act became effective April 29, 2009.

Ga. L. 2009, p. 223, § 10/SB 13, not codified by the General Assembly, provides that: "A person may be sentenced to

life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3)/HB 142 codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a)/SB 13, not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b)/SB 13, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2011, p. 752, § 17(2)/HB 142, not codified by the General Assembly, provides, in part, that the amendment to paragraph (b)(2) was made to conform with Merritt v. State, 286 Ga. 650 (2010).

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Law reviews. — For article, "Campbell v. Georgia: Mandatory Minimum Sentencing Survives Separation of Power Attacks, Remaining a Viable Option for the Legislature in Its War on Crime," see 17 Ga. St. U.L. Rev. 637 (2001). For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For annual survey on criminal law, see 66 Mercer L. Rev. 37 (2014).

For note, "Can't Do the Time, Don't Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia," see 22 Ga. St. U.L. Rev. 519 (2005). For note, "Calling on the Legislature: Dixon v. State and Georgia's Statutory Scheme to Protect Minors from Sexual Exploitation," see 56 Mercer L. Rev. 777 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration
Specific Crimes
Sentencing

General Consideration

Constitutionality. — O.C.G.A. § 17-10-6.1 does not impose unconstitutionally excessive punishment and the fact that defendants were 18 years old at the time of sentencing and may have been first offenders did not render the statute unconstitutional as applied to the defendants. Campbell v. State, 268 Ga. 44, 485 S.E.2d 185 (1997).

O.C.G.A. § 17-10-6.1, which dictates the punishment for serious violent offenders, in conjunction with O.C.G.A. § 17-10-7, the sentencing statute applicable to recidivist armed robbers, does not violate either the federal or the state constitutions. State v. Vanburen, 210 Vt. 293, 214 A.3d 791 (2019).

Statute governing the punishment for serious violent offenders does not violate the separation of powers doctrine of the state constitution. State v. Vanburen, 210 Vt. 293, 214 A.3d 791 (2019).

O.C.G.A. § 17-10-6.1(c)(1) and (c)(3) are not unconstitutional on the basis that, when taken together, they render defense counsel ineffective by presenting counsel with an impossible conundrum regarding the representation of a convicted client -- having to choose between seeking a term of years without parole, or a life sentence with a possibility of parole after fourteen years. Guyton v. State, 272 Ga. 529, 531 S.E.2d 94 (2000).

Statutory scheme governing punishment for a first-time rape conviction, O.C.G.A. §§ 16-6-1(b) and 17-10-6.1, gave

a defendant fair notice that the defendant could be sentenced either to life imprisonment, eligible for parole after 30 years, or a minimum of 25 years without parole, with any additional years likewise not subject to any possibility of parole. Therefore, the statutes were not unconstitutionally vague and allowed the defendant to intelligently plea bargain. Merritt v. State, 286 Ga. 650, 690 S.E.2d 835 (2010).

Eighth Amendment not violated by service of mandatory minimum sentences. — Defendant failed to show that trial counsel was ineffective by failing to assert that the state's statutory and constitutional provisions requiring the service of mandatory minimum sentences before consideration for parole regardless of age constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution because any consideration for Eighth Amendment purposes of incomplete brain maturation due solely to age was inappropriate since the defendant was 20 years old at the time the defendant committed the crime and was sentenced to a term of years rather than death. Gandy v. State, 290 Ga. 166, 718 S.E.2d 287 (2011).

Legislative intent and authority. — O.C.G.A. § 17-10-6.1 does not violate the separation of powers doctrine in that the legislature acted within constitutional bounds in establishing minimum and maximum punishment and in eliminating judicial discretion in sentencing certain violent offenders. Campbell v. State, 268 Ga. 44, 485 S.E.2d 185 (1997).

O.C.G.A. § 17-10-6.1 does not violate equal protection because the legislation bears a reasonable relationship to the legitimate legislative concern of deterring crime and ensuring that a court imposed sentence will be served in the sentence's entirety. Campbell v. State, 268 Ga. 44, 485 S.E.2d 185 (1997).

Legislature's choice of sentence for a conviction on the charge of aggravated sexual battery, a ten year mandatory minimum prison sentence, was not so wholly irrational or grossly disproportionate to the severity of the crime that the sentence constituted cruel and unusual punishment; thus, that sentence imposed in the defendant's case was affirmed. Taylor v. State, 259 Ga. App. 457, 576 S.E.2d 916 (2003).

Hearsay statement of prosecutor establishing fact for sentencing. — Defendant's sentence was vacated because although the fact that the defendant was sentenced as a recidivist did not appear on the face of the sentencing sheet, the trial court did indicate that the court was following the state's recommendation in sentencing the defendant, and that recommendation included that the defendant be sentenced as a recidivist; a trial court cannot rely upon the hearsay statement of a prosecutor to establish a fact for purposes of sentencing. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Application. — State's claim that defendant's sentence was not subject to review because the sentence followed a probation revocation was rejected as the defendant initially was sentenced as a first offender; the first offender sentence was revoked, and a sentence of 12 or more years was imposed. State v. Swartz, 277 Ga. App. 241, 626 S.E.2d 210 (2006).

Applicability to offenses committed before 1998. — Defendant found guilty of a serious violent felony under O.C.G.A. § 17-10-6.1 could apply for first offender status prior to the 1998 amendments to that section and the First Offender Act, O.C.G.A. § 42-8-60 et seq. Fleming v. State, 271 Ga. 587, 523 S.E.2d 315 (1999), reversing Fleming v. State, 233 Ga. App. 483, 504 S.E.2d 542 (1998); Horton v. State, 241 Ga. App. 605, 527 S.E.2d 254 (1999); Griffin v. State, 244 Ga. App. 447, 535 S.E.2d 783 (2000).

Since the defendants committed the crimes charged prior to the March 29, 1998, amendment to O.C.G.A. § 17-10-6.1 and enactment of the provision in O.C.G.A. § 42-8-66, stating that a defendant who is convicted of a serious violent felony as defined in O.C.G.A. § 17-10-6.1(a) is not eligible for first offender treatment, the trial court erred in determining that the defendants were not eligible for first offender status. Riley v. State, 243 Ga. App. 697, 534 S.E.2d 437 (2000).

Prior to the 1998 amendments to O.C.G.A. § 17-10-6.1 and to the First Offender Act (O.C.G.A. § 42-8-60 et seq.), a

General Consideration (Cont'd)

defendant found guilty of a serious violent felony under that section was not barred from requesting and obtaining first offender treatment. Burns v. State, 241 Ga. App. 886, 528 S.E.2d 547 (2000).

Applying the Georgia Supreme Court's holding from Fleming v. State, 271 Ga. 587 (523 S.E.2d 315) (1999), resentencing was required because, prior to the 1998 amendments to O.C.G.A. §§ 17-10-6.1 and 42-8-60 et seq., a defendant found guilty of a serious violent felony under § 17-10-6.1 was not precluded from requesting and obtaining first offender treatment. Burleson v. State, 242 Ga. App. 217, 529 S.E.2d 228 overruling State v. Allmond, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

Since the serious violent felonies committed by the defendant occurred prior to the March 29, 1998, amendment to O.C.G.A. § 17-10-6.1 and enactment of the provision in O.C.G.A. § 42-8-66, stating that a defendant who is convicted of a serious violent felony as defined in § 17-10-6.1(a) is not eligible for first offender treatment, then the prohibition of the latter section had no retroactive application to the defendant to limit the discretion of the trial judge in what sentence to impose. Camaron v. State, 246 Ga. App. 80, 539 S.E.2d 577 (2000).

Person convicted of serious violent felony cannot be sentenced as first offender. — Allowing the defendant who was sentenced to ten years for armed robbery, eleven years for aggravated assault, and five years on a firearms charge, all to be served concurrently, to serve the remainder of the sentence on probation after serving ten years, the mandatory minimum sentence for armed robbery was illegal and therefore completely void. State v. Hamilton, 238 Ga. App. 40, 517 S.E.2d 583 (1999).

Defendant did not receive ineffective assistance of counsel in entering the defendant's guilty plea even though the defendant asserted, in part, that trial counsel misled the defendant about the applicability of first offender treatment; the defendant was properly informed that first offender treatment was not available under O.C.G.A. § 17-10-6.1 as the defendant committed felony murder. Shaheed v. State, 276 Ga. 291, 578 S.E.2d 119 (2003).

Defendant was not eligible to be sentenced as a first offender because such treatment was not available for a conviction for armed robbery. Johnson v. State, 274 Ga. App. 848, 619 S.E.2d 488 (2005).

There was no error in the trial court's failure to convict the defendant of kidnapping and armed robbery, in violation of O.C.G.A. §§ 16-5-40 and 16-8-41, respectively, under the First Offender Act as O.C.G.A. § 42-8-66 specifically stated that the Act did not apply to sentences for violent felonies outlined in O.C.G.A. § 17-10-6.1, and those two crimes were listed as serious violent felonies. Isaac v. State, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

Due process. — Defendants were not deprived of due process of law on the basis that the constraints upon the court's discretion under O.C.G.A. § 17-10-6.1 denied the defendants meaningful allocution. Campbell v. State, 268 Ga. 44, 485 S.E.2d 185 (1997).

Construction with § 17-10-1. — O.C.G.A. § 17-10-1(b) does not conflict with O.C.G.A. § 17-10-6.1 and, thus, the trial court has no discretion to alter or to allow the parole board to alter the mandatory minimum sentence of ten years for any serious violent felony, including armed robbery. Taylor v. State, 241 Ga. App. 439, 526 S.E.2d 910 (1999).

Since the defendant pled guilty to aggravated child molestation, the trial court did not err in ruling that the court lacked discretion to sentence the defendant under O.C.G.A. § 17-10-1(b). Rolader v. State, 249 Ga. App. 213, 547 S.E.2d 778 (2001).

Pursuant to O.C.G.A. § 16-13-31(g)(1), the trial court lacked the authority to probate or suspend sentences imposed against two defendants in unrelated criminal actions, and neither the 2004 nor the 2006 amendments to the general sentencing provisions under O.C.G.A. § 17-10-1(a)(1) were relevant; moreover, because O.C.G.A. §§ 17-10-6.1 and 17-10-6.2 were statutes that defined certain categories of crimes and provided the sentencing guidelines for those categories,

it did not appear that the list of these two exceptions normally would have included § 16-13-31 or any other specific criminal statute, and any omission would be significant only with regard to a statute that defined classes or categories of crimes. Gillen v. State, 286 Ga. App. 616, 649 S.E.2d 832 (2007), cert. denied, No. S07C1780, 2007 Ga. LEXIS 809 (Ga. 2007).

Construction with O.C.G.A. § 49-4A-9(e). — Discretion given to sentencing courts for reviewing the sentences of juveniles turning 17 in O.C.G.A. § 49-4A-9(e) was limited by the mandatory minimum sentence requirements of O.C.G.A. § 17-10-6.1; therefore, in reviewing a juvenile's prison sentence for armed robbery, the superior court erred by reducing the juvenile's original five-year prison sentence to which the state had agreed. State v. Hudson, 303 Ga. 348, 812 S.E.2d 270 (2018).

Cited in Burleson v. State, 233 Ga. App. 769, 505 S.E.2d 515 (1998); Ellis v. State, 240 Ga. App. 498, 523 S.E.2d 914 (1999); Baldwin v. State, 242 Ga. App. 205, 529 S.E.2d 201 (2000); Johnson v. State, 276 Ga. 57, 573 S.E.2d 362 (2002); Lee v. State, 267 Ga. App. 834, 600 S.E.2d 825 (2004); Davis v. Murrell, 279 Ga. 584, 619 S.E.2d 662 (2005); Gibson v. State, 281 Ga. App. 607, 636 S.E.2d 767 (2006); Upton v. Johnson, 282 Ga. 600, 652 S.E.2d 516 (2007); Brown v. Incarcerated Pub. Defender Clients Div. 3, 288 Ga. App. 859, 655 S.E.2d 704 (2007); Dunagan v. State, 283 Ga. 501, 661 S.E.2d 525 (2008); Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008); Cox v. Howerton, 290 Ga. 693, 723 S.E.2d 891 (2012); Freeman v. State, 328 Ga. App. 756, 760 S.E.2d 708 (2014); Hayward v. Danforth, 299 Ga. 261, 787 S.E.2d 709 (2016); Benton v. Hines, 306 Ga. 722, 832 S.E.2d 801 (2019).

Specific Crimes

Sentence for burglary and aggravated assault. — Defendant's 20-year sentences without parole for burglary and aggravated assault were not improper merely because the defendant was eligible for parole on the murder conviction after 14 years, pursuant to O.C.G.A. § 17-10-6.1(c)(1); O.C.G.A. § 17-10-7(a) and (c) mandated the maximum sentences for burglary and aggravated assault without parole, and did not require probation or suspension of any part. Clark v. State, 279 Ga. 243, 611 S.E.2d 38 (2005).

Application to kidnapping. — Defendant was incorrect in arguing that O.C.G.A. § 17-10-6.1 reduced the applicable sentence in a kidnapping case to a minimum of ten years with life being discretionary as the statute established a mandatory minimum sentence for certain violent felonies, including kidnapping. Fulcher v. State, 259 Ga. App. 648, 578 S.E.2d 264 (2003).

There is no requirement that a kidnapping victim receive bodily injury when sentencing is pursuant to O.C.G.A. § 17-10-6.1; moreover, as the defendant had also been convicted of armed robbery, the trial court correctly imposed a mandatory life without parole sentence for either of the defendant's second serious violent felonies: kidnapping and armed robbery. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. 2007).

Trial counsel did not render ineffective assistance by failing to raise the constitutionality of the defendant's mandatory minimum sentence of 25 years imprisonment without parole, as codified in O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), because the defendant's concurrent 25-year sentences for child kidnapping did not raise a threshold inference of gross disproportionality; after beating the mother in the young children's presence so severely as to break her jaw and cause other injuries, the defendant ordered all three of the victims to enter a car, drove the victims away, and left the victims in a location where the victims were isolated and unprotected. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), as applied to the defendant, did not violate due process because an earlier indictment charged regular kidnapping and, only after plea negotiations failed, the more severe sentence was included in a re-indictment because such circumstances did not raise a presumption of prosecutorial vindictiveness in the ab-

Specific Crimes (Cont'd)

sence of actual evidence thereof. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Different sentences for kidnapping based on victim's age. — O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2) do not violate equal protection by punishing a person differently depending on the age of the victim because that classification is not arbitrarily drawn and, instead, is rationally related to the legitimate governmental interest in protecting children. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Application to child molestation. — Defendant's sentence to life imprisonment without parole for the defendant's conviction of aggravated child molestation was not illegal as it was the defendant's second "serious violent felony" pursuant to O.C.G.A. § 17-10-6.1(a)(5), and accordingly, the trial court had no discretion but to impose that sentence pursuant to O.C.G.A. § 17-10-7(b)(2); it was noted that the defendant's motion to vacate, modify, correct, or set aside the sentence was made four and a half years after the defendant's sentencing, at which point the trial court no longer had jurisdiction because it was past the court's term. Gosnell v. State, 262 Ga. App. 641, 586 S.E.2d 350 (2003).

Mandatory sentence for aggravated child molestation of ten years without parole pursuant to O.C.G.A. §§ 16-6-4(d)(1) and 17-10-6.1 was not cruel and unusual punishment as applied to the defendant, despite the fact that the defendant was 18 years old at the time of the act and the victim was only four years younger. Widner v. State, 280 Ga. 675, 631 S.E.2d 675 (2006).

Sentence cruel and unusual when defendant 17 and victim 15. — Habeas court properly ruled that an inmate's sentence of ten years in prison for having consensual oral sex with a 15-year-old when the inmate was only 17 years old constituted cruel and unusual punishment in light of the 2006 amendments to O.C.G.A. §§ 16-6-4 and 42-1-12. Humphrey v. Wilson, 282 Ga. 520, 652 S.E.2d 501 (2007).

Defendant failed to establish that the defendant was rendered ineffective assistance of counsel with regard to a guilty plea to aggravated child molestation and other crimes as the defendant failed to show that the defendant indicated any time prior to sentencing that the defendant wanted to withdraw the guilty plea. Further, although the defendant established that defense counsel improperly advised the defendant that parole was possible, since the defense strategy in seeking the plea agreement was not to ensure parole eligibility but to minimize the defendant's exposure to sentencing as a recidivist, no ineffectiveness was established. Floyd v. State, 293 Ga. App. 235, 666 S.E.2d 611 (2008).

Application to incest. — Trial court did not abuse the court's discretion in denying a defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing because the defendant was barred from requesting DNA testing under O.C.G.A. § 5-5-41(c)(3) since the defendant's conviction for the crime of incest in violation of O.C.G.A. § 16-6-22(a)(3) was not defined as a serious violent felony under O.C.G.A. § 17-10-6.1(a). Hunter v. State, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Rape sentences proper. — O.C.G.A. § 17-10-6.1(a) defined both rape and aggravated sodomy as "serious violent felonies"; thus, in light of a prior aggravated sodomy conviction, a trial court would have been required to sentence the defendant to life without parole for subsequent violent rape felonies under the sentencing statutes either as the statutes existed at the time of the rapes, 1996, or at the time of the defendant's trial, 1998. Thompson v. State, 279 Ga. App. 657, 632 S.E.2d 407 (2006).

Scrutiny of rape sentence not prohibited. — Fairness of a defendant's sentence of life imprisonment for being a party to rape was not examined because, contrary to the defendant's claims, the plain terms of O.C.G.A. § 17-10-6.1(a)(5) did not prohibit the defendant from applying for scrutiny of the sentence by the Georgia Sentence Review Panel; as the defendant conceded, the sentence fell within the statutory limits under O.C.G.A. §§ 16-2-21 and 16-6-1, and as a

rule, sentences that fell within such limits were not reviewed for legal error. Johnson v. State, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

Misinformation about review of rape charge. — Misinformation about review from the Sentence Review Panel came after the defendant pled guilty to the rape charge and thus could not have contributed to the defendant's decision to enter a guilty plea. Askew v. State, 318 Ga. App. 454, 734 S.E.2d 222 (2012).

Sentencing

Sentence not grossly out of proportion. — Claim by the defendant that a sentence pursuant to O.C.G.A. §§ 16-6-22.2(b) and 17-10-6.1(b)(2) constituted cruel and unusual punishment because the sentence was grossly out of proportion to the severity of the crime, and that the sentence was overly severe under the circumstances, was within the exclusive jurisdiction of the Georgia Supreme Court when the claim challenged the constitutionality of the statutes themselves; as the sentence was legally authorized and within statutory limits, the sentence was upheld. Colton v. State, 297 Ga. App. 795, 678 S.E.2d 521 (2009).

Plea bargains. — Since the defendant entered a negotiated guilty plea and received the sentences for which the defendant had bargained, the defendant's argument that the defendant's attorney did not inform the defendant of the defendant's possible parole eligibility and that the court did not tell the defendant that the defendant would not be eligible for parole did not alter the voluntariness of the defendant's plea since parole eligibility is not so much a direct consequence of a trial court's acceptance of a plea bargain as it is a collateral legislative consequence of the defendant's own decision to accept a certain sentence in exchange for the defendant's plea, and the court is entitled to presume that a defendant has apprised oneself of such collateral consequences before agreeing to accept that plea bargain. Wilcox v. State, 236 Ga. App. 235, 511 S.E.2d 597 (1999).

Defendant was not entitled to relief under 28 U.S.C. § 2254; the defendant failed to show that the defendant was prejudiced by counsel's failure to inform the defendant that the defendant faced a mandatory life sentence under O.C.G.A. § 17-10-6.1 because the evidence showed that the defendant likely would not have accepted a plea bargain that included a 15 to 25-year sentence because the victim's whereabouts were unknown, and the defendant felt that the aggravated assault and armed robbery case against the defendant was weak without the victim's testimony. Carson v. Thompson, No. 06-12691, 2007 U.S. App. LEXIS 9692 (11th Cir. Apr. 27, 2007) (Unpublished).

When the defendant entered a negotiated guilty plea to malice murder, and the state nol prossed the remaining charges, the defendant's plea counsel was not ineffective as the defendant was correctly advised in numerous ways about the defendant's parole eligibility because the plea offer cited O.C.G.A. § 17-10-6.1(c)(1) and stated that the defendant had to serve 30 years before being eligible for parole; the defendant signed the offer to show the defendant's acceptance of its terms; and, at the plea hearing, the trial court asked the defendant if the defendant understood how the possibility of parole worked; the defendant answered yes; and the defendant stated that it would be 30 years under the plea. Stokes v. State, 299 Ga. 37, 785 S.E.2d 883 (2016).

Mandated minimum not excessive. — Mandated minimum ten year prison term under O.C.G.A. § 17-10-6.1 was not unconstitutionally excessive. Carter v. State, 257 Ga. App. 620, 571 S.E.2d 831 (2002).

Resentencing did not violate double jeopardy. — Because the defendant's original sentence upon conviction for aggravated sexual battery was not in compliance with the minimum sentence requirements of O.C.G.A. § 17-10-6.1, resentencing did not violate double jeopardy. Bryant v. State, 229 Ga. App. 534, 494 S.E.2d 353 (1998).

Trial court was without jurisdiction to resentence the defendant after expiration of the term during which the sentence was entered since the sentence was not void. Shaw v. State, 233 Ga. App. 232, 504 S.E.2d 18 (1998).

Sentencing according to guidelines at time of crime. — Defendant convicted

Sentencing (Cont'd)

of rape was required to be sentenced in accordance with the sentencing provisions that existed at the time of the defendant's crime, and the court's failure to sentence the defendant according to guidelines in effect at the time rendered the sentence void ab initio, requiring resentencing. Lockhart v. State, 227 Ga. App. 481, 489 S.E.2d 594 (1997).

Split sentences. — Trial court's denial of the defendant's motion to vacate sentences for child molestation, aggravated child molestation, and incest was upheld because to apply the split-sentencing provisions to pre-2006 law would require the court to re-write applicable statutes to make them subject to statutory provisions that did not even exist at the time the statutes were enacted, which the court was prohibited to do without contravening the plain meaning of the statutory text. Bryson v. State, 350 Ga. App. 206, 828 S.E.2d 450 (2019).

Parole. — O.C.G.A. § 17-10-6.1(c)(1) gives a defendant no affirmative right to parole. Howard v. State, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Trial court's failure to advise defendants of the "no parole" policy of O.C.G.A. § 17-10-6.1 did not constitute manifest injustice mandating reversal. Bess v. State, 235 Ga. App. 372, 508 S.E.2d 664 (1998).

Counsel not ineffective in advising on sentence. — Trial counsel's performance was not deficient for not informing the defendant that the defendant would not be eligible for parole for 30 years because the offenses of trafficking a person for sexual servitude that the defendant was convicted of did not constitute serious violent felonies; and no other authority or competent evidence supported the defendant's claim that the defendant would not be eligible for parole until the defendant served 30 years in prison; thus, trial counsel did not misinform the defendant as to the defendant's parole eligibility if the defendant rejected the plea deal, was convicted at trial, and was sentenced to life imprisonment. Byrd v. State, 344 Ga. App. 780, 811 S.E.2d 85 (2018), overruled on other grounds by Thomas v. State, 352 Ga. App. 640, 835 S.E.2d 640 (2019).

Counsel ineffective for failing to inform defendant of ineligibility for parole. — Habeas court erred by holding that a petitioner was not affirmatively misinformed by petitioner's counsel regarding petitioner's parole eligibility on a 20-year sentence for armed robbery because, under O.C.G.A. § 17-10-6.1, the petitioner was required to serve the entire 20 years. Remand to the habeas court was required to determine whether, but for counsel's deficiency, the petitioner would have proceeded to trial rather than plead guilty. Johnson v. Roberts, 287 Ga. 112, 694 S.E.2d 661 (2010).

Ignorance of parole eligibility was a collateral consequence that did not render defendant's guilty plea involuntary. — Defendant's claimed lack of knowledge that, pursuant to O.C.G.A. § 17-10-6.1(c)(1), the defendant would be ineligible for parole until the defendant had served 30 years, did not render the guilty plea to felony murder and other crimes involuntary, because the knowledge of parole ineligibility was a collateral consequence. Stinson v. State, 286 Ga. 499, 689 S.E.2d 323 (2010).

Sentence violating minimum sentencing requirements. — In sentencing a defendant who was convicted on three counts of aggravated child molestation and nine counts of child molestation, the trial court erred as a matter of law in merging the three aggravated child molestation convictions into the child molestation convictions, thereby violating the minimum sentencing requirements under O.C.G.A. § 17-10-6.1(a). Graham v. State, 239 Ga. App. 429, 521 S.E.2d 249 (1999).

Trial court's imposition of a ten year probated sentence on a count of aggravated child molestation was null and void; O.C.G.A. § 16-6-4(d)(1) imposed a ten year minimum sentence for the offense, and under O.C.G.A. § 17-10-6.1(b), because the offense was a serious violent felony, no portion of the ten year sentence was to be probated. Priest v. State, 281 Ga. App. 89, 635 S.E.2d 377 (2006).

Prior out of state convictions. — There was no merit to the defendant's

contention that the trial court erred in sentencing the defendant to life in prison without parole under the recidivist provisions of O.C.G.A. § 17-10-7(b)(2) since the defendant was convicted of a serious violent felony, armed robbery, and the state produced evidence that the defendant had previously been convicted in Florida of the offense of armed robbery, which, if committed in Georgia, would also have been a serious violent felony as defined in O.C.G.A. § 17-10-6.1(a). Cordy v. State, 257 Ga. App. 726, 572 S.E.2d 73 (2002).

Habeas court properly found that an inmate's prior West Virginia conviction for second-degree murder was a "serious violent felony" under O.C.G.A. § 17-10-6.1. Although the language of the West Virginia indictment, charging that the inmate did "feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder" the victim, did not directly track the language of Georgia's murder statute, O.C.G.A. § 16-5-1, the indictment was sufficient to show that the same offense, if committed in Georgia, would be a serious violent felony. Walker v. Hale, 283 Ga. 131, 657 S.E.2d 227, cert. denied, 555 U.S. 911, 129 S. Ct. 255, 172 L.Ed.2d 192 (2008).

Illegal sentence. — Although the evidence was sufficient to find the defendant guilty of murder beyond a reasonable doubt, because the defendant was convicted of capital murder, the defendant could not be sentenced under O.C.G.A. § 17-10-6.1(a), the recidivist statute; the illegal sentence could not be waived. Funderburk v. State, 276 Ga. 554, 580 S.E.2d 234 (2003).

Void sentence. — Because the defendant's questions and discovery claims were speculative, the defendant failed to show error in their exclusion or denial; however, because none of the prior offenses on which the recidivist sentencing was based was a serious violent felony as defined in O.C.G.A. § 17-10-6.1, the sentence of life imprisonment without parole for capital murder was void. Dempsey v. State, 279 Ga. 546, 615 S.E.2d 522 (2005).

Construing O.C.G.A. § 16-10-94(c), and in order to avoid rendering the terms "and involving another person" meaningless, the court had to interpret that language as imposing felony punishment when the person committed the tampering offense involving the prosecution or defense of a third person; hence, because the state did not present any allegations or evidence indicating that the defendant committed the tampering offense to prevent the apprehension or prosecution of anyone other than the defendant, the felony sentence imposed was void, and had to be vacated. English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006).

Life sentence properly imposed. — Because the state introduced certified copies of the defendant's prior serious violent felonies convictions, the trial court correctly imposed a sentence of life imprisonment without parole for murder under O.C.G.A. § 17-10-6.1(b). Henry v. State, 279 Ga. 615, 619 S.E.2d 609 (2005).

Motion to be removed from sex offender registry properly denied and first offender treatment inappropriate. — Trial court properly denied a defendant's motion to remove the defendant from the sex offender registry, or in the alternative to be resentenced as a first offender, as the United States Supreme Court had already determined that retroactive registration of sex offenders was nonpunitive and did not constitute an ex post facto law, and to resentence the defendant as a first offender would be in direct contravention of the plain language of O.C.G.A. §§ 17-10-6.1 and 42-1-12 since the defendant pled guilty but mentally ill to kidnaping a child under the age of 14, which was a serious violent felony. Finnicum v. State, 296 Ga. App. 86, 673 S.E.2d 604 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Constitutional limitations on power to parole. — As of January 1, 1995, there have been placed additional constitutional limitations on the power of the State Board of Pardons and Paroles to parole. The limitations include the inability to parole during the mandatory minimum sentence for the seven serious vio-

lent felonies set out in O.C.G.A. § 17-10-6.1, the inability to parole for sentences of life without parole as set out in O.C.G.A. §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in O.C.G.A. § 42-9-45(b), subject to the authority reserved by statute to the board in O.C.G.A. § 42-9-46 to consider for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

RESEARCH REFERENCES

ALR. — What constitutes "violent felony" for purpose of sentence enhancement under Armed Career Criminal Act (18 USCS § 924(e)(1)), 119 A.L.R. Fed. 319.

Construction and application of enhanced sentencing provision of Armed Career Criminal Act (ACCA), 18 U.S.C.A. § 924(e) — United States Supreme Court cases, 67 A.L.R. Fed. 2d 1.

C.J.S. — 16B C.J.S., Constitutional Law, §§ 1354, 1742.

24 C.J.S., Criminal Procedure and Rights of the Accused, § 2324 et seq.

27 C.J.S., District and Prosecuting Attorneys, § 50.

17-10-6.2. Punishment for sexual offenders.

(a) As used in this Code section, the term "sexual offense" means:

(1) Aggravated assault with the intent to rape, in violation of Code Section 16-5-21;

(2) False imprisonment, in violation of Code Section 16-5-41, if the victim is not the child of the defendant and the victim is less than 14 years of age;

(3) Sodomy, in violation of Code Section 16-6-2, unless subject to the provisions of subsection (d) of Code Section 16-6-2;

(4) Statutory rape, in violation of Code Section 16-6-3, if the person convicted of the crime is 21 years of age or older;

(5) Child molestation, in violation of subsection (a) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (b) of Code Section 16-6-4;

(6) Enticing a child for indecent purposes, in violation of Code Section 16-6-5, unless subject to the provisions of subsection (c) of Code Section 16-6-5;

(7) Improper sexual contact by employee or agent, as provided in Code Section 16-6-5.1;

(8) Incest, in violation of Code Section 16-6-22;

(9) A second or subsequent conviction for sexual battery, in violation of Code Section 16-6-22.1; or

(10) Sexual exploitation of children, in violation of Code Section 16-12-100, unless subject to the provisions of paragraph (2) or (3) of subsection (f) of Code Section 16-12-100.

(b) Except as provided in subsection (c) of this Code section, and notwithstanding any other provisions of law to the contrary, any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the Code section applicable to such sexual offense. No portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the court. Any such sentence shall include, in addition to the mandatory term of imprisonment, an additional probated sentence of at least one year; provided, however, that when a court imposes consecutive sentences for sexual offenses, the requirement that the court impose a probated sentence of at least one year shall only apply to the final consecutive sentence imposed. No person convicted of a sexual offense shall be sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42 or any other provision of Georgia law relating to the sentencing of first offenders.

(c)(1) In the court's discretion, the court may deviate from the mandatory minimum sentence as set forth in subsection (b) of this Code section, or any portion thereof, when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum or provided that:

(A) The defendant has no prior conviction of an offense prohibited by Chapter 6 of Title 16 or Part 2 of Article 3 of Chapter 12 of Title 16, nor a prior conviction for any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of offenses prohibited by Chapter 6 of Title 16 or Part 2 of Article 3 of Chapter 12 of Title 16;

(B) The defendant did not use a deadly weapon or any object, device, or instrument which when used offensively against a person would be likely to or actually did result in serious bodily injury during the commission of the offense;

(C) The court has not found evidence of a relevant similar transaction;

(D) The victim did not suffer any intentional physical harm during the commission of the offense;

(E) The offense did not involve the transportation of the victim; and

(F) The victim was not physically restrained during the commission of the offense.

(2) If the court deviates in sentencing pursuant to this subsection, the judge shall issue a written order setting forth the judge's reasons. Any such order shall be appealable by the defendant pursuant to Code Section 5-6-34, or by the State of Georgia pursuant to Code Section 5-7-1, unless the sentence imposed was pursuant to an agreement by the prosecuting attorney and the defendant.

(d) If the court imposes a probated sentence, the defendant shall submit to review by the Sexual Offender Registration Review Board for purposes of risk assessment classification within ten days of being sentenced and shall otherwise comply with Article 2 of Chapter 1 of Title 42.

History. — Code 1981, § 17-10-6.2, enacted by Ga. L. 2006, p. 379, § 21/HB 1059; Ga. L. 2013, p. 222, § 9/HB 349; Ga. L. 2017, p. 489, § 5/HB 341; Ga. L. 2019, p. 912, § 3/SB 9.

The 2019 amendment, effective July 1, 2019, rewrote paragraph (a)(7), which formerly read: "Sexual assault against persons in custody, in violation of Code Section 16-6-5.1;".

Editor's notes. — Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a

regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c)/HB 1059, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For annual survey on criminal law, see 66 Mercer L. Rev. 37 (2014). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

JUDICIAL DECISIONS

Construction with § 17-10-1. — Pursuant to O.C.G.A. § 16-13-31(g)(1), the trial court lacked the authority to probate or suspend sentences imposed against two defendants in unrelated criminal actions, and neither the 2004 nor the 2006 amendments to the general sentencing provisions under O.C.G.A. § 17-10-1(a)(1) were relevant; moreover, because O.C.G.A. §§ 17-10-6.1 and 17-10-6.2 were statutes that defined certain categories of crimes and provided the sentencing guidelines for those categories, it did not appear that the list of these two exceptions normally would have included § 16-13-31 or any other specific criminal statute, and any omission would be significant only with regard to a statute that defined classes or categories of crimes. Gillen v. State, 286 Ga. App. 616, 649 S.E.2d 832 (2007), cert. denied, No. S07C1780, 2007 Ga. LEXIS 809 (Ga. 2007).

"Sexual offense" applies only to section. — O.C.G.A. § 17-10-6.2 does not explain when registration as a sex offender is required but rather proscribes the mandatory minimum sentence for individuals convicted of a "sexual offense" and sets forth circumstances under which the trial court may depart from that sentence. The definition of "sexual offense" in § 17-10-6.2 has no application beyond that Code section. Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Interpretation of "any portion thereof" in sentencing. — Defendant's sentence for statutory rape was affirmed because the "any portion thereof" language in O.C.G.A. § 17-10-6.2(c)(1) indicated that the legislature's intent was not to allow the trial court to deviate from the entirety of § 17-10-6.2(b), but rather to grant the trial court discretion to deviate only from the mandatory minimum sentence guidelines. Tew v. State, 320 Ga. App. 127, 739 S.E.2d 423 (2013).

Not applicable to crime committed before effective date. — Because O.C.G.A. § 17-10-6.2 was not in effect when the defendant committed the charged crime, the trial court committed no error in failing to apply its provisions when resentencing the defendant. Richardson v. State, 334 Ga. App. 344, 779 S.E.2d 406 (2015).

Intentional physical harm explained. — Term intentional physical harm as used in O.C.G.A. § 17-10-6.2(c)(1)(D) refers to conduct by the defendant involving the intentional infliction of physical pain or injury upon the victim and that, consequently, evidence that the underlying sexual offense involved offensive and unwanted touching of the victim did not, standing alone, create a presumption of intentional physical harm that precluded a defendant from satisfying the criteria for release under the statute. State v. Randle, 331 Ga. App. 1, 769 S.E.2d 724 (2015).

Phrase "intentional physical harm," as it was used in O.C.G.A. § 17-10-6.2(c)(1)(D), providing conditions for release from the sex offender registry,

meant intentional physical contact that caused actual physical damage, injury, or hurt to the victim; a sex offender registrant was entitled to release from registration because the registrant's unwanted touching of a ten-year-old boy's penis did not constitute such physical damage, injury, or hurt. State v. Randle, 298 Ga. 375, 781 S.E.2d 781 (2016).

Following the interpretation of O.C.G.A. § 17-10-6.2(c)(1)(D) set forth by the Georgia Supreme Court in Randle II, the Georgia Court of Appeals concludes that the phrase intentional physical harm as used in the statute means a specific intent to commit the act that causes the physical damage, injury, or hurt to the victim. Strickland v. State, 347 Ga. App. 216, 818 S.E.2d 675 (2018).

Denial of petition for release from requirement to register. — Trial court did not abuse the court's discretion by denying the defendant's petition for release from the requirement to register as a sexual offender for life as the defendant failed to make a prima facie showing that the defendant was no longer a substantial risk of reoffending since an agency abuse case was pending against the defendant, which required a child of the defendant to not bring any children around the defendant, and the defendant characterized the conduct involving the child molestation of the defendant's three children as a mistake, which everyone makes. Miller v. State, 291 Ga. App. 478, 662 S.E.2d 261 (2008).

Trial court did not abuse the court's discretion by denying a defendant's petition seeking relief from the sexual offender registration requirements, pursuant to O.C.G.A. § 42-1-12(g)(1), because the defendant failed to provide a report from a licensed psychiatrist that allegedly set forth an opinion that the defendant posed no threat whatsoever of reoffending. Further, the defendant failed to provide any additional information regarding the underlying conduct for the out-of-state conviction that required the registration. In re Baucom, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

Defendant's confinement in a probation detention center was not equivalent to confinement in prison for purposes of O.C.G.A. § 42-1-12(g) and therefore the ten year waiting period for release from sex offender registration requirements did not begin running upon the defendant's release from the center, but from the date the defendant was released from probation. The trial court did not err in finding that the defendant was sentenced pursuant to O.C.G.A. § 17-10-6.2(c), although that section was not enacted until after the defendant's conviction. In re White, 306 Ga. App. 365, 702 S.E.2d 694 (2010).

Trial court erred when the court denied the defendant's petition for release from the requirement to register as a sex offender and failed to determine whether the defendant ever touched a woman who testified at the criminal trial without the woman's consent, thereby committing a sexual offense; thus, since neither the verdict nor the evidentiary ruling in the defendant's case conclusively established that the encounter was a "relevant similar transaction," further proceedings were necessary. Yelverton v. State of Georgia, 300 Ga. 312, 794 S.E.2d 613 (2016).

Motion to be removed from sex offender registry properly denied. — Trial court properly denied a defendant's motion to remove the defendant from the sex offender registry, or in the alternative to be resentenced as a first offender, as the United States Supreme Court had already determined that retroactive registration of sex offenders was nonpunitive and did not constitute an ex post facto law, and to resentence the defendant as a first offender would be in direct contravention of the plain language of O.C.G.A. §§ 17-10-6.1 and 42-1-12 since the defendant pled guilty but mentally ill to kidnaping a child under the age of 14, which was a serious violent felony. Finnicum v. State, 296 Ga. App. 86, 673 S.E.2d 604 (2009).

Release from registration requirements proper. — Trial court did not abuse the court's discretion in releasing the defendant from the sex offender registration requirements because under O.C.G.A. § 17-10-6.2(c)(1)(D) there was evidence that the underlying child molestation offense consisted of the defendant touching the genitals of the child victim with the defendant's hands, thus, the sex-

ual offense did not rise to the level of intentional physical harm so as to preclude release from the registration requirements. State v. Randle, 331 Ga. App. 1, 769 S.E.2d 724 (2015).

Considering relevant similar transaction when sentencing. — Trial court properly refused to deviate from the mandatory minimum sentence for child molestation under O.C.G.A. § 17-10-6.2(c)(1)(C) because the court found the defendant's conviction for sexual exploitation of children was a relevant similar transaction and the phrase relevant similar transaction under § 17-10-6.2(c)(1)(C) included a conviction for a sexual offense charged within the same indictment as the offense for which a deviation from the mandatory minimum sentence was considered. Evans v. State, 334 Ga. App. 104, 778 S.E.2d 360 (2015), aff'd, 300 Ga. 271, 794 S.E.2d 40 (Ga. 2016).

When the trial court considers sentencing on any specific count, a similar act not included in that count is independent to it such that, even if it is charged in the same indictment, it can be a "relevant similar transaction" so as to preclude a downward modification of sentencing; thus, the phrase "relevant similar transaction" used in O.C.G.A. § 17-10-6.2 includes sexual offenses charged in the same indictment as the crime for which sentence is imposed. Therefore, the commission of multiple separate sexual offenses may, or may not, be prosecuted as one action, but the presence of such relevant similar transactions prevents a downward modification of the sentence to be afforded such an offender, regardless of the specifics of the prosecution. Evans v. State, 300 Ga. 271, 794 S.E.2d 40 (2016).

When the defendant was indicted on one count of child molestation, that was alleged to have occurred between January 1, 2009 and August 31, 2009, and two counts of sexual exploitation of children, that were alleged to have occurred on or about January 21, 2010, because the acts that the defendant was convicted of committing were well separated in time and were not part of one sequence of events, the trial court was correct to consider the act of sexual exploitation of a child to be a relevant similar transaction that precluded a downward modification of sentencing for the crime of child molestation. Evans v. State, 300 Ga. 271, 794 S.E.2d 40 (2016).

When the defendant was indicted on one count of child molestation and two counts of sexual exploitation of children, the trial court did not err in opining that the court could not sentence the defendant to less than the mandatory minimum of five years to serve in prison for the child molestation conviction because the conviction for sexual exploitation of children was a relevant similar transaction, which precluded a downward deviation under O.C.G.A. § 17-10-6.2; and the trial court did not err in sentencing the defendant to 20 years, with five years to be served in prison, on the child molestation charge, and a concurrent sentence of five years to be served in prison for the sexual exploitation conviction. Evans v. State, 300 Ga. 271, 794 S.E.2d 40 (2016).

First offender consideration appropriate for rapist. — Based on the plain language of O.C.G.A. §§ 17-10-6.2(a)(4) and 42-8-60(d)(2), a defendant who commits statutory rape is excluded from first offender consideration only if the defendant was 21 years of age or older. Thus, a defendant who was 18 at the time of the offense and 19 at the time of the conviction was eligible for first offender consideration. Planas v. State, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

First offender consideration not appropriate. — Because the defendant was not entitled to first offender treatment for the crimes of child molestation and enticing a child for indecent purposes, to which the defendant pled guilty, the defendant's claims that trial counsel was deficient for misinforming the defendant about the defendant's eligibility for and failing to request first offender treatment were without merit. Harris v. State, 325 Ga. App. 568, 754 S.E.2d 148 (2014), recons. denied, 2019 U.S. App. LEXIS 30410 (11th Cir. Ga. 2019), overruled on other grounds by Collier v. State, 834 S.E.2d 769, 2019 Ga. LEXIS 708 (Ga. 2019).

Sentencing discretion. — Trial court erred in determining that the court was without discretion to deviate from the minimum sentencing requirements of

O.C.G.A. § 17-10-6.2(b), and the court of appeals erred in affirming that ruling because the defendants were charged with possession of material in violation of O.C.G.A. § 16-12-100(b)(8) and, therefore, it would have to be shown that the child victims in the images that were stored in the defendants' computers were physically restrained at the same time that the defendants possessed the offending material in order for O.C.G.A. § 17-10-6.2(c)(1)(F) to exclude the trial court from having the sentencing discretion set forth in O.C.G.A. § 17-10-6.2(c)(1), but no such evidence existed; O.C.G.A. § 17-10-6.2(c)(1)(F) precludes the trial court from exercising sentencing discretion when the victim was physically restrained during the commission of the offense, and the use of the words "during the commission of the offense" in O.C.G.A. § 17-10-6.2(c)(1)(F) must be given effect. Hedden v. State, 288 Ga. 871, 708 S.E.2d 287 (2011).

Trial court erred in sentencing the defendant on each of the defendant's three convictions for child molestation to a term of confinement rather than exercising the court's discretion and imposing split sentences of confinement and probation because the defendant had no prior conviction for child molestation. Watkins v. State, 336 Ga. App. 145, 784 S.E.2d 11 (2016).

Defendant's sentence on Count 2 of six years, to serve five, fell within the applicable statutory range of sentencing, according to the provisions of the law existing in 2003 and 2004, for a first offense of child molestation; thus, the defendant's sentence was legally authorized and not subject to review. Wilder v. State, 343 Ga. App. 110, 806 S.E.2d 200 (2017).

Sentencing errors. — Resentencing on defendant's convictions for child molestation and statutory rape was necessary because the trial court failed to impose split sentences for child molestation, and the probation only sentences for statutory rape were void because the trial court was precluded from probating any portion of the sentence for statutory rape. Daniels v. State, 344 Ga. App. 190, 809 S.E.2d 473 (2018).

Defendant's sentences on four incest counts were void because the sentences did not each include a split sentence of incarceration and probation as required by the former version of O.C.G.A. § 17-10-6.2(b) applicable at the time the defendant committed those offenses. Torres v. State, 353 Ga. App. 470, 838 S.E.2d 137 (2020).

Imposition of hybrid sentence. — Discretion afforded to trial courts at sentencing included the authority to impose partially consecutive and partially concurrent sentences, such that the probationary component of a split sentence could be served concurrently with a period of confinement imposed by the sentence on another count. State v. Riggs, 301 Ga. 63, 799 S.E.2d 770 (2017).

Sentence violated minimum sentencing requirements. — In a child molestation case, the trial court erred in sentencing the defendant to ten years to serve on Count 1 and probation on the remaining four counts, with the first 10 years to be served in confinement and the remainder to be served on probation, and the defendant's sentence was void because the defendant was not properly sentenced under the sexual offenders punishment statute as the sentence did not consist of a minimum term of imprisonment for child molestation, followed by an additional probated sentence of at least one year on each offense; no portion of the mandatory minimum sentence imposed could be suspended, stayed, or probated; and the trial court did not enter written findings necessary to deviate from the mandatory minimum. Brown v. State, 345 Ga. App. 622, 814 S.E.2d 738 (2018).

Application of split-sentence requirement. — Split-sentence requirement applied to each sexual offense count, not to the overall sentence as alleged by the state. State v. Riggs, 301 Ga. 63, 799 S.E.2d 770 (2017).

Failure to impose a "split sentence". — Because the trial court sentenced the defendant on each count of child molestation to twenty years imprisonment, and did not impose a "split sentence" including probation as required, the sentences were void. Spargo v. State, 332 Ga. App. 410, 773 S.E.2d 35 (2015).

Defendant's sentences were void be-

cause the trial court failed to impose split sentences on the defendant's child molestation convictions, as required by O.C.G.A. § 17-10-6.2(b), which required a total sentence that included at least a mandatory-minimum five-year prison sentence and one year of probation. Jackson v. State, 338 Ga. App. 509, 790 S.E.2d 295 (2016).

Trial court was required to impose a sentence for the defendant's child molestation conviction that included at least the mandatory minimum of five years to serve in prison plus at least one year of probation, or to issue a written order setting forth its reasons for imposing a sentence below the statutory minimum, but the defendant was sentenced only to probation on the child molestation count, and no written findings were made by the trial court to support the deviation from the mandatory minimum term of imprisonment; thus, the defendant raised a colorable claim that the defendant's sentence was void in the defendant's motion to vacate void sentence. Hood v. State, 343 Ga. App. 230, 807 S.E.2d 10 (2017).

Trial court committed error requiring that the defendant's sentence be vacated when the court sentenced the defendant to 20 years in prison but failed to include at least one year of probation as required by statute. Hughes v. State, 341 Ga. App. 594, 802 S.E.2d 30 (2017).

Defendant's sentence for child molestation was improper because the sentence failed to include a split sentence. Underwood v. State, 344 Ga. App. 403, 810 S.E.2d 315 (2018).

Defendants convicted of the rape and molestation of one defendant's step-daughters failed to show their separate counsel were ineffective; however, their sentences failed to include a split sentence as required by former O.C.G.A. § 17-10-6.2 and failed to include the five-year statutory minimum for child molestation under O.C.G.A. § 16-6-4(b)(1). The 2017 amendments to § 17-10-6.2 did not apply retroactively. Hardin v. State, 344 Ga. App. 378, 810 S.E.2d 602 (2018).

Trial court erred when the court sentenced the defendant on the first count to ten years in prison with no probation because a split sentence was required. Cobb v. State, 843 S.E.2d 912, No. A19A2170, 2020 Ga. App. LEXIS 297 (2020).

Resentencing on the sodomy counts was required because the trial court failed to impose a split sentence. Jones v. State, 354 Ga. App. 568, 841 S.E.2d 112 (2020).

Corrected sentence remained void because the trial court failed to impose a split sentence on the statutory rape and child molestation charges because those offenses were subject to the split sentence requirements, which required split sentences for each count. When the trial court resentenced the defendant in 2018, the court was still required to impose a split sentence on each count as required by the statute in effect at the time the defendant committed the crimes. Martinez-Chavez v. State, 352 Ga. App. 142, 834 S.E.2d 139 (2019).

Trial court's denial of the defendant's motion to vacate sentences for child molestation, aggravated child molestation, and incest was upheld because to apply the split-sentencing provisions to pre-2006 law would require the court to re-write applicable statutes to make them subject to statutory provisions that did not even exist at the time the statutes were enacted, which the court was prohibited to do without contravening the plain meaning of the statutory text. Bryson v. State, 350 Ga. App. 206, 828 S.E.2d 450 (2019).

Downward departure proper. — State's contention that the defendant's previous acts of viewing pornography on a cell phone app should have been treated as relevant similar transactions so as to divest the trial court of the court's discretion to downwardly deviate from the mandatory minimum sentence was rejected because the state presented scant evidence about the defendant's previous conduct other than to show when the defendant first started using the app and the trial court gave sound reasons why the court rejected the state's assertion. State v. McCauley, 353 Ga. App. 94, 834 S.E.2d 567 (2019).

Denial of downward departure proper. — Because the acts that the defendant was convicted of committing were separated in time and were not part

of one sequence of events, the trial court was correct to consider one act of child molestation to be a "relevant similar transaction" that precluded a downward modification of sentencing for the other crime of child molestation. Koroma v. State, 350 Ga. App. 530, 827 S.E.2d 903 (2019), cert. denied, 2020 Ga. LEXIS 35 (Ga. 2020).

O.C.G.A. § 17-10-6.2(a) provided that the term "sexual offense" included the crime of child molestation, but did not include aggravated child molestation or cruelty to children; thus, the trial court did not err in failing to apply the split sentence provision in § 17-10-6.2(b) to the defendant's sentences for aggravated child molestation and cruelty to children; however, the 20-year sentence imposed for child molestation did not include at least one year of probation and was void. Whitelock v. State, 349 Ga. App. 28, 825 S.E.2d 426 (2019).

Resentencing on rape charge appropriate. — Because the defendant could have been convicted of statutory rape based on acts committed both before or after the change in the law, the defendant's sentence for statutory rape was vacated and the case was remanded for resentencing pursuant to O.C.G.A. § 17-10-6.2. Bryson v. State, 350 Ga. App. 206, 828 S.E.2d 450 (2019).

No application to attempted crimes. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err by refusing to follow the guidelines set forth in O.C.G.A. § 17-10-6.2 for sexual offenses because the statute only applied to completed crimes, not to attempted crimes. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Cited in Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012); Hayward v. Danforth, 299 Ga. 261, 787 S.E.2d 709 (2016); State v. Cash, 302 Ga. 587, 807 S.E.2d 405 (2017); Owens v. State, 353 Ga. App. 848, 840 S.E.2d 70 (2020); Slack v. State, 354 Ga. App. 727, 841 S.E.2d 231 (2020).

RESEARCH REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d, Mentally Impaired Persons, § 144 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2183 et seq.

ALR. — Validity, construction, and application of state statute including "sexually motivated offenses" within definition of sex offense for purposes of sentencing or classification of defendant as sex offender, 30 A.L.R.6th 373.

Removal of adults from state sex offender registries, 77 A.L.R.6th 197.

17-10-6.3. Disposition of cases currently under review by three-judge panel; duties and responsibilities of the president of The Council of Superior Court Judges of Georgia with respect to abolishing the three-judge panel.

(a) As used in this Code section, the term "three-judge panel" means the three-judge panel that was created and existed pursuant to the former provisions of Code Section 17-10-6 as it existed on June 30, 2007, which reviewed certain sentences to determine if a sentence was excessively harsh and what relief, if any, should be given.

(b) The right of a defendant to have a sentence reviewed by a three-judge panel shall be terminated for sentences imposed by a trial or appellate court on or after July 1, 2007. No new application for review of a sentence shall be transmitted to the three-judge panel on or

after July 1, 2007, except for cases in which a sentence was imposed prior to July 1, 2007.

(c) No new application for review of a sentence shall be accepted by the three-judge panel unless such application has been received by the three-judge panel on or before September 1, 2007. Any sentence that has an application for review with the three-judge panel pending on September 1, 2007, shall have such review completed by the three-judge panel by November 1, 2008.

(d) It shall be the duty of the president of The Council of Superior Court Judges of Georgia to cause all administrative measures which may be necessary to conclude the business of the three-judge panel to be completed no later than January 1, 2009. Such administrative, clerical, or secretarial personnel as may be assigned to provide support for the three-judge panel may continue to be employed for the purpose of providing support to the president of The Council of Superior Court Judges of Georgia until January 1, 2009.

(e) No later than January 1, 2009, all records and documents relating to the activities of the three-judge panels during the period July 1, 1974, through November 1, 2008, shall be transmitted to the Division of Archives and History for retention in accordance with Article 5 of Chapter 18 of Title 50, the "Georgia Records Act." All equipment, supplies, and materials which the president of The Council of Superior Court Judges of Georgia determines are excess or surplus shall be distributed by the president to the judges of the superior courts for use in the performance of their official duties. Any fees or expenses due to any clerk, superior court judge, or other person as a result of the three-judge panel shall be paid out of such funds as are appropriated for the operation of the superior courts during fiscal year 2009.

History. — Code 1981, § 17-10-6.3, enacted by Ga. L. 2007, p. 595, § 3/HB 197; Ga. L. 2013, p. 594, § 2-6/HB 287.

Editor's notes. — Ga. L. 2007, p. 595, § 5/HB 197, not codified by the General Assembly, provides that this Code section shall apply to all trials which occur on or after July 1, 2007.

JUDICIAL DECISIONS

Former § 17-10-6. — Trial court properly ruled that former O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly did not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. Sentence Review Panel v. Moseley, 284 Ga. 128, 663 S.E.2d 679 (2008).

Out of time sentence review granted under former § 17-10-6. — Trial court erred in denying the defendant's motion to hold judgment void and reinstating the defendant's 20-year sentence for voluntary manslaughter because the defendant's application for an out-of-time sentence review was granted under former O.C.G.A. § 17-10-6(a), thus, the trial court's reinvested subject matter

jurisdiction over the question of the sentencing was improper. McClendon v. State, 318 Ga. App. 676, 734 S.E.2d 505 (2012).

Former § 17-10-6 not to be applied retroactively. — Trial court erred by holding that the unconstitutionality of former O.C.G.A. § 17-10-6 applied retroactively to an inmate whose sentence for voluntary manslaughter was reduced by the Georgia Sentence Review Panel and to other defendants similarly situated as the trial court should have applied the ruling prospectively only. Sentence Review Panel v. Moseley, 284 Ga. 128, 663 S.E.2d 679 (2008).

Denial of motion to withdraw guilty plea proper. — Denial of the defendant's motion to withdraw a guilty plea pursuant to Ga. Unif. Super. Ct. R. 33.12(A) was proper because the defendant failed to establish that but for defense counsel's failure to inform the defendant of the repeal of former O.C.G.A. § 17-10-6, which allowed for a sentence review, the defendant would have insisted on a trial; further, the defendant was aware of the maximum sentence, and the availability of a sentence review did not alter the possibility that the defendant could have potentially been required to serve up to 66 years in prison. The record supported a finding that the defendant entered the plea knowingly, intelligently, and voluntarily. Vaughn v. State, 298 Ga. App. 669, 680 S.E.2d 680 (2009).

Cited in Askew v. State, 318 Ga. App. 454, 734 S.E.2d 222 (2012).

17-10-7. Punishment of repeat offenders; punishment and eligibility for parole of persons convicted of fourth felony offense.

(a) Except as otherwise provided in subsection (b) or (b.1) of this Code section, any person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

(b)(1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.

(2) Except as provided in subsection (e) of Code Section 17-10-6.1, any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph

shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution.

(b.1) Subsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of subsection (a), paragraph (1) of subsection (i), or subsection (j) of Code Section 16-13-30.

(c) Except as otherwise provided in subsection (b) or (b.1) of this Code section and subsection (b) of Code Section 42-9-45, any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

(d) For the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) This Code section is supplemental to other provisions relating to recidivous offenders.

History. — Laws 1833, Cobb's 1851 Digest, p. 840; Code 1863, § 4562; Code 1868, § 4582; Code 1873, § 4676; Code 1882, § 4676; Penal Code 1895, § 1042; Penal Code 1910, § 1068; Code 1933, § 27-2511; Ga. L. 1953, Nov.-Dec. Sess., p. 289, § 1; Ga. L. 1974, p. 352, § 5; Ga. L. 1983, p. 3, § 14; Ga. L. 1984, p. 760, § 2; Ga. L. 1994, p. 1959, § 12; Ga. L. 2010, p. 563, § 1/HB 901; Ga. L. 2012, p. 899, § 4-4/HB 1176; Ga. L. 2013, p. 222, § 10/HB 349; Ga. L. 2015, p. 519, § 2-1/HB 328.

Cross references. — Effect of third conviction for abandonment of child, § 19-10-1. Parole generally, T. 42, C. 9.

Editor's notes. — Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned

time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act." This Act became effective January 1, 1995.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in State v. Allmond, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in State v. Allmond, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Ga. L. 2015, p. 519, § 9-1/HB 328, not codified by the General Assembly, provides, in part, that: "The provisions of Part II of this Act shall be given retroactive effect to those sentences imposed before the effective date of Part II of this Act." The effective date of this Act is May 5, 2015.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005); 58 Mercer L. Rev. 83 (2006). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

For comment regarding presentation of guidance of prior convictions in trial of criminal recidivist in light of State v. Meyer, 258 Wisc. 326, 46 N.W.2d 341 (1951), see 14 Ga. B.J. 235 (1951).

JUDICIAL DECISIONS

Analysis

General Consideration
Allegation and Proof of Prior Convictions
Disclosure of Prior Convictions to Jury

General Consideration

Editor's notes. — Many of the cases noted below were decided prior to the 1994 amendment of this Code section.

Constitutionality. — O.C.G.A. § 17-10-7 does not constitute cruel and unusual punishment under the federal or state constitutions and does not violate an individual's due process or equal protection rights. Ortiz v. State, 266 Ga. 752, 470 S.E.2d 874 (1996); Gibson v. State, 233 Ga. App. 838, 505 S.E.2d 63 (1998); Worthy v. State, 237 Ga. App. 565, 515 S.E.2d 869 (1999); Brabham v. State, 240 Ga. App. 506, 524 S.E.2d 1 (1999); Shuman v. State, 244 Ga. App. 335, 535 S.E.2d 526 (2000).

O.C.G.A. § 17-10-7 does not violate the constitutional prohibition against cruel and unusual punishment or deprive defendants of due process. Hindman v. State, 234 Ga. App. 758, 507 S.E.2d 862 (1998).

Application of O.C.G.A. § 17-10-7(c) to defendant did not constitute application of an ex post facto law; enactment of an effective date provision in the Sentence Reform Act had no effect on the applicability of former subsection (b) (now subsection (c)) to sentences imposed prior to the effective date. Moore v. Ray, 269 Ga. 457, 499 S.E.2d 636 (1998).

O.C.G.A. § 17-10-6.1, which dictates the punishment for serious violent offenders, in conjunction with O.C.G.A. § 17-10-7, the sentencing statute applicable to recidivist armed robbers, does not violate either the federal or the state constitutions. State v. Vanburen, 210 Vt. 293, 214 A.3d 791 (2019).

Imposition of a mandatory life sentence under O.C.G.A. § 17-10-7 does not violate the Eighth Amendment proscription against cruel and unusual punishment. Howard v. State, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Trial court did not unfairly enhance the defendant's sentence for armed robbery based on a previous aggravated child molestation conviction committed when the defendant was 13 years old as: (1) under O.C.G.A. § 16-3-1, the legislature made the age of 13 the age of criminal responsibility in Georgia; (2) the legislature did not elect to carve out an exception that would exempt youthful offenders from the sentencing provisions of O.C.G.A. § 17-10-7(b)(2); and (3) the Georgia Supreme Court upheld the constitutionality of the "two violent felonies" statute, § 17-10-7(b)(2). Lee v. State, 267 Ga. App. 834, 600 S.E.2d 825 (2004).

Conviction for possession of a firearm by a convicted felon could not stand because the same prior conviction could not support both recidivist sentencing and a conviction of possession of a firearm by a convicted felon, and also a nolo contendere plea could not serve as proof of a prior conviction for charge of possession of a firearm by a convicted felon; prior conviction remained available to support enhanced sentencing as a recidivist, however. Wyche v. State, 291 Ga. App. 165, 661 S.E.2d 226 (2008), cert. denied, No. S08C1413, 2008 Ga. LEXIS 914 (Ga. 2008).

Effect of 2012 amendment. — O.C.G.A. § 17-10-7 was amended in 2012 to make subsection (c) no longer applicable to a sentence imposed for simple possession of a controlled substance in violation of O.C.G.A. § 16-13-30 (a). Barber v. State, 350 Ga. App. 309, 827 S.E.2d 733 (2019).

Purpose of O.C.G.A. § 17-10-7 is to see that persons with at least three prior felony convictions serve the maximum time imposed in a sentence for a subsequent felony conviction. Aldridge v. State, 158 Ga. App. 719, 282 S.E.2d 189 (1981).

Defendant's sentence of 30 years without parole for trafficking in cocaine was a sentence allowed under O.C.G.A. § 16-13-30(d), and hence, not illegal or void. Defendant could not have been sentenced under O.C.G.A. § 17-10-7(a), or the defendant's sentence would have been 40 years. Because the sentence was not void, it was not subject to modification under O.C.G.A. § 17-10-1(f). State v. Blue, 304 Ga. App. 471, 696 S.E.2d 692 (2010).

General Consideration (Cont'd)

Separation of powers. — O.C.G.A. § 17-10-7 does not violate the separation of powers doctrine of the state constitution. Brabham v. State, 240 Ga. App. 506, 524 S.E.2d 1 (1999).

Ex post facto clause not violated. — Because the offense for which the defendant was sentenced occurred after the effective date of O.C.G.A. § 17-10-7, there was no violation of the ex post facto clause even though the defendant's previous conviction occurred before that date. Johnson v. State, 229 Ga. App. 400, 493 S.E.2d 926 (1997).

Decision of the State Board of Pardons and Paroles to eliminate the plaintiff's parole eligibility which constituted a change in the policy of the Board to grant parole to persons convicted under the recidivist statute did not violate the ex post facto clause of the United States Constitution. Metheny v. Hammonds, 216 F.3d 1307 (11th Cir. 2000), cert. denied, 531 U.S. 1196, 121 S. Ct. 1200, 149 L. Ed. 2d 114 (2001).

When it was clear from the record that the defendant was sentenced on two separate accusations in 2001 that were not consolidated for trial, under O.C.G.A. § 17-10-7(d), the trial court properly refused to treat the two charges as one offense for purposes of recidivism. Although trial counsel testified that at the time it was the policy of the district attorney's office to encourage defendants to plead on multiple accusations on the same day and to represent to them that those pleas would only count as one offense for purposes of recidivism, it was the law as provided in the applicable statutes rather than local practices that governed. Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849 (2008).

Decision limiting the parole board's authority to grant parole. — Decision in Freeman v. State, 264 Ga. 27, 440 S.E.2d 181 (1994)--limiting the parole board's authority of the State Board of Pardons and Paroles to grant parole--and ultimately resulting in the Board's elimination of plaintiffs' parole eligibility did not violate the due process clause of the United States Constitution. Metheny v. Hammonds, 216 F.3d 1307 (11th Cir. 2000), cert. denied, 531 U.S. 1196, 121 S. Ct. 1200, 149 L. Ed. 2d 114 (2001).

Construed with § 42-7-1 et seq. — Youthful Offender Act (O.C.G.A. § 42-7-1 et seq.), unlike the First Offender Act (O.C.G.A. § 42-8-60 et seq.), does not authorize the discharge of a felony conviction and a conviction under the Youthful Offender Act may serve as a predicate for sentencing under O.C.G.A. § 17-10-7. Lazenby v. State, 221 Ga. App. 148, 470 S.E.2d 526 (1996).

Construed with § 16-13-30. — Both O.C.G.A. §§ 16-13-30(d) and 17-10-7 give direction as to the imposition of punishment under specified aggravated circumstances; however, § 16-13-30(d) increases the maximum from 15 years to life for the subsequent offense, whereas O.C.G.A. § 17-10-7 does not increase the maximum but adds weight in favor of its imposition. Wainwright v. State, 208 Ga. App. 777, 432 S.E.2d 555 (1993).

Prior conviction under O.C.G.A. § 16-13-32.5(b) should be viewed the same as a prior conviction under O.C.G.A. § 16-13-30 for purposes of sentencing under the recidivist statute, O.C.G.A. § 17-10-7. Mikell v. State, 231 Ga. App. 85, 498 S.E.2d 531 (1998).

O.C.G.A. § 16-13-30(d) is interpreted as providing that, although the court may not sentence second time offenders under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(a), the court may sentence second time offenders under both § 16-13-30(d) and any remaining provisions of § 17-10-7. Blackwell v. State, 237 Ga. App. 896, 516 S.E.2d 787 (1999).

Because O.C.G.A. § 17-10-7 is the only recidivist provision that governs the situation when a defendant who has a prior felony conviction for armed robbery and who is subsequently convicted of a felony for selling cocaine, the trial court correctly applied that section in sentencing the defendant. Harden v. State, 239 Ga. App. 700, 521 S.E.2d 829 (1999).

In a prosecution for the sale of cocaine, the court was not required to impose a life sentence upon the defendant who had five previous drug convictions. The court retained the discretion either to impose any sentence within the statutory mandatory

minimum and maximum sentence range or to impose a life sentence. Scott v. State, 248 Ga. App. 542, 545 S.E.2d 709 (2001).

Because the defendant was found guilty of possessing cocaine with the intent to distribute, defendant's third conviction for the possession of a controlled substance with the intent to distribute and the defendant's ninth felony conviction, the sentencing judge had the discretion to sentence the defendant under O.C.G.A. § 16-13-30(d) to "any sentence within the statutory mandatory minimum and maximum sentence range or to impose a life sentence" and was not required to sentence the defendant to life imprisonment under O.C.G.A. § 17-10-7(a). Mann v. State, 273 Ga. 366, 541 S.E.2d 645 (2001).

Because the defendant entered a guilty plea to possession of cocaine with intent to distribute, and the state introduced copies of a prior out-of-state drug conviction and a prior federal drug conviction, the trial court erred in sentencing the defendant to 30 years under O.C.G.A. §§ 16-13-30(d) and 17-10-7(a). Papadoupalos v. State, 249 Ga. App. 300, 548 S.E.2d 59 (2001).

Trial court's decision to probate a portion of the sentence imposed on the defendant for the defendant's second conviction for possession of cocaine with intent to distribute, requiring the defendant to serve only seven years, was in direct contravention to O.C.G.A. § 16-13-30(d), which stated specifically that a second time offender was to have been imprisoned for not less than ten years; by the plain reading of § 16-13-30(d), a defendant must have served at least ten years in prison, and O.C.G.A. § 17-10-7(c), which applied to a second offense under § 16-13-30(b), required that the time have been served without parole. State v. Jones, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

Trial court did not err in stacking two recidivist sentencing provisions by first sentencing the defendant to life in prison under former O.C.G.A. § 16-13-30(d), which at the time of the defendant's crime and sentencing required a life sentence for repeat offenders of § 16-13-30(b), and by then sentencing the defendant to life without parole under O.C.G.A. § 17-10-7(c), which required that upon conviction of a fourth felony, the defendant was not eligible for parole. Butler v. State, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Court of Appeals properly affirmed the imposition of a life sentence without parole against the defendant as a recidivist, under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(c), as the defendant was convicted and sentenced before the effective date of the 1996 amendment to § 16-13-30(d), thus making a life sentence the only sentence that the trial court could impose; further, because the instant felony conviction was the defendant's fourth, § 17-10-7(c) applied to the sentence by operation of subsection (e) of that statute, as enacted in 1994, so as to require the defendant to serve the sentence imposed by the trial court without the possibility of parole. Butler v. State, 281 Ga. 310, 637 S.E.2d 688 (2006).

Upon conviction for the sale of cocaine, the trial court properly sentenced the defendant under O.C.G.A. § 17-10-7(c) and not O.C.G.A. § 17-10-1(a)(1), to the minimum sentence of ten years imprisonment under O.C.G.A. § 16-13-30(d), without the possibility of parole, as the defendant had three prior felony convictions. Fortson v. State, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Trial court properly denied the defendant's plea withdrawal motion as the court fully informed the defendant that the sentence the court intended on imposing would be without parole, despite failing to advise the defendant of that fact prior to the acceptance of the plea; moreover, as methamphetamine was a Schedule II non-narcotic drug, the more general provisions of O.C.G.A. §§ 16-13-30(e) and 17-10-7, and not O.C.G.A. § 16-13-30(c), applied. Thomas v. State, 287 Ga. App. 500, 651 S.E.2d 801 (2007).

Construed with § 16-13-31. — Recidivist sentence imposed upon the defendant was upheld on appeal, pursuant to O.C.G.A. §§ 16-13-31(a)(1)(A) and (h) and 17-10-7(a), based on evidence of the defendant's 1993 convictions; hence, the defendant was properly sentenced to the longest period of time prescribed for the punishment of the offense and ordered to serve the mandatory minimum of ten years. Smith v. State, 282 Ga. App. 317,

General Consideration (Cont'd)

638 S.E.2d 440 (2006).

Section should be construed with § 40-5-75. — Because O.C.G.A. § 40-5-75 is a recidivist statute and not an habitual traffic offense violator statute, that statute should be construed together with O.C.G.A. § 17-10-7, such that multiple counts of a single indictment are deemed as a single conviction. Bowman v. Griffith, 204 Ga. App. 851, 420 S.E.2d 795 (1992).

Construed with § 17-10-2(b). — Because sentencing under O.C.G.A. § 17-10-7(a) is a matter of discretion, O.C.G.A. § 17-10-2(b) requires a felony defendant be given "unmistakable advance warning" that prior convictions will be used in aggravation of punishment. Armstrong v. State, 209 Ga. App. 796, 434 S.E.2d 560 (1993).

Although the state's original notice to the defendant's counsel of the state's intention to admit prior felony convictions as aggravators for sentencing purposes was amended on the day of trial to include new convictions that were not previously listed, the court found that defendant's counsel was timely served with notice of the prior convictions, pursuant to O.C.G.A. §§ 17-10-2(a) and 17-10-7(b), because the defendant had time to review the convictions prior to the commencement of the trial; it was accordingly proper that the trial court considered the convictions in determining the appropriate sentence. Howard v. State, 262 Ga. App. 198, 585 S.E.2d 164 (2003).

Construed with § 16-7-1. — Because O.C.G.A. § 16-7-1(b) provides a specific sentencing scheme for defendants convicted more than once of burglary, the general recidivist scheme of O.C.G.A. § 17-10-7 does not apply. Norwood v. State, 249 Ga. App. 507, 548 S.E.2d 478 (2001).

Since the defendant pled guilty to burglary and had a prior felony conviction for forgery in addition to a prior burglary conviction, the defendant was, for sentencing purposes, a three-time felony offender under the general recidivist provisions of O.C.G.A. § 17-10-7(a) rather than a mere two-time burglary offender under the specific recidivist provisions of O.C.G.A. § 16-7-1(b); accordingly, the trial court properly found that the court was required to sentence the defendant as a recidivist under § 17-10-7 to the maximum period of confinement allowed for burglary, which was 20 years. Stephens v. State, 259 Ga. App. 564, 578 S.E.2d 179 (2003).

Because the defendant had multiple prior convictions in addition to burglary convictions, the existence of the prior convictions in addition to those for burglary removed the case from the purview of O.C.G.A. § 16-7-1(b); thus, the defendant was properly sentenced under O.C.G.A. § 17-10-7. Goldberg v. State, 280 Ga. App. 600, 634 S.E.2d 419 (2006), aff'd, 282 Ga. 542, 651 S.E.2d 667 (2007).

When O.C.G.A. §§ 16-7-1(b) and 17-10-7(a) are harmonized, the former specific recidivist statute applies when the defendant is a habitual burglar having only prior convictions for burglary, whereas the latter general recidivist statute applies when the defendant is a habitual felon with prior convictions for other crimes; § 17-10-7(e) provides that the general recidivist sentencing statute for habitual felons is supplemental to other recidivist sentencing statutes, such as § 16-7-1(b), and when the Georgia General Assembly enacted § 16-7-1(b), the General Assembly did not provide that O.C.G.A. § 17-10-7 would not be applicable to subsequent convictions for burglary. Goldberg v. State, 282 Ga. 542, 651 S.E.2d 667 (2007), cert. denied, 554 U.S. 905, 128 S. Ct. 2932, 171 L. Ed. 2d 868 (2008).

Construing O.C.G.A. §§ 16-7-1(b) and 17-10-7(a) together, the Georgia General Assembly intends that a habitual burglar be given the benefit of the trial court's sentencing discretion, but it further intends that a habitual burglar who is also a habitual felon be subject to the imposition of the longest sentence prescribed for the subsequent offense for which he or she was convicted; because Mikell v. State, 270 Ga. 467 (510 SE2d 523) (1999) failed to consider O.C.G.A. § 17-10-7(e) and its effect on other recidivist sentencing provisions, it reached an erroneous result and is therefore overruled. Goldberg v. State, 282 Ga. 542, 651 S.E.2d 667 (2007), cert. denied, 554 U.S. 905, 128 S. Ct. 2932, 171 L. Ed. 2d 868 (2008).

Trial court did not abuse the court's discretion in sentencing a defendant as a recidivist under O.C.G.A. § 17-10-7 because the trial court imposed a modified sentence of 20 years to serve ten upon the defendant; the sentence, as modified, was proper under O.C.G.A. § 16-7-1(b), the specific sentencing scheme applicable to a defendant convicted of burglary having two prior burglary convictions. Williams v. State, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Construed with § 16-8-14. — Because there was no language within O.C.G.A. § 16-8-14(b)(1)(c) which specifically governed fourth-time shoplifting offenders or that blocked the application of the general recidivist provisions set forth in O.C.G.A. § 17-10-7(c), the trial court's imposition of a recidivist's sentence under § 17-10-7(c), as opposed to the specific provision for shoplifting contained in O.C.G.A. § 16-8-14(b)(1)(C), was upheld. Patrick v. State, 284 Ga. App. 472, 644 S.E.2d 309 (2007).

Defendant was wrongfully sentenced as a recidivist under the state's general recidivist statute, O.C.G.A. § 17-10-7(c), rather than the specific recidivist statute applicable to shoplifting offenses, O.C.G.A. § 16-8-14(b)(1)(C) because the record showed that the defendant had three prior felony shoplifting convictions and one prior misdemeanor shoplifting conviction at the time of trial, but there was no evidence of felony convictions for other crimes. Wester v. State, 294 Ga. App. 263, 668 S.E.2d 862 (2008).

Construction with O.C.G.A. § 16-8-41. — Trial court did not err by imposing the maximum sentence, which was life imprisonment, upon the defendant's conviction for armed robbery as the court lacked the authority to probate or suspend any part of that sentence pursuant to O.C.G.A. § 17-10-7 based on the defendant's prior felony conviction. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Recidivist punishment under O.C.G.A. § 16-13-30(d) not precluded by O.C.G.A. § 17-10-7(c). — Imposition of mandatory life sentences as recidivist punishment for convictions under each count of an indictment charging six separate offenses of selling cocaine was not precluded by provisions of the statute placing limitations on the use of prior convictions as the basis for imposing enhanced recidivist punishment. McCoy v. State, 210 Ga. App. 672, 437 S.E.2d 366 (1993).

O.C.G.A. § 17-10-7(c) does not apply to capital felonies. — Defendant was convicted of murder and sentenced to life without possibility of parole which was a void sentence as a matter of law, even if the issue was not raised at trial. Funderburk v. State, 276 Ga. 554, 580 S.E.2d 234 (2003).

Recidivist punishment. — Trial court did not err in sentencing the defendant as a recidivist after considering O.C.G.A. § 17-10-7(a) and (c) together. Reason v. State, 353 Ga. App. 266, 836 S.E.2d 223 (2019).

Life without parole could not be imposed upon conviction of malice murder. — Because O.C.G.A. § 17-10-7(c) expressly excluded capital felonies from the statute's coverage, and malice murder was a capital felony, a sentence of life imprisonment without parole could not be imposed upon a malice murder conviction. Miller v. State, 283 Ga. 412, 658 S.E.2d 765 (2008).

Inclusion of prior convictions in indictment read to jury is not unconstitutional. — Procedure under former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7), whereby the defendant's prior convictions are placed in the indictment and read to a jury before guilt or innocence is determined, does not violate any constitutional rights of the defendant. Landers v. Smith, 226 Ga. 274, 174 S.E.2d 427 (1970), but see 1954-56 Op. Att'y Gen. p. 519.

Submission to jury of prior conviction not unconstitutional. — Statute authorized submission to a jury of proof of a prior conviction during the trial and before determination of a defendant's guilt. This procedure is not a violation of the constitutional rights of the accused. Cook v. Smith, 303 F. Supp. 90 (S.D. Ga. 1969), aff'd, 427 F.2d 1172 (5th Cir. 1970).

Trial court properly sentenced a defendant as a recidivist for 20 years imprisonment, to serve 15 years, pursuant to

General Consideration (Cont'd)

O.C.G.A. § 17-10-7, as a result of the defendant's arson conviction, because the defendant chose to proceed with a jury trial instead of pleading guilty, which would have involved only a three-year sentence as indicated by the trial judge during a pretrial hearing. Moore v. State, 283 Ga. App. 533, 642 S.E.2d 163 (2007).

Statute did not violate the double jeopardy clause of the constitution. Tribble v. State, 168 Ga. 699, 148 S.E. 593 (1929).

No double jeopardy violation. — Statute did not violate Ga. Const. 1877, Art. I, Sec. I, Para. VIII (see Ga. Const. 1983, Art. I, Sec. I, Para. XVIII). Reid v. State, 49 Ga. App. 429, 176 S.E. 100 (1934).

O.C.G.A. § 17-10-7 does not violate the due process clause of the constitution. Getty v. State, 207 Ga. App. 736, 429 S.E.2d 100 (1993).

Section does not violate right to impartial trial. — Statute did not violate Ga. Const. 1877, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XI) which guaranteed to one accused of a crime an impartial trial. Tribble v. State, 168 Ga. 699, 148 S.E. 593 (1929).

Statute did not violate Ga. Const. 1877, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XI) which guarantees to one accused of a crime an impartial trial. The general rule is that, in a prosecution for a particular crime, proof and allegations of another crime wholly independent from that for which the defendant is on trial, even though it is a crime of the same nature, are irrelevant and inadmissible; but there are exceptions to this rule. One of these exceptions is when the grade or punishment of the second offense is made by statute different from that of a first offense but the fact of a former conviction and sentence must be charged in the indictment, since a second conviction would affect the grade of the offense or require the imposition of a different punishment. McNabb v. State, 69 Ga. App. 885, 27 S.E.2d 246 (1943).

Statute related only to procedure in the trial of a criminal case and does not affect any vested privilege or constitutional right of the defendant. Kryder v. State, 212 Ga. 272, 91 S.E.2d 612, cert. denied, 352 U.S. 850, 77 S. Ct. 71, 1 L. Ed. 2d 61 (1956).

Prior convictions obtained in violation of indigent defendant's right to appointed counsel cannot be introduced for the purpose of imposing a recidivist sentence or other collateral use in subsequent trials. Blaylock v. Hopper, 233 Ga. 504, 212 S.E.2d 339 (1975).

Gideon v. Wainwright has a retroactive effect if the records of prior convictions obtained in violation of its standards are introduced for collateral use in subsequent trials. Convictions obtained in violation of an indigent's right to counsel, even though obtained prior to Gideon v. Wainwright, cannot be used for the purpose of imposing a recidivist sentence. Blaylock v. Hopper, 233 Ga. 504, 212 S.E.2d 339 (1975).

Purpose of the increased punishment doctrine is to serve as a warning to first offenders so as to afford first offenders an opportunity to reform, and to penalize first offenders upon subsequent infractions for failure to do so. Curtis v. State, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

State's burden of proof. — When the defendant collaterally attacked the defendant's prior guilty pleas, which the state proposed using to seek defendant's sentencing as a recidivist, the state's burden was to prove the existence of the prior guilty pleas and the defendant's representation by counsel if the pleas involved a felony, and, upon that showing, it was the defendant's burden to present evidence of a constitutional infirmity in the prior plea hearings, and, if the defendant made such a showing, it was then the state's burden to prove the constitutionality of the pleas. Smith v. State, 260 Ga. App. 785, 581 S.E.2d 349 (2003).

State interpretation binding on federal court. — Georgia Court of Appeals' interpretation of the distinctions between O.C.G.A. § 17-10-7(a) and (b) was binding upon the United States Court of Appeals. McCoy v. Newsome, 953 F.2d 1252 (11th Cir.), cert. denied, 504 U.S. 944, 112 S. Ct. 2283, 119 L. Ed. 2d 208 (1992).

Correction of scrivener's error. — Because the final disposition form indicated that the defendant was sentenced as a recidivist under one subsection, when the trial court's oral pronouncement indicated the defendant would be sentenced under a different subsection, the scrivener's error was ordered to be corrected. Cooper v. State, 352 Ga. App. 783, 835 S.E.2d 724 (2019).

Construed with U.S. Sentencing Guidelines Manual. — By committing a new crime, the defendant lost the benefit of first offender status, and the unadjudicated guilt in connection with the prior state offense was properly considered a prior conviction for purposes of sentencing under the U.S. Sentencing Guidelines Manual, which pursuant to U.S. Sentencing Guidelines Manual § 4A1.2, mandated the imposition of criminal history points, even if doing so undermined the purpose of the Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq. United States v. Barner, 572 F.3d 1239 (11th Cir. 2009).

Informing on punishment. — There is no requirement in recidivist cases sentenced under O.C.G.A. § 17-10-7 that the court inform the defendant that the custodial portion of any sentence is non-parolable but that the trial court need not impose the maximum custodial sentence. State v. Hayes, 301 Ga. 342, 801 S.E.2d 50 (2017).

When the defendant appeared for a calendar call and made unusual assertions and demands, with no basis in law, to the trial court, the trial court responded appropriately and informed the defendant that the defendant's trial was imminent, and that it was necessary for the defendant to make a decision whether to go to trial or to enter a plea. The court's explanation of the potential maximum sentence was carefully expressed in conditional language, avoiding any positive statement of what sentence might be imposed after a trial or plea; and in informing the defendant of the potential maximum sentence, the trial court was attempting to communicate to the defendant the gravity of the decision the defendant faced as well as the potential consequences of that decision. State v. Hayes, 301 Ga. 342, 801 S.E.2d 50 (2017).

Hearing not required to correct final disposition order. — Trial court did not err in entering the corrected final disposition order when the defendant was sentenced as a recidivist without first conducting a hearing in the defendant's presence because the entry of the final disposition order merely corrected the written sentence to conform to the sentence pronounced orally. Barber v. State, 350 Ga. App. 309, 827 S.E.2d 733 (2019).

Conviction must be final before a conviction can be included in the pre-trial notice given by the state pursuant to O.C.G.A. § 17-10-7(a). Mitchell v. State, 202 Ga. App. 100, 413 S.E.2d 517 (1991); Stephenson v. State, 218 Ga. App. 613, 462 S.E.2d 767 (1995).

Even though the court erred in allowing reference in a recidivist indictment to a conviction which was not yet final, there was no harm since there were two other valid felonies for the court's consideration. Stephenson v. State, 218 Ga. App. 613, 462 S.E.2d 767 (1995).

Although an out-of-time appeal was pending at the time a trial court dismissed a defendant's motion to vacate an allegedly void sentence that was based on prior felony convictions, one of which was subject to a pending "out-of-time" appeal, an appeals court found that the conviction was final within the meaning of O.C.G.A. § 17-10-7 because the defendant was not successful in the appeal; thus, the appeal was no longer pending. Dykes v. State, 272 Ga. App. 203, 612 S.E.2d 53 (2005).

Correction of sentence required. — Trial court erred in sentencing the defendant by failing to comply with O.C.G.A. § 17-10-7(c) as the trial court was required to impose a 20 year sentence for each burglary count, the longest sentence prescribed in the burglary statute, O.C.G.A. § 16-7-1(b), which the court did not do since the court sentenced the defendant merely to 10 years on Count 1. Barney v. State, 333 Ga. App. 807, 777 S.E.2d 490 (2015).

Trial court did not err in considering the defendant's federal conviction for counterfeiting when the court resentenced the defendant as a recidivist because the provisions of both 18 U.S.C. § 472 and Georgia's statute criminalizing forgery in the

General Consideration (Cont'd)

second degree would criminalize the conduct to which the defendant pled guilty in federal court. Loveless v. State, 344 Ga. App. 716, 812 S.E.2d 42 (2018).

Exception to finality of conviction rule. — In an escape case, the defendant's prior aggravated assault, robbery, battery, and theft convictions were available to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because any of the defendant's armed robbery convictions, which were pending at the time the defendant escaped, would support the defendant's being sentenced as a convicted felon under O.C.G.A. § 16-10-52(b). Allen v. State, 292 Ga. App. 133, 663 S.E.2d 370 (2008), aff'd, 286 Ga. 273, 687 S.E.2d 417 (2009).

Conviction which was on appeal is not a conviction within the meaning of this section. The conviction must be final before the conviction can be included in an indictment. Croker v. Smith, 225 Ga. 529, 169 S.E.2d 787 (1969).

Section inapplicable to prior conviction in another state. — This section was not applicable in a case when the defendant was convicted of a crime punishable by confinement in a penal institution, but when the defendant had previously been convicted in another state of an offense and sentenced to confinement in a penal institution of that state. Lowe v. State, 179 Ga. 742, 177 S.E. 240 (1934), answer conformed to, 50 Ga. App. 369, 178 S.E. 203 (1935).

It must be presumed that the General Assembly used the words employed in their ordinary, everyday, common-sense meaning, and that in referring to the previous conviction the General Assembly had no reference to convictions in courts of states beyond the jurisdiction of this state. The courts of this state do not take judicial cognizance of the laws of these foreign jurisdictions, and therefore there cannot be attributed to the General Assembly an intention to give equal dignity to proof of a conviction in another jurisdiction to that which properly inheres in those of the state, when it may be that in many of these states important rules of procedure, in criminal trials, are entirely different from those which the General Assembly has adopted. Lowe v. State, 179 Ga. 742, 177 S.E. 240 (1934), answer conformed to, 50 Ga. App. 369, 178 S.E. 203 (1935).

Required proof of felony status to use foreign conviction. — Before a defendant can be sentenced under O.C.G.A. § 17-10-7(a) based upon a foreign conviction, the state was required to prove that the conviction was for conduct that would also constitute a felony in Georgia; since it was possible that the defendant was convicted under Tenn. Code Ann. § 39-13-102(b), and this conduct may not have constituted a felony in Georgia, the state failed to sustain the state's burden under § 17-10-7(a), and the defendant's recidivist sentence was vacated. Lewis v. State, 263 Ga. App. 98, 587 S.E.2d 245 (2003), overruled on other grounds by Washington v. State, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Prior offense qualified even though mistakenly treated as misdemeanor. — Prior offense of possession of tools for the commission of crime was "punishable" for confinement by up to five years, and was therefore a felony, qualifying so as to invoke the recidivist statute, even though the court had mistakenly sentenced defendant for a misdemeanor and probated confinement. State v. Temple, 189 Ga. App. 284, 375 S.E.2d 300 (1988).

Improper consideration of prior arrests. — Although prior arrests are not properly considered in imposing recidivist punishment, there is a presumption that a trial judge does not consider improper matters in imposing sentences. Jenkins v. State, 235 Ga. App. 547, 510 S.E.2d 87 (1998).

This section was not applicable in capital cases; the statute was applicable only in felony cases that are not capital because the statute requires that the recidivist shall be sentenced to undergo the longest period of time and labor prescribed for the punishment of the offense of which the defendant stands convicted. Clemmons v. State, 233 Ga. 187, 210 S.E.2d 657 (1974).

Indictment not under section for capital crime after March 28, 1973. — If a capital crime occurred after March 28, 1973, the effective date of former Code

1933, § 27-2534.1 (see O.C.G.A. § 17-10-30), the accused should not be indicted under former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7). Clemmons v. State, 233 Ga. 187, 210 S.E.2d 657 (1974).

Applicability when capital and noncapital counts combined. — When capital felonies and noncapital felonies are included in separate counts of an indictment, the fact that this section was not applicable to the capital felony count in no way affects its applicability to the remaining counts. Thornton v. State, 144 Ga. App. 595, 241 S.E.2d 478 (1978).

Lack of any allegation as to defendant's recidivism in an indictment would be no impediment to the imposition of recidivist sentences pursuant to O.C.G.A. § 17-10-7. Mitchell v. State, 202 Ga. App. 100, 413 S.E.2d 517 (1991); State v. Willis, 218 Ga. App. 402, 461 S.E.2d 576 (1995).

Defendant properly sentenced as recidivist. — Defendant's challenge to the recidivist sentences failed because the certified copy of the defendant's prior burglary conviction showed that the defendant was sentenced to a term of probation to be served at a halfway house; it did not indicate, as the defendant claimed, that the sentence was entered pursuant to the First Offender Act, O.C.G.A. § 42-8-60. Robbins v. State, 326 Ga. App. 812, 757 S.E.2d 452 (2014).

Trial court did not err in sentencing the defendant as a four-time recidivist because the defendant waived any challenge to the validity of the prior felony conviction for financial transaction credit card fraud as the defendant never challenged the validity of the defendant's prior felony conviction for financial transaction credit card fraud at the sentencing hearing, in the defendant's motion for new trial as twice amended, or in the hearing on the defendant's motion for new trial; and a claim that one of the predicate felonies used in aggravation of punishment was invalid did not raise a cognizable claim that the recidivist sentence was void. Barber v. State, 350 Ga. App. 309, 827 S.E.2d 733 (2019).

Failure to object to procedural irregularity. — Since certified copies of the plea revealed that the defendant was represented by counsel and signed defendant's own name to the plea documents, the state was entitled to a presumption of regularity and the burden shifted to the defendant to show an infringement of the defendant's rights or a procedural irregularity in the plea; since the defendant failed to do so, the trial court properly sentenced the defendant as a recidivist under O.C.G.A. § 17-10-7(a). Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

Failure to indict as recidivist. — Trial court could impose recidivist punishment even though the defendant had not been indicted under O.C.G.A. § 17-10-7. Jefferson v. State, 205 Ga. App. 687, 423 S.E.2d 425 (1992).

Trial court could not sentence defendant as recidivist after already serving prior oral sentence. — Trial court improperly increased the defendant's sentence by imposing a recidivist sentence under O.C.G.A. § 17-10-7, making the defendant ineligible for parole, when the defendant had already begun to serve the trial court's prior oral sentence; although the length of the sentence was not changed, the recidivist designation constituted added punishment. Caldwell v. State, No. A20A0747, 2020 Ga. App. LEXIS 356 (June 18, 2020).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7 as O.C.G.A. § 16-7-1(b) was inapplicable since the defendant was convicted of attempted burglary, which was subject to sentencing under O.C.G.A. § 16-4-6; further, the defendant had been convicted of two other burglaries and two other felonies so the defendant was a four-time felony offender subject to the general recidivist sentencing scheme in § 17-10-7. Smith v. State, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

Trial court did not err in sentencing the defendant as a recidivist as there was no proof presented that the defendant had begun to serve the non-recidivist sentence immediately after the sentence was pronounced, but before the judge set the sentence aside, and despite a claim that the state failed to provide certified copies of the earlier convictions prior to trial.

General Consideration (Cont'd)

Ivey v. State, 278 Ga. App. 463, 629 S.E.2d 127 (2006).

Trial court properly dismissed the defendant's petition to correct a void sentence, which challenged the imposition of a 60-year recidivist sentence imposed against the defendant for burglary and arson, in violation of O.C.G.A. §§ 16-7-1(a) and 16-7-60(c), respectively, as the state gave notice to the state's intent to have the defendant sentenced as a recidivist under O.C.G.A. § 17-10-7(a) and (c) and no abuse of the trial court's discretion was shown. Marshall v. State, 294 Ga. App. 282, 668 S.E.2d 892 (2008).

Trial court did not abuse the court's discretion in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7(a) and (c) because the defendant had been convicted of at least three prior felonies and, thus, the defendant was required to be sentenced to the longest period of time prescribed for the punishment of the subsequent armed robbery offense and was required to serve the maximum time provided in the sentence of the trial court based upon the defendant's conviction of armed robbery and would not be eligible for parole until the maximum sentence had been served; because life imprisonment was an authorized punishment for a conviction of armed robbery under O.C.G.A. § 16-8-41(b), and because the defendant was sentenced as a recidivist under § 17-10-7(a) and (c), the trial court lacked the discretion to sentence the defendant to a lesser sentence, and it was presumed that the trial court exercised the court's discretion in sentencing the defendant to a period of incarceration, rather than probation, when no evidence to the contrary appeared. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Trial court did not err by sentencing the defendant as a recidivist because under O.C.G.A. § 17-10-7, the trial court was required to sentence the defendant to life imprisonment without eligibility for parole since the state introduced certified records of the defendant's six prior felony convictions; O.C.G.A. § 17-10-7(a) and (c) must be read together. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Trial court did not err by sentencing the defendant to life without parole as a recidivist because although the trial court failed to mention O.C.G.A. § 17-10-7 when the court orally pronounced sentence, but included § 17-10-7 in the written final disposition, the defendant's sentence did not change; the defendant was still sentenced to life in prison without parole. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Trial court did not err in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the notice of the state's intent to seek recidivist sentencing was served on defense counsel on the first day of trial prior to the jury being sworn, and certified copies of the convictions were admitted without objection; therefore, any defects or untimeliness in the notice under O.C.G.A. § 17-16-4(a)(5) were waived. Ross v. State, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

Trial court did not err in sentencing the defendant to life without parole as the state served the defendant with notice of the state's intent to seek recidivist punishment and the state introduced evidence of the defendant's three prior felony convictions. Wynn v. State, 332 Ga. App. 429, 773 S.E.2d 393 (2015).

Trial court did not err in sentencing the defendant under the general recidivist statute, which applied when the defendant was a habitual felon with prior convictions for crimes other than just burglary, rather than the specific recidivist statute, which applied only to prior convictions for burglary, because the defendant's federal conviction for conspiracy to transport stolen goods did not constitute a burglary conviction; thus, the defendant's conviction in the current case represented not only the defendant's third burglary conviction but also the defendant's fourth felony conviction, and the defendant fell squarely within the ambit of the general recidivist statute. Nordahl v. State, 344 Ga. App. 686, 811 S.E.2d 465 (2018), aff'd, 306 Ga. 15, 829 S.E.2d 99 (2019).

Trial court did not err in sentencing the defendant as a recidivist based on the defendant's New York burglary conviction, New Jersey burglary conviction, and federal conviction for conspiracy to transport

stolen goods because the state met the state's statutory burden of proving that the defendant was convicted of conduct which would be considered felonious under the laws of Georgia. Nordahl v. State, 344 Ga. App. 686, 811 S.E.2d 465 (2018), aff'd, 306 Ga. 15, 829 S.E.2d 99 (2019).

Trial court did not err in imposing maximum and consecutive sentences on the defendant for the burglary and theft by taking convictions as the defendant's prior convictions for three or more felonies qualified the defendant to be sentenced as a recidivist, requiring the defendant to be sentenced to the maximum time allowed; the sentences were within the statutory ranges; and the trial court had the authority to require that the sentences run consecutively. Hamlett v. State, 350 Ga. App. 93, 828 S.E.2d 132 (2019), cert. denied, No. S19C1274, 2019 Ga. LEXIS 860 (Ga. 2019), cert. denied, No. A19C1275, 2019 Ga. LEXIS 890 (Ga. 2019).

Recidivist sentencing appropriate when offenses not consolidated. — Trial court did not err either in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the record showed that each of the offenses which resulted in the convictions at issue were committed at different times, each was indicted separately by different grand juries, and the trial court entered separate sentencing orders in each of the three cases; the offenses were not considered consolidated under § 17-10-7 even after being entered on the same day and ordered to run concurrently. Becoats v. State, 318 Ga. App. 262, 733 S.E.2d 795 (2012).

Recidivist sentence was erroneous. — Trial court erred by sentencing the defendant as a recidivist because the defendant's one prior conviction could not serve as the basis for both the failure of a registered sex offender to report a change in residence count and the recidivist sentence. Pardon v. State, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Pursuant to O.C.G.A. § 17-10-7(b.1), a defendant who has been convicted previously of violating either subsections (a), (i)(1), or (j) of O.C.G.A. § 16-13-30 may not be sentenced as a recidivist for a second or any subsequent conviction for violating any of those code sections even if the defendant had never been convicted previously of violating the exact subsection for which the defendant is being sentenced. Mathis v. State, 336 Ga. App. 257, 784 S.E.2d 98 (2016).

Defendant could not be sentenced for possession of cocaine as a recidivist under O.C.G.A. § 17-10-7(c) because one of the three prior felony convictions used in aggravation was also a conviction under O.C.G.A. § 16-13-30(a). Johnson v. State, 335 Ga. App. 796, 783 S.E.2d 156 (2016).

Trial court erred by sentencing the defendant as a recidivist because the defendant had not been convicted of a felony prior to the commission of the rape. Cook v. State, 338 Ga. App. 489, 790 S.E.2d 283 (2016).

Nolo contendere plea could not be used as proof of prior conviction under recidivist statute. — Trial court erred in considering the defendant's nolo contendere plea as proof of a prior conviction under the recidivist statute because the plain language of O.C.G.A. §§ 17-7-95 and 17-10-7(c) indicated that such a plea could not be used against the defendant in sentencing the defendant as a recidivist. Miller v. State, 353 Ga. App. 518, 838 S.E.2d 602 (2020).

Counsel was effective in advising on recidivism. — Defendant failed to prove that the defendant was rendered ineffective assistance of counsel based on the defendant's allegation that trial counsel failed to inform the defendant that the state intended to prosecute the defendant as a recidivist as, while the record reflected that trial counsel was confused about the issue and that trial counsel did not know the state intended to prosecute the defendant as a recidivist, trial counsel testified that there was always a possibility of a life sentence for rape and that trial counsel discussed that possibility with the defendant. Mora v. State, 295 Ga. App. 641, 673 S.E.2d 23 (2009).

Counsel's failure to inform defendant of the consequences of recidivist punishment and of proceeding to trial rather than accepting a guilty plea cannot rise to the level of constitutionally ineffective assistance of counsel. Taylor v. State, 239 Ga. App. 329, 521 S.E.2d 375 (1999).

General Consideration (Cont'd)

Defendant's trial counsel did not render ineffective assistance by failing to inform the defendant that the defendant would receive a mandatory recidivist sentence of life without parole if the defendant rejected a plea offer; prejudice could only be shown by some indication that, when the defendant rejected the plea, the defendant was amenable to the plea offer. Defendant's rejection of the plea was part of an effort to stall the trial on the hope that the victim, who was the state's key witness, would die and would be unavailable for trial. Carson v. State, 264 Ga. App. 763, 592 S.E.2d 161 (2003).

Defendant was not entitled to relief under 28 U.S.C. § 2254 because the defendant failed to show that the defendant was prejudiced by counsel's failure to inform the defendant that the defendant faced a mandatory life sentence under O.C.G.A. § 17-10-7 since the evidence showed that the defendant likely would not have accepted a plea bargain that included a 15 to 25-year sentence because the victim's whereabouts were unknown, and the defendant felt that the aggravated assault and armed robbery case against defendant was weak without the victim's testimony. Carson v. Thompson, No. 06-12691, 2007 U.S. App. LEXIS 9692 (11th Cir. Apr. 27, 2007) (Unpublished).

Trial court did not err in denying the defendant's motion for new trial on the grounds of ineffective assistance of counsel with regard to the defendant's drug-related convictions based on defense counsel failing to advise the defendant that the state intended to prosecute defendant as a recidivist since the defendant did not testify that the defendant would have accepted a plea offer had the defendant known that the defendant was facing the prospect of being sentenced as a recidivist; thus, the defendant failed to show that counsel's alleged deficiency affected the end result of the case. Furthermore, the defendant did not show in the record that the state made or was amenable to any plea negotiations. Heard v. State, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

Trial counsel's performance was constitutionally deficient because counsel did not advise the defendant during plea negotiations that the defendant faced a mandatory sentence as a recidivist and would be ineligible for parole if the defendant was convicted at trial. Because counsel's performance was deficient, and the defendant made a showing that the defendant was amenable to the state's plea offer of 15 years with six to serve, the case was remanded to the trial court to make the necessary factual determinations concerning the remaining elements of the prejudice analysis regarding whether the prosecution would have withdrawn the offer and whether the trial court would have accepted the plea. Daniel v. State, 342 Ga. App. 448, 803 S.E.2d 603 (2017).

Ineffective assistance for failing to challenge sufficiency of notice. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the sufficiency of the state's notice of intent to seek punishment as a recidivist because there was no evidence in the record that the state failed to provide a copy of the criminal history report, nor was there any evidence that the defendant and counsel were unaware of the specific felony convictions listed in the criminal history record. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

No ineffective assistance due to failure to challenge sentence. — Even if counsel was professionally deficient in failing to challenge the defendant's sentences for armed robberies, burglary, and aggravated assault based on post-King cases, the defendant could not show Strickland prejudice as the defendant's sentences under O.C.G.A. § 17-10-7(a) were legally proper as a prior felony conviction was not an element of those crimes. Hillman v. Johnson, 297 Ga. 609, 774 S.E.2d 615 (2015).

Effect of counsel's inaccurate advice. — Inmate, charged with kidnapping, was facing the possibility of 20 years prison time, except that the sentence could have been enhanced under O.C.G.A. § 17-10-7(b)(2) to life without parole; thus, the inmate accepted the advice of counsel to plead guilty to avoid a second trial in another county since the kidnapping offense occurred in two counties. However, the inmate was granted habeas

relief as the advice of counsel was incorrect as a second trial was prohibited under double jeopardy principles. Upton v. Johnson, 282 Ga. 600, 652 S.E.2d 516 (2007).

Defendant was properly allowed to withdraw a guilty plea to armed robbery, and the probation revocation that this plea triggered was properly reversed as counsel had been ineffective in misadvising the defendant that the defendant would be eligible for parole if a guilty plea was entered. Instead, under O.C.G.A. § 17-10-7(b)(2), the defendant's second conviction for a serious violent felony mandated a sentence of life imprisonment without the possibility of parole. Tillman v. Gee, 284 Ga. 416, 667 S.E.2d 600 (2008).

No ineffective assistance of counsel for failure to object to admission of prior convictions. — With regard to the defendant's conviction for distributing cocaine, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel based on trial counsel failing to adequately challenge the admission of prior convictions at the sentencing hearing as the evidence established that the state gave the defendant pre-trial notice that the state intended to introduce the convictions at sentencing. Therefore, any objection in that regard would have been futile. Beck v. State, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Trial court did not abuse the court's discretion by denying the defendant's motion to withdraw the guilty plea because the defendant did not identify any specific prior guilty pleas that counsel should have objected to as improper considerations for recidivist sentencing.

Effect of recidivism on voluntariness of guilty plea. — Defendant was not entitled to withdraw the defendant's guilty pleas on the ground that trial counsel had failed to inform the defendant that the defendant would be ineligible for parole since the record revealed that trial counsel had informed the defendant of the ramifications of a guilty plea and that the defendant qualified as a recidivist, and the defendant had stated in open court that the defendant was entering the defendant's pleas freely and voluntarily and that the defendant understood, as a recidivist, the defendant would serve the entire sentence in prison. State v. Abel, 210 Vt. 1, 210 A.3d 439 (2019).

Because the defendant failed to show sufficient evidence of a psychological impairment, due in part by ceasing to take needed medication, sleep deprivation, racing thoughts or other psychological turmoil, or that trial counsel was ineffective as to counsel's advice regarding sentencing as a recidivist under O.C.G.A. § 17-10-7, the appeals court agreed that a guilty plea was intelligently and voluntarily entered; thus, the trial court properly denied a motion to withdraw the plea. Frost v. State, 286 Ga. App. 694, 649 S.E.2d 878 (2007).

State met the state's burden of showing that the defendant's plea was freely and voluntarily entered, that the defendant understood the nature of the charges, and that the defendant was aware of the consequences of a guilty plea because the possibility of a nonrecidivist sentence never was presented to or considered by the court; the defendant's response showed that the defendant understood that a nonrecidivist sentence was not a possibility; and trial counsel testified that the defendant and counsel had discussed what the term recidivism meant, and that counsel had explained to the defendant the difference between recidivist and nonrecidivist sentencing several times. Ranger v. State, 330 Ga. App. 578, 768 S.E.2d 768 (2015).

After entering a non-negotiated guilty plea to influencing a witness and being sentenced to the maximum sentence of ten years, with the possibility of parole under O.C.G.A. § 17-10-7(a), the defendant's motion to withdraw the plea was properly denied because the defendant failed to show that counsel was ineffective in failing to contact the defendant or explain the plea. Coleman v. State, 337 Ga. App. 732, 788 S.E.2d 826 (2016).

Split sentences. — Trial court's denial of the defendant's motion to vacate sentences for child molestation, aggravated child molestation, and incest was upheld because to apply the split-sentencing provisions to pre-2006 law would require the court to re-write applicable statutes to

General Consideration (Cont'd)

make them subject to statutory provisions that did not even exist at the time the statutes were enacted, which the court was prohibited to do without contravening the plain meaning of the statutory text. Bryson v. State, 350 Ga. App. 206, 828 S.E.2d 450 (2019).

Appeals. — Claims that the defendant's sentence under the recidivist statute was invalid were waived as the defendant did not raise the claims of error regarding the defendant's sentence when the defendant appealed the defendant's conviction; thus, having already invoked the appellate process, the defendant was not entitled to raise those claims when the defendant appealed a second time. Taylor v. State, 261 Ga. App. 248, 582 S.E.2d 209 (2003).

Because the defendant's argument that the trial court erred in sentencing the defendant under the recidivist statute, O.C.G.A. § 17-10-7, was not raised before the trial court, the defendant waived the right to argue it on appeal. Boyd v. State, 302 Ga. App. 455, 691 S.E.2d 325 (2010).

Duty to charge as to section. — It was the duty of the court to charge the jury relative to the provisions of this section in order that the jury's findings with respect to such former offense and sentence might be given effect in the punishment imposed. Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938).

Since former conviction is jury question. — When a former offense and conviction are alleged in the indictment, it is for the jury and not for the court to determine the truth of such allegation. Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938).

Error in recidivist sentence was benefit to defendant. — Defendant cannot complain that the defendant received one year less than the law required since the judge pronounced a 14-year sentence for burglary and a consecutive 5-year sentence for recidivism, yet the court entered a single 19-year sentence. Murphy v. State, 203 Ga. App. 152, 416 S.E.2d 376 (1992).

Since the defendant was sentenced to a shorter term of confinement than that required by O.C.G.A. § 17-10-7, the error was a benefit and the trial court did not err in denying the defendant's motion to correct an illegal sentence. O'Neal v. State, 238 Ga. App. 446, 519 S.E.2d 244 (1999), cert. denied, 529 U.S. 1039, 120 S. Ct. 1535, 146 L. Ed. 2d 349 (2000).

Discretion in imposition of sentence. — Trial court's failure to exercise the court's discretion in sentencing the defendant to the maximum was error requiring remand for resentencing. Bradshaw v. State, 237 Ga. App. 627, 516 S.E.2d 333 (1999).

When the defendant was convicted of possession of cocaine with the intent to distribute, the trial court did not err in concluding that the court lacked the discretion to suspend or probate any portion of the defendant's mandatory ten-year minimum sentence because, at sentencing, the state presented evidence that the defendant had three prior felony convictions, including one for possession of cocaine with the intent to distribute; in such cases, the court of appeals had held that O.C.G.A. § 17-10-7(c) required the trial court to impose a mandatory minimum ten-year sentence, no part of which could be probated. Thomas v. State, 321 Ga. App. 214, 741 S.E.2d 298 (2013).

Resentencing required. — Although the trial court was required to impose the maximum penalty, the court had discretion to probate or suspend the penalty, and because the court's remarks did not indicate a recognition of this discretion, the court of appeals was required to vacate the sentence and remand the case for resentencing. Minter v. State, 245 Ga. App. 327, 537 S.E.2d 769 (2000), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009).

Ten year sentence for shoplifting inappropriate. — Trial court erred in failing to exercise the sentencing discretion provided under O.C.G.A. § 16-8-14 for the shoplifting conviction because the court erroneously concluded that the court was required to impose the maximum sentence of ten years with no eligibility for parole because nothing in the specific sentencing scheme in § 16-8-14(b)(1)(C) permitted application of conflicting provisions in the general recidivist sentencing

scheme in O.C.G.A. § 17-10-7(a); instead, the specific scheme controlled. Williams v. State, 261 Ga. App. 176, 582 S.E.2d 141 (2003).

Remand for resentencing required. — Because the trial court retained discretion to sentence a defendant within the minimum and maximum sentence provided for the crime charged, the trial judge erred in stating otherwise when sentencing the defendant to the maximum time to serve for each convicted count, requiring a remand for resentencing. Johnson v. State, 285 Ga. App. 590, 646 S.E.2d 760 (2007).

Even if a trial court improperly constrained the court's own discretion in applying the recidivist statute, any procedural error did not void a defendant's resulting sentence of life imprisonment for armed robbery; thus, the defendant's only remedy was to apply for a writ of habeas corpus. Brown v. State, 295 Ga. App. 66, 670 S.E.2d 867 (2008).

Trial court erred in sentencing the defendant as a recidivist to ten years imprisonment under O.C.G.A. § 17-10-7 for theft by shoplifting in violation of O.C.G.A. § 16-8-14 because the defendant demonstrated that the trial court did not exercise the court's discretion to consider probating or suspending a portion of the sentence after the defendant served one year pursuant to O.C.G.A. § 16-8-14(b)(1)(C). Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Although a defendant's trial counsel incorrectly stated that the trial court was required to sentence the defendant to ten years to serve for receiving stolen property, given the defendant's three prior felony convictions, the trial court was presumed to have exercised the court's discretion in imposing the sentence. Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Trial court's failure to exercise the court's discretion as to the three misdemeanor crimes, instead stating that the court was imposing the maximum sentence on each count as required by the recidivism statute, was error that was not harmless as such sentences were only required for subsequent felonies and, thus, remand was necessary. Hobbs v. State, 334 Ga. App. 241, 779 S.E.2d 15 (2015).

Court must impose maximum sentence. — Once the jury finds the defendant to be a multiple offender, the court is required to impose the maximum sentence authorized by law for the offense of which the defendant had been found guilty. Hammond v. State, 139 Ga. App. 820, 229 S.E.2d 685 (1976).

Life without parole was required sentence. — Defendant was required to be sentenced to life without parole for the conviction of murder in light of the defendant's prior kidnapping conviction, and it was not required that the state had been seeking the death penalty for that sentence to be imposed. Kimbrough v. State, 300 Ga. 516, 796 S.E.2d 694 (2017).

Life sentence for murder upheld. — In the defendant's trial for murder, the trial court properly exercised the court's discretion to sentence the defendant to life in prison with the possibility of parole under O.C.G.A. §§ 16-5-1(e)(1), 17-9-2, and 17-10-7(a), rather than life without the possibility of parole, because parole did not extend the duration of the sentence. Blackwell v. State, 302 Ga. 820, 809 S.E.2d 727 (2018).

Life without parole appropriate sentence for multiple felon. — Trial court did not err in denying the defendant's motion to correct a void sentence as the sentence of life imprisonment without parole imposed by the trial court was supported by the defendant's three prior felony convictions, and there was no merit to the defendant's claim that the law did not allow for the life sentence because the state failed to follow the procedures required for a death penalty case. Bihlear v. State, 341 Ga. App. 364, 801 S.E.2d 68 (2017).

No parole for fourth offender recidivist. — Since certified records of at least five noticed prior felony convictions were introduced by the state, sentence of the defendant to life imprisonment without eligibility for parole was required under the applicable version of O.C.G.A. § 17-10-7 which removed the possibility of parole in regard to the sentence of fourth offender recidivists. State v. Willis, 218 Ga. App. 402, 461 S.E.2d 576 (1995).

General Consideration (Cont'd)

In discussing the proposed sentence on a guilty plea, the court did not commit reversible error by informing the defendant that, as a recidivist, the defendant would get the maximum punishment since the court had inquired and the defendant had offered no evidence in mitigation. Quarterman v. State, 223 Ga. App. 566, 479 S.E.2d 397 (1996).

Trial court was required to sentence the defendant to life imprisonment because the defendant had previously been convicted of a felony under Georgia law and sentenced to confinement in a penal institution. Webb v. State, 251 Ga. App. 414, 554 S.E.2d 563 (2001).

Trial court correctly understood that under O.C.G.A. § 17-10-7 the court was required to impose the maximum sentence for each current felony conviction but had the discretion to probate or suspend part of that sentence (which the court chose not to do). Whether the offense for which the defendant currently stood convicted was defendant's second, third, fourth or fourteenth, the only sentence imposable for such conviction was the maximum time prescribed by the statute for that offense. Buckner v. State, 253 Ga. App. 294, 558 S.E.2d 823 (2002).

Defendant's sentence to life imprisonment without parole for the defendant's conviction of aggravated child molestation was not illegal as the sentence was the defendant's second "serious violent felony" pursuant to O.C.G.A. § 17-10-6.1(a)(5), and, accordingly, the trial court had no discretion but to impose that sentence pursuant to O.C.G.A. § 17-10-7(b)(2); it was noted that the defendant's motion to vacate, modify, correct, or set aside the sentence was made four and a half years after the defendant's sentencing, at which point the trial court no longer had jurisdiction because it was past the court's term. Gosnell v. State, 262 Ga. App. 641, 586 S.E.2d 350 (2003).

Trial court did not have the power to sentence the defendant who was convicted of armed robbery after the defendant was already convicted of committing other felonies to probation, or to suspend any part of the defendant's sentence, and because life in prison was the maximum penalty for armed robbery, the trial court properly sentenced the defendant to life in prison without parole. Thompson v. State, 265 Ga. App. 696, 595 S.E.2d 377 (2004).

Defendant's 20-year sentences without parole for burglary and aggravated assault were not improper merely because the defendant was eligible for parole on the murder conviction after 14 years pursuant to O.C.G.A. § 17-10-6.1(c)(1); O.C.G.A. § 17-10-7(a) and (c) mandated the maximum sentences for burglary and aggravated assault without parole and did not require probation or suspension of any part. Clark v. State, 279 Ga. 243, 611 S.E.2d 38 (2005).

Trial court did not err at the defendant's resentencing hearing in resentencing the defendant to 20 years, after the court had originally sentenced the defendant to two concurrent 12-year terms for aggravated assault convictions because, as a recidivist, the defendant should have been given the maximum sentence of 20 years as required by O.C.G.A. § 17-10-7(c). Hill v. State, 272 Ga. App. 280, 612 S.E.2d 92 (2005).

O.C.G.A. § 17-10-6.1(a) defined both rape and aggravated sodomy as "serious violent felonies"; thus, in light of a prior aggravated sodomy conviction, a trial court would have been required to sentence the defendant to life without parole for subsequent violent rape felonies under the sentencing statutes either as the statutes existed at the time of the rapes, 1996, or at the time of the defendant's trial, 1998. Thompson v. State, 279 Ga. App. 657, 632 S.E.2d 407 (2006).

Trial court properly vacated a consent order modifying the defendant's original sentence as such was based upon a mistake of law induced by the defendant personally, and hence, void; moreover, because the defendant was sentenced as a recidivist, the trial court was required to impose a sentence pursuant to O.C.G.A. § 17-10-7(a). Sosebee v. State, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

Because the defendant was a three-time recidivist and because the maximum sentence for aggravated sodomy was life in prison, the trial court correctly imposed sentence against the defendant to serve

life in prison without the possibility of parole. Bharadia v. State, 282 Ga. App. 556, 639 S.E.2d 545 (2006), cert. denied, No. S07C0522, 2007 Ga. LEXIS 222 (Ga. 2007).

Failure to specify sentencing provision. — Since the trial court, in erroneously finding that the defendant had three prior convictions rather than only two, erred only to the extent that the court did not specify that the sentences were being imposed pursuant to subsection (a) rather than subsection (b) of O.C.G.A. § 17-10-7, the case was remanded with direction to amend the order sentencing the defendant to show that the defendant was not found to be a fourth offender under § 17-10-7(b). Mitchell v. State, 202 Ga. App. 100, 413 S.E.2d 517 (1991).

Because the record reflected that the defendant's five convictions were not consolidated for trial, and the trial court necessarily was sentencing the defendant under O.C.G.A. § 17-10-7(c), which applied to defendants having three or more prior felony convictions, the defendant was sentenced correctly; while it would have been the better practice for the trial court to plainly indicate on the court's final disposition which subsection of the repeat offender statute applied to the defendant's recidivist sentence, the failure to do so did not amount to reversible error. Harper v. State, 270 Ga. App. 376, 606 S.E.2d 599 (2004).

Judicial discretion. — Although the defendant would be required under O.C.G.A. § 17-10-7(c) to serve the maximum time provided in the sentence of the judge, the sentence of the judge was by no means fixed; because the trial judge mistakenly believed that a life sentence was mandatory, the judge failed to exercise judicial discretion. Blevins v. State, 270 Ga. App. 388, 606 S.E.2d 624 (2004).

Whether offense is defendant's second, third, fourth, or fourteenth, the only sentence imposable for such conviction is the maximum time prescribed by the statute for that offense. Hammond v. State, 139 Ga. App. 820, 229 S.E.2d 685 (1976).

State introduced three prior felony convictions at the defendant's sentencing on a fourth felony conviction for possession of cocaine and, thus, the trial court was authorized to sentence the defendant under the recidivist statute, O.C.G.A. § 17-10-7, to any sentence permitted under that statute for a fourth-time felon. Taylor v. State, 261 Ga. App. 248, 582 S.E.2d 209 (2003).

Defendant's third prior felony conviction did not count for purposes of O.C.G.A. § 17-10-7(c), inasmuch as that conviction was entered only after the defendant committed the crimes of which the defendant was convicted. The terms of § 17-10-7(c) plainly forbid parole only when a defendant, "after having been convicted" of three felonies, committed another felony. Barber v. State, 316 Ga. App. 701, 730 S.E.2d 176 (2012).

Effect of maximum punishment requirement for second offense. — Maximum penalty might be imposed on a first conviction. The requirement of this section, that it must be imposed in the event of a second conviction, does not alter the character of the original offense or provide for a different punishment. McWhorter v. State, 118 Ga. 55, 44 S.E. 873 (1903).

Sentenced for a second offense of cocaine possession. — Defendant's previous conviction for cocaine possession with intent to distribute constituted a previous conviction for cocaine possession that triggered the mandatory 30-year sentencing for a second simple possession offense under O.C.G.A. § 16-30-30(c). Smiley v. State, 241 Ga. App. 712, 527 S.E.2d 585 (2000).

If prior felony punished as for misdemeanor, maximum punishment rule inapplicable. — If evidence showed that although the defendant was convicted of a reducible felony, the defendant was only sentenced to misdemeanor punishment, the defendant was thus not "sentenced to confinement and labor in the penitentiary" under this section so as to make this conviction relevant under the second conviction rule prescribing maximum punishment. Mobley v. State, 101 Ga. App. 317, 113 S.E.2d 654 (1960).

If maximum punishment applicable, punishment for misdemeanor inapplicable. — When it was decided that former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7), fixing the punish-

General Consideration (Cont'd)

ment of a second felony at the maximum time for the felony of which the defendant was convicted in this prosecution, is applicable, it necessarily follows that former Code 1933, § 27-2501 (see O.C.G.A. § 17-10-5), which authorizes reductions in the severity of punishment for certain felonies to the level applied in misdemeanors, which was a punishment less than that for a felony, was inapplicable. Moye v. State, 70 Ga. App. 890, 29 S.E.2d 791 (1944).

Judge may impose maximum sentence when prior sentence probated. — Trial judge did not err in giving a maximum sentence under this section since the record disclosed that on a prior conviction the defendant was sentenced to confinement and labor in the penitentiary with the privilege of serving the sentence on probation. Bennett v. State, 132 Ga. App. 397, 208 S.E.2d 181 (1974).

Failure to probate sentence. — In sentencing a four-time recidivist, the trial court's failure to exercise the court's discretion to probate a portion of the maximum 20-year sentence was reversible error. Banks v. State, 225 Ga. App. 754, 484 S.E.2d 786 (1997).

Probating portion of sentence appropriate. — Based upon a defendant's three prior felony convictions, the defendant's sentencing was governed by both O.C.G.A. § 17-10-7(a) and (c), and the trial court was required to apply both. The trial court properly exercised the court's discretion when the court probated a portion of the defendant's sentence. Jefferson v. State, 309 Ga. App. 861, 711 S.E.2d 412 (2011).

Probation was not available option. — Trial court properly sentenced the defendant to life imprisonment because, pursuant to O.C.G.A. § 17-10-7(a), the court lacked discretion to probate any portion of the sentence. Grace v. State, 347 Ga. App. 396, 819 S.E.2d 674 (2018).

Proof of prior conviction need not be made basis for maximum penalty. — Allegation and proof that the defendant had previously been sentenced to imprisonment in the penitentiary would tend to prejudice defendant and need not be made as a basis for the imposition of the maximum penalty provided by this section. McWhorter v. State, 118 Ga. 55, 44 S.E. 873 (1903).

Consolidation for trial. — Fact that sentences were entered on the same day and that the sentences on one charge ran concurrent with the other sentence did not require the conclusion that the two prior convictions had been "consolidated for trial" within the meaning of the statute when burglary and criminal damage to property convictions were committed against different victims on the same date, both convictions were the result of separate indictments, and a separate order of sentence was entered on each indictment. Thompson v. State, 237 Ga. App. 466, 517 S.E.2d 339 (1999).

Section may be applied to defendant charged with armed robbery. — If death is not a possible sentence insofar as punishment is concerned, the offense cannot be capital and a defendant charged with armed robbery may be indicted as a recidivist under O.C.G.A. § 17-10-7. Ivory v. State, 160 Ga. App. 193, 286 S.E.2d 435 (1981).

Imposition under O.C.G.A. § 17-10-7 of sentence of life imprisonment for armed robbery is not cruel and unusual punishment in violation of the United States Const., amend. 8. Chappell v. State, 164 Ga. App. 77, 296 S.E.2d 629 (1982), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Standing of non-parolees to challenge constitutionality. — Appellant lacked standing to challenge the constitutionality of O.C.G.A. § 17-10-7 on the theory that the statute diminishes the powers and authority of Board of Pardons and Paroles until the defendant claimed a right of parole and the statute was asserted against the defendant as a bar. Sewell v. State, 162 Ga. App. 483, 291 S.E.2d 783 (1982); Stevens v. State, 210 Ga. App. 355, 436 S.E.2d 82 (1993); Guice v. State, 223 Ga. App. 161, 477 S.E.2d 322 (1996).

Defendant lacked standing to challenge the failure to impose parole pursuant to O.C.G.A. § 17-10-7 until the defendant claimed a right of parole and the statute

was asserted against the defendant as a bar. Butler v. State, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Notice to defendant of intent to prosecute as a recidivist performs the function of any required notice in an indictment. Anderson v. State, 176 Ga. App. 255, 335 S.E.2d 487 (1985); Anderson v. State, 199 Ga. App. 559, 405 S.E.2d 558 (1991).

Failure to inform on parole. — In sentencing the defendant under O.C.G.A. § 17-10-7(c), there was no requirement that the trial court inform the defendant that there was no eligibility for parole. Hildreth v. State, 256 Ga. App. 832, 570 S.E.2d 49 (2002).

Notice of intent to use prior convictions is sufficient. — There was no error since the trial court found the notice of intent to use prior convictions sufficient to allow the defendant's sentencing because the matters asserted were merely served by the prosecutor and not returned in a separate count of the indictment. Bonds v. State, 203 Ga. App. 51, 416 S.E.2d 329, cert. denied, 203 Ga. App. 905, 416 S.E.2d 329 (1992).

Notice of state's intentions to use prior convictions in aggravation of punishment was fair when served on the defendant more than a week before trial. Martin v. State, 205 Ga. App. 200, 422 S.E.2d 6 (1992).

Because state's written notice sufficiently notified the defendant of the state's intent to seek recidivist sentence under O.C.G.A. § 17-10-7 upon conviction of felony obstruction of an officer, and during plea negotiations the state again referenced the defendant's prior criminal history and reiterated the state would seek recidivist punishment, no error occurred in imposing the sentence based on lack of notice. Evans v. State, 290 Ga. App. 746, 660 S.E.2d 841 (2008).

Prior convictions listed on an attached GCIC as aggravation evidence for a defendant's sentencing for theft by deception were sufficient notice that the state intended to seek sentencing as a recidivist under O.C.G.A. §§ 17-10-2 and 17-10-7. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because the prosecutor properly served under O.C.G.A. § 17-16-4(a)(5) the state's notice of intent to seek recidivist punishment and introduce evidence of the defendant's prior convictions on defense counsel on the first day of trial; any defects or untimeliness in the notice were waived as certified copies of the convictions were admitted without objection. Howard v. State, 297 Ga. App. 316, 677 S.E.2d 375 (2009).

State timely filed the state's notice of intent to use the defendant's prior convictions in aggravation of punishment pursuant to O.C.G.A. § 17-10-7(c) because the state provided the notice four days before trial; the state served and filed the state's notice of intent on March 20, 2008, and trial commenced on March 24. Shindorf v. State, 303 Ga. App. 553, 694 S.E.2d 177 (2010).

Trial court did not err by sentencing defendant to serve sentence without parole. — Trial court did not err by sentencing the defendant to serve the defendant's sentence without parole pursuant to O.C.G.A. § 17-10-7(c) as the state notified the defendant in the indictment and a separate notice that the state intended to seek recidivist punishment, and the state produced copies of three prior felony convictions, which were used to sentence the defendant. King v. State, 290 Ga. App. 118, 658 S.E.2d 883 (2008).

Imprisonment for prior crime not prerequisite to applicability. — Application of O.C.G.A. § 17-10-7 is not contingent on a person having been convicted of a felony and sentenced to confinement for that person's prior crime; the statute may also apply if the person had been given a probated sentence. Hernandez v. State, 182 Ga. App. 797, 357 S.E.2d 131 (1987).

Prior federal conviction not predicate for second-offender treatment. — Defendant may not be sentenced as a second offender recidivist based upon a previous mail theft conviction in the United States District Court for the Eastern District of Tennessee. Only Georgia convictions provide the predicate for second-offender treatment. Cofer v. State, 166 Ga. App. 436, 304 S.E.2d 537 (1983) (decided prior to 1984 amendment).

General Consideration (Cont'd)

Prior federal felony conviction not shown to be a felony under Georgia law. — Trial court erred in imposing a recidivist sentence against the defendant without the possibility of parole under O.C.G.A. § 17-10-7(c) because the state failed to establish that the defendant's federal felony conviction for theft or receipt of stolen mail, in violation of 18 U.S.C. § 1708, was considered a felony under Georgia law. Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012).

Fourth-offender provisions cover both prior federal and other state convictions. — O.C.G.A. § 17-10-7(b), dealing with fourth offenders, was added in 1953 and specifically encompasses both prior federal convictions and prior convictions in other states. Cofer v. State, 166 Ga. App. 436, 304 S.E.2d 537 (1983).

Section applicable when defendant found guilty of voluntary manslaughter. — Because O.C.G.A. § 17-10-7 is applicable to felonies and since the death penalty was not sought, neither the offense charged nor the offense of which the accused was found guilty, voluntary manslaughter, was a capital felony within that section's meaning; therefore, the trial court did not err in denying the defendant's motion to strike the recidivist counts. Scott v. State, 172 Ga. App. 725, 324 S.E.2d 565 (1984).

Possession of firearm by convicted felon. — Prior felony conviction under O.C.G.A. § 16-11-131, regarding possession of firearms by convicted felons, cannot also be used to punish a defendant as a repeat offender under O.C.G.A. § 17-10-7(a). King v. State, 169 Ga. App. 444, 313 S.E.2d 144 (1984).

Prior felony conviction for possession of a firearm by a convicted felon was properly considered for purposes of sentencing a defendant as a recidivist because the court did not use the underlying felony used to convict the defendant of being a felon in possession of a firearm to enhance the defendant's punishment as a repeat offender. Nelson v. State, 210 Ga. App. 249, 435 S.E.2d 750 (1993).

Rape now included in cases to which § 17-10-7 applies. — Capital cases to which O.C.G.A. § 17-10-7 is not applicable no longer include the offense of rape. Haslem v. State, 160 Ga. App. 251, 286 S.E.2d 748 (1981).

Mistaken sentence may be corrected. — Judge who through a mistaken interpretation of the law incorrectly sentences an habitual offender to less than the term required by law is required and empowered to increase the sentence later on after the error becomes known. Wallace v. State, 175 Ga. App. 685, 333 S.E.2d 874 (1985).

Defendant may not contest O.C.G.A. § 17-10-7 until defendant claims right of parole and the statute is asserted against defendant as a bar. Ivory v. State, 160 Ga. App. 193, 286 S.E.2d 435 (1981); Martin v. State, 205 Ga. App. 200, 422 S.E.2d 6 (1992).

Consideration of mitigating factor when mandatory sentence applies. — Although O.C.G.A. § 17-14-8 requires the trial court to consider fact of tender of restitution by criminal offender to a victim before imposing sentence, failure of trial court to consider this fact was not error since the sentence imposed was mandatory under O.C.G.A. § 17-10-7. Chappell v. State, 164 Ga. App. 77, 296 S.E.2d 629 (1982), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

If armed robbery indictment contains recidivist count which specifically invokes O.C.G.A. § 17-10-7, rather than the specific recidivist sentencing statute for armed robbery, O.C.G.A. § 16-8-41(b), the trial court errs when the court sets the final sentence pursuant to § 16-8-41(b). Under such an indictment and a guilty verdict, the trial court is required to sentence the defendant, pursuant to § 17-10-7(a), to "the longest period of time prescribed" for armed robbery, that sentence being life imprisonment. State v. Baldwin, 167 Ga. App. 737, 307 S.E.2d 679 (1983); Stone v. State, 218 Ga. App. 350, 461 S.E.2d 548 (1995).

For the purpose of punishment, armed robbery was not a capital felony; the general recidivist statute, O.C.G.A. § 17-10-7(c), included, for purpose of punishment, armed robbery, and a sentence of life without parole for defendant's armed

robbery conviction was proper and was affirmed. Dixon v. State, 267 Ga. App. 479, 600 S.E.2d 415 (2004).

Life without parole. — There is no requirement that a kidnapping victim receive bodily injury when sentencing is pursuant to O.C.G.A. § 17-10-6.1; moreover, as the defendant had also been convicted of armed robbery, the trial court correctly imposed a mandatory life without parole sentence for either of the defendant's second serious violent felonies: kidnapping and armed robbery. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. 2007).

An inmate who sought a writ of habeas corpus had been properly sentenced to life without the possibility of parole under O.C.G.A. § 17-10-7(b)(2). A felony murder charge with the underlying felony of possession of a firearm by a convicted felon had been vacated by operation of law, and no conviction on that charge had been entered; accordingly, unlike the case relied upon by the habeas court, the trial court had not used the prior felony conviction both to support a possession conviction and to enhance the inmate's sentence. Walker v. Hale, 283 Ga. 131, 657 S.E.2d 227, cert. denied, 555 U.S. 911, 129 S. Ct. 255, 172 L.Ed.2d 192 (2008).

Proper application of recidivism. — Pursuant to O.C.G.A. § 17-10-7(a), the defendant's two prior convictions as a habitual violator allowed the defendant to be sentenced as a recidivist after the defendant was convicted of two drug crimes. Morrison v. State, 256 Ga. App. 23, 567 S.E.2d 360 (2002).

Because the defendant failed to show an infringement of rights or a procedural irregularity relating to the three prior felony convictions the state used to support the imposition of a recidivist sentence, that sentence was upheld. Hampton v. State, 287 Ga. App. 896, 652 S.E.2d 915 (2007).

In a felony murder case, as the defendant was convicted of both predicate felonies, armed robbery and burglary, it was within the trial court's discretion to choose to merge the former rather than the latter into the felony murder count for which the defendant was sentenced. Thus, the defendant was not sentenced as a recidivist for felony murder, but was properly sentenced under O.C.G.A. § 17-10-7(c) to 20 years without the possibility of parole for the separate crime of burglary, which did not merge into the conviction for felony murder while in the commission of an armed robbery. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008).

As a violation of O.C.G.A. § 40-5-58(c)(1) (operating a vehicle by a habitual offender whose license has been revoked) is punishable by one to five years' imprisonment, the offense is a felony. Since a defendant had four prior convictions for violations of § 40-5-58(c)(1), the defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c). Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

Trial court did not err in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because the indictment stated that the defendant was in lawful confinement for the 1987 felony convictions and, thus, those convictions were properly admitted at trial to prove felony escape, O.C.G.A. § 16-10-52, for which the defendant could be sentenced up to ten years imprisonment; because the defendant's 1987 conviction for theft by taking was not used by the state as the predicate felony for the offense of felony escape pursuant to § 16-10-52(b), the 1987 felony theft by taking conviction remained available for sentence enhancement under § 17-10-7(a), and, inasmuch as the record was silent as to the specific felony conviction the trial court relied upon for sentence enhancement, it had to be presumed that the trial court knew the state of the law and did not use any of the 1987 felony convictions listed in the escape indictment to enhance the defendant's punishment under § 17-10-7(a). Allen v. State, 286 Ga. 273, 687 S.E.2d 417 (2009).

There was no error in the trial court's entry of sentence under O.C.G.A. § 17-10-7(d) because the defendant pled guilty to various counts of entering an automobile and theft by receiving, which were alleged in three separate indictments on which three separate orders of sentence were entered; each indictment

General Consideration (Cont'd)

alleged crimes that occurred on different days. Baker v. State, 306 Ga. App. 99, 701 S.E.2d 572 (2010).

Instruction on elements of recidivism. — Trial court was not required by the constitution to instruct the jury on the elements of recidivism. McCoy v. Newsome, 953 F.2d 1252 (11th Cir.), cert. denied, 504 U.S. 944, 112 S. Ct. 2283, 119 L. Ed. 2d 208 (1992).

Recidivism not jury issue. — Defendant has no right to a jury trial on a recidivism count. Zachery v. State, 241 Ga. App. 722, 527 S.E.2d 601 (2000).

Controlling issue on appeal is would result have been different. — When the defendant showed the constitutional deficiency of the defendant's appellate counsel for not raising an improper jury instruction, the habeas court used the wrong analysis of whether the defendant also showed prejudice by considering the possibility that the defendant would be subject to the same punishment on remand, as a recidivist under O.C.G.A. § 17-10-7(b), and thus showed no prejudice because the proper analysis looked only at whether the result of the defendant's appeal would have been different. Nelson v. Hall, 275 Ga. 792, 573 S.E.2d 42 (2002).

Issues raised on appeal. — Since the defendant did not raise the issue of intelligent and voluntary waiver with respect to prior guilty pleas in the trial court, it was held that issues which were not raised in the trial court cannot be raised for the first time on appeal. Mincey v. State, 186 Ga. App. 839, 368 S.E.2d 796 (1988).

Defendant's life sentence under O.C.G.A. § 17-10-7 should be sustained if the state demonstrates that the defendant was previously convicted of a felony under the laws of this state and was sentenced to confinement in a penal institution. Melton v. State, 216 Ga. App. 215, 454 S.E.2d 545 (1995).

No review of sentence within guidelines. — Appellate court declined to review the defendant's 30-year sentence because the sentence was within the statutory guidelines; the defendant was found guilty of possessing cocaine with the intent to distribute, the state introduced three prior felony convictions in aggravation of sentencing pursuant to O.C.G.A. § 17-10-2(a), and given the defendant's prior drug convictions and the mandate of O.C.G.A. § 17-10-7(c), the defendant faced a maximum punishment of life in prison under O.C.G.A. § 16-13-30(d). Jackson v. State, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

Ten-year sentence for shoplifting appropriate. — In applying the statute for imposition of recidivist sentencing, based on the defendant's four prior felony drug convictions, the trial court had no discretion with regard to the term of the sentence and was required to sentence the defendant to ten years, which was the maximum sentence for theft by shoplifting. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Sentence of ten years to serve for felony shoplifting was upheld; contrary to the defendant's contention, the trial court did not sentence the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7. The trial court's imposition of a sentence within the statutory limits would not be disturbed. Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

No error in imposition of sentence. — As the defendant was not sentenced as a recidivist under O.C.G.A. § 17-10-7(c) or to the maximum term pursuant to § 17-10-7(a) for a conviction of aggravated assault, in violation of O.C.G.A. § 16-5-21(b), the defendant's claim that the sentencing imposed was improper lacked merit. Tatum v. State, 297 Ga. App. 550, 677 S.E.2d 740 (2009).

Sentence of 30 years for each of the three attempted armed-robbery convictions fell within the statutory range and was not void. Issa v. State, 340 Ga. App. 327, 796 S.E.2d 725 (2017).

Sentence was within statutory range. — Trial court did not err in imposing separate sentences for the defendant's two convictions because the sentence was within the statutory range and the law allowed separate and consecutive punishment for separate criminal transactions;

O.C.G.A. § 17-10-7 applies to the use of prior convictions to enhance the punishment of repeat offenders, and the statute does not apply to the trial court's authority to impose separate sentences for a defendant's current convictions of two distinct offenses committed on different dates. Ross v. State, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

Sentence not cruel and unusual. — Trial court did not commit cruel and unusual punishment in sentencing a defendant to two consecutive terms of 20 years to serve in confinement for two burglary convictions under O.C.G.A. § 16-7-1(a), based on the defendant's recidivism under O.C.G.A. § 17-10-7(c), because the sentence was within statutory limits. Hight v. State, 302 Ga. App. 826, 692 S.E.2d 69 (2010).

Cited in Stinson v. State, 65 Ga. App. 592, 16 S.E.2d 111 (1941); Vann v. State, 72 Ga. App. 301, 33 S.E.2d 742 (1945); Norton v. State, 73 Ga. App. 307, 36 S.E.2d 120 (1945); Randall v. State, 73 Ga. App. 354, 36 S.E.2d 450 (1945); Rampley v. State, 81 Ga. App. 782, 60 S.E.2d 180 (1950); Cozzolino v. Colonial Stores, Inc., 213 Ga. 225, 98 S.E.2d 613 (1957); Hooks v. State, 215 Ga. 869, 114 S.E.2d 6 (1960); Lewis v. State, 113 Ga. App. 714, 149 S.E.2d 596 (1966); McEwen v. State, 113 Ga. App. 765, 149 S.E.2d 716 (1966); Burke v. State, 116 Ga. App. 753, 159 S.E.2d 176 (1967); Little v. State, 121 Ga. App. 792, 175 S.E.2d 922 (1970); Cook v. Smith, 427 F.2d 1172 (5th Cir. 1970); Todd v. State, 228 Ga. 746, 187 S.E.2d 831 (1972); Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903 (1972); Green v. State, 129 Ga. App. 27, 198 S.E.2d 343 (1973); Mathis v. State, 133 Ga. App. 445, 211 S.E.2d 400 (1974); Ingram v. State, 137 Ga. App. 412, 224 S.E.2d 527 (1976); Hinton v. State, 138 Ga. App. 702, 227 S.E.2d 474 (1976); Herrin v. State, 138 Ga. App. 729, 227 S.E.2d 498 (1976); Brogdon v. State, 138 Ga. App. 900, 228 S.E.2d 5 (1976); Lloyd v. State, 139 Ga. App. 625, 229 S.E.2d 106 (1976); Massey v. State, 141 Ga. App. 557, 234 S.E.2d 144 (1977); Cox v. State, 241 Ga. 154, 244 S.E.2d 1 (1978); Simmons v. State, 148 Ga. App. 317, 251 S.E.2d 167 (1978); Green v. State, 244 Ga. 755, 262 S.E.2d 68 (1979); Newton v. State, 154 Ga. App. 98, 267 S.E.2d 641 (1980); Wilson v. State, 158 Ga. App. 174, 279 S.E.2d 345 (1981); Jackson v. State, 158 Ga. App. 702, 282 S.E.2d 181 (1981); Davis v. State, 159 Ga. App. 356, 283 S.E.2d 286 (1981); Peavy v. State, 159 Ga. App. 280, 283 S.E.2d 346 (1981); State v. Shuman, 161 Ga. App. 304, 287 S.E.2d 757 (1982); Rothfuss v. State, 160 Ga. App. 863, 288 S.E.2d 579 (1982); Jones v. State, 161 Ga. App. 620, 288 S.E.2d 795 (1982); Henderson v. State, 162 Ga. App. 320, 292 S.E.2d 77 (1982); Waters v. State, 249 Ga. 671, 293 S.E.2d 333 (1982); Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360 (1982); Staton v. State, 164 Ga. App. 464, 297 S.E.2d 375 (1982); Dodd v. Williams, 560 F. Supp. 372 (N.D. Ga. 1983); Griffin v. State, 170 Ga. App. 287, 316 S.E.2d 797 (1984); Dobbs v. State, 180 Ga. App. 714, 350 S.E.2d 469 (1986); Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); Darty v. State, 188 Ga. App. 447, 373 S.E.2d 389 (1988); Edwards v. State, 188 Ga. App. 667, 374 S.E.2d 97 (1988); Brown v. State, 191 Ga. App. 875, 383 S.E.2d 361 (1989); Yearby v. State, 259 Ga. 461, 385 S.E.2d 414 (1989); Smith v. State, 193 Ga. App. 208, 387 S.E.2d 419 (1989); Tenney v. State, 194 Ga. App. 820, 392 S.E.2d 294 (1990); Daniel v. State, 196 Ga. App. 160, 395 S.E.2d 638 (1990); Andrews v. State, 200 Ga. App. 47, 406 S.E.2d 801 (1991); Brenneman v. State, 200 Ga. App. 111, 407 S.E.2d 93 (1991); Jenkins v. State, 201 Ga. App. 654, 413 S.E.2d 460 (1991); Rich v. State, 207 Ga. App. 343, 427 S.E.2d 796 (1993); Wallace v. State, 216 Ga. App. 718, 455 S.E.2d 615 (1995); Knight v. State, 221 Ga. App. 92, 470 S.E.2d 486 (1996); Beck v. State, 222 Ga. App. 168, 473 S.E.2d 263 (1996); Scott v. State, 240 Ga. App. 586, 524 S.E.2d 287 (1999); Mann v. State, 240 Ga. App. 809, 524 S.E.2d 763 (1999); Burruss v. State, 242 Ga. App. 241, 529 S.E.2d 375 (2000); Gary v. State, 244 Ga. App. 577, 536 S.E.2d 220 (2000); Davis v. State, 244 Ga. App. 715, 536 S.E.2d 603 (2000); Henderson v. State, 247 Ga. App. 31, 543 S.E.2d 95 (2000); Teasley v. State, 247 Ga. App. 580, 545 S.E.2d 17 (2001); Walton v. State, 247 Ga. App. 717, 544 S.E.2d 540 (2001); Sweeder v. State, 246 Ga. App. 557, 541 S.E.2d 414 (2000); Duncan v. State, 253 Ga. App. 239, 558

General Consideration (Cont'd)

S.E.2d 783 (2002); McGee v. State, 255 Ga. App. 708, 566 S.E.2d 431 (2002); Harper v. State, 262 Ga. App. 136, 586 S.E.2d 336 (2003); McMorris v. State, 263 Ga. App. 630, 588 S.E.2d 817 (2003); Shields v. State, 264 Ga. App. 232, 590 S.E.2d 217 (2003); Dawson v. State, 260 Ga. App. 824, 581 S.E.2d 371 (2003); Hunter v. State, 261 Ga. App. 276, 582 S.E.2d 228 (2003); Woodson v. State, 268 Ga. App. 731, 605 S.E.2d 822 (2004); Henry v. State, 279 Ga. 615, 619 S.E.2d 609 (2005); Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582 (2006); Dozier v. Jackson, 282 Ga. App. 264, 638 S.E.2d 337 (2006); Snelson v. State, 286 Ga. App. 203, 648 S.E.2d 647 (2007); Self v. State, 288 Ga. App. 77, 653 S.E.2d 787 (2007); Smith v. State, 289 Ga. App. 742, 658 S.E.2d 156 (2008); Dunagan v. State, 283 Ga. 501, 661 S.E.2d 525 (2008); Hooks v. State, 284 Ga. 531, 668 S.E.2d 718 (2008); Hampton v. State, 294 Ga. App. 857, 670 S.E.2d 502 (2008); Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008); Cobb v. State, 309 Ga. App. 70, 709 S.E.2d 9 (2011); McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014); Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014); Payne v. State, 338 Ga. App. 677, 791 S.E.2d 451 (2016); Harvey v. State, 344 Ga. App. 761, 811 S.E.2d 479 (2018); Troutman v. State, 348 Ga. App. 375, 823 S.E.2d 66 (2019); Worthen v. State, 304 Ga. 862, 823 S.E.2d 291 (2019); Dozier v. Watson, 305 Ga. 629, 827 S.E.2d 276 (2019); Purnell v. State, 843 S.E.2d 637, No. A20A0526, 2020 Ga. App. LEXIS 287 (2020).

Allegation and Proof of Prior Convictions

Knowing and voluntarily entered pleas. — Defendant's signature on forms in which the defendant acknowledged that the defendant was aware of specified constitutional rights and that the defendant was waiving those rights by pleading guilty, which the defendant signed in regard to three prior negotiated guilty pleas, showed that the defendant was aware the defendant was waiving constitutional rights when entering those guilty pleas, and permitted the trial court to find the state met the state's burden of proving the defendant's guilty pleas were validly entered; accordingly, the state showed that those prior pleas were knowingly and voluntarily entered for the purpose of the defendant being sentenced as a recidivist under O.C.G.A. § 17-10-7(c). Hall v. State, 261 Ga. App. 64, 581 S.E.2d 695 (2003).

Offenses charged in indictment for which defendant is on trial cannot be considered in determining defendant's status as a recidivist. McCoy v. State, 168 Ga. App. 598, 310 S.E.2d 2 (1983).

First offender guilty plea was not prior conviction. — Defendant would not have been subject to recidivist treatment and plea counsel's advice in this regard was erroneous because one of the prior felony convictions was based on a first offender guilty plea, which did not constitute a "conviction" for those purposes. Ingram v. State, 338 Ga. App. 552, 790 S.E.2d 641 (2016).

First offender probation not admissible. — Trial court erred in admitting the defendant's prior guilty plea, which had been resolved by placing the defendant on probation, as a first offender, in sentencing the defendant as a recidivist; however, the error was harmless since there was evidence of another guilty plea to felony counts sufficient to support a maximum sentence. Scott v. State, 216 Ga. App. 692, 455 S.E.2d 609 (1995).

Defendant violated the terms of first offender probation. — Due to the defendant's earlier violation of the terms of the defendant's first offender probation, the defendant was a convicted felon at the time of sentencing by the trial court; therefore, the trial court did not err in treating the defendant as a repeat offender. Daniels v. State, 271 Ga. 167, 517 S.E.2d 66 (1999).

Prior federal felony conviction shown to be felony under Georgia law. — For purposes of Georgia's recidivist statute, the defendant's federal conviction for conspiracy to transport stolen goods, in which the defendant admitted that the defendant stole more than $5,000 worth of silver, and that the defendant transported that stolen property across state lines, was a conviction that would have constituted a felony under Georgia

law based on the state offense of theft by receiving as the defendant received stolen property with a value that exceeded $500. Nordahl v. State, 344 Ga. App. 686, 811 S.E.2d 465 (2018), aff'd, 306 Ga. 15, 829 S.E.2d 99 (2019).

Convictions while a juvenile. — Defendant could not be found to be a recidivist under O.C.G.A. § 17-10-7(c) since one of the defendant's prior felony convictions was invalid as the conviction was for burglaries committed when the defendant was 16 years of age; the superior court did not have concurrent jurisdiction with the juvenile court to find the defendant guilty of a felony under O.C.G.A. § 15-11-28(b)(1) because the punishment for burglary was neither death nor life imprisonment under O.C.G.A. § 16-7-1. Smith v. State, 266 Ga. App. 111, 596 S.E.2d 230 (2004).

Convictions when juvenile tried as adult. — Defendant's sentence to life in prison without parole, under the three felony recidivist sentencing provision of O.C.G.A. § 17-10-7(c), was proper as the trial court could rely on an armed robbery conviction from the superior court against the defendant when the defendant was 16 years old as the court properly assumed jurisdiction over the matter. Moore v. State, 276 Ga. App. 55, 622 S.E.2d 417 (2005).

Out-of-state convictions for acts committed while defendant was a juvenile could not be used as prior felony convictions for purposes of recidivist sentencing under O.C.G.A. § 17-10-7 because the defendant would not have been convicted of felonies in this state, but would have been adjudicated delinquent. Miller v. State, 231 Ga. App. 869, 501 S.E.2d 42 (1998).

Trial court did not err in sentencing the defendant as a recidivist because the trial court committed no error in using the defendant's 1991 Michigan armed robbery conviction as a predicate offense for recidivist punishment as the state met the state's burden of proving that the defendant's Michigan conviction was for conduct that would have been considered a felony under Georgia law because, if the defendant had committed the offense of armed robbery in Georgia as a juvenile in 1991, a superior court would have had concurrent jurisdiction over the matter and the defendant could have been convicted of the felony offense of armed robbery. Anderson v. State, 337 Ga. App. 739, 788 S.E.2d 831 (2016).

Requirements of indictment for recidivist punishment. — Indictment for the second offense must allege the indictment and conviction of the accused for the first offense. Harris v. State, 40 Ga. App. 228, 149 S.E. 153 (1929).

Defendant must be indicted as a recidivist in order to impose recidivist punishment. Brown v. State, 144 Ga. App. 509, 241 S.E.2d 621 (1978).

For one to receive recidivist punishment one must have been indicted under a recidivist statute, one's prior convictions having been considered by the grand jury and having been included in the indictment. Aldridge v. State, 158 Ga. App. 719, 282 S.E.2d 189 (1981).

Defendant's prior felony convictions could not be used against the defendant since there was no recidivist charge contained in the indictment and the record did not contain any other affirmative notice to the defendant that the defendant's prior felony offenses would be used against the defendant for recidivist purposes during sentencing. State v. Freeman, 198 Ga. App. 553, 402 S.E.2d 529 (1991).

In a prosecution for armed robbery, even though the defendant was not indicted as a recidivist under O.C.G.A. § 17-10-7, the court did not err in sentencing the defendant as a recidivist since the state provided notice to the defendant that the defendant's prior offenses would be used against the defendant for recidivist purposes during sentencing. Kinsey v. State, 219 Ga. App. 204, 464 S.E.2d 648 (1995).

With regard to a defendant's conviction for burglary, the trial court properly sentenced the defendant under O.C.G.A. § 17-10-7 to 20 years, with ten years to serve in prison without parole and the remainder of the sentence suspended on the condition that the defendant not violate any laws, as a result of three prior felony convictions because the defendant waived any claimed error by failing to challenge the sentence. However, even if

Allegation and Proof of Prior Convictions (Cont'd)

the error had not been waived, the recidivist sentence was proper since the state proved all four of the convictions that were listed in the indictment and notices and, although the trial court stated that the court was not relying on the defendant's robbery convictions in imposing a sentence, there was no reason those convictions could not be used to support the sentence. Battise v. State, 295 Ga. App. 833, 673 S.E.2d 262 (2009), cert. denied, No. S09C0917, 2009 Ga. LEXIS 369 (Ga. 2009).

Trial court did not err by sentencing the defendant as a recidivist since the defendant's convictions for selling cocaine and possessing a firearm as a convicted felon were separate convictions and were not merged for sentencing purposes. The trial court's use of the same waiver form with regard to the defendant's guilty pleas did not negate the fact that the convictions were separate and were not consolidated. Crutchfield v. State, 295 Ga. App. 490, 672 S.E.2d 467 (2009).

Recidivist punishment appropriate. — Because the state provided adequate notice to the defendant of the state's intent to ask for recidivist sentencing and counsel chose to move forward at sentencing without making any objection, the trial court did not err in sentencing the defendant as a recidivist. Pruitt v. State, 354 Ga. App. 73, 840 S.E.2d 597 (2020).

No evidence that out-of-state convictions were felonies in Georgia. — Because the trial court considered the out-of-state convictions without evidence that the convictions were for conduct that would have constituted felonies in Georgia, the felony sentences were vacated and the case remanded for re-sentencing. Woodson v. State, 242 Ga. App. 67, 530 S.E.2d 2 (2000), aff'd, 273 Ga. 557, 544 S.E.2d 431 (2001).

When the defendant was sentenced to a life sentence as a recidivist, but a certified copy of the defendant's prior conviction from another state was not included in the record, the appellate court could not uphold the sentence as the court had no opportunity to inspect the prior conviction, nor did the state offer any proof that the acts of which the defendant was convicted in the prior conviction were a felony in Georgia, and it appeared that the prior sentence was for probation alone, meaning that the defendant was not "sentenced to confinement in a penal institution" as required by O.C.G.A. § 17-10-7(a). Wheeler v. State, 270 Ga. App. 363, 606 S.E.2d 612 (2004).

Trial court erred in sentencing the defendant as a recidivist because the defendant's prior Florida convictions did not match the elements of felonies in Georgia and, thus, did not qualify as predicate convictions. Butler v. State, 354 Ga. App. 473, 841 S.E.2d 162 (2020).

Proof of previous felony allegation must be made before the accused can be subjected to the maximum punishment prescribed. Harris v. State, 40 Ga. App. 228, 149 S.E. 153 (1929).

Failure to charge recidivism in indictment not error. — Since the state served notice to the defendant that the state planned to seek recidivist sentencing and to offer the defendant's prior convictions into evidence as aggravating factors, it was not error for the state to fail to charge the defendant under the recidivist statute in the indictment or for the court to sentence the defendant under such statute. Mikell v. State, 231 Ga. App. 85, 498 S.E.2d 531 (1998).

When sentencing the defendant as a recidivist, the trial court erred in considering prior convictions which were not supported by admissible evidence. Williams v. State, 235 Ga. App. 876, 510 S.E.2d 848 (1999).

Recidivism evidence used to enhance sentence. — Trial court may impose a higher degree of punishment for an offense due to evidence in aggravation of the punishment of O.C.G.A. § 17-10-2 and not have sentenced the defendant under a recidivist statute when the defendant was never indicted under a recidivist statute. Williams v. State, 208 Ga. App. 716, 431 S.E.2d 469 (1993).

Trial court properly resentenced the defendant to ten years, six to serve, on the defendant's guilty plea to sale of marijuana as the state provided an additional recidivist notice which listed three prior

felony convictions and O.C.G.A. § 17-10-7(a) did not give the trial judge discretion to impose less than the maximum sentence under those circumstances. West v. State, 255 Ga. App. 334, 565 S.E.2d 538 (2002).

Because the state introduced certified copies of convictions at the defendant's sentencing proving that, while represented by counsel, defendant pled guilty to at least three separate felony offenses, and the defendant did not produce any counter evidence showing an infringement of the defendant's rights or a procedural irregularity in the taking of the pleas, the state properly met the state's burden of proof of showing recidivism. Clark v. State, 279 Ga. 243, 611 S.E.2d 38 (2005).

Trial court did not err in considering the defendant's three prior sale-of-cocaine convictions as three separate convictions for purposes of O.C.G.A. § 17-10-7(c); even though two of the prior convictions were entered on the same date by the same judge and had concurrent sentences, the convictions were separately indicted and concerned two separate sales of cocaine that took place on different days. Butler v. State, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Because the defendant's three prior felony convictions, and a subsequent conviction of possession of a firearm by a convicted felon as a result of one or more of those felonies, remained separate felonies that could be used to impose a recidivist punishment for the commission of yet another felony, and the defendant did not seek to collaterally attack any of those convictions, the recidivists sentences imposed under O.C.G.A. § 17-10-7 were valid. Campbell v. State, 279 Ga. App. 331, 631 S.E.2d 388 (2006).

Trial court properly sentenced the defendant as a repeat offender under O.C.G.A. § 17-10-7(c) since the defendant had previously been convicted of three prior crimes which would have been felonies if committed in Georgia; moreover, there was no evidence in the record to support claims that defendant was not represented by counsel in the prior matters. McConnell v. State, 281 Ga. App. 303, 635 S.E.2d 882 (2006).

Because sufficient proof of the necessary prior convictions, even without inclusion of the defendant's first offender plea, existed to authorize punishment under both O.C.G.A. §§ 16-13-30 and 17-10-7, the recidivist sentence imposed by the trial court was upheld. Johnson v. State, 284 Ga. App. 724, 644 S.E.2d 544, cert. denied, No. S07C1179, 2007 Ga. LEXIS 538 (Ga. 2007).

Trial court properly denied the defendant's motion complaining of the imposition of recidivist sentencing under O.C.G.A. § 17-10-7(c) as the defendant did not establish that the trial court erred in considering any of the defendant's three prior felony convictions for purposes of recidivist sentencing. Defendant's argument that a third prior conviction was not final since the conviction still involved a period of probation that had not yet been discharged or revoked was found meritless as the prior conviction at issue did not involve a first offender sentence. Land v. State, 291 Ga. App. 617, 662 S.E.2d 368 (2008).

Trial court correctly sentenced a defendant to serve life without the possibility of parole because the defendant was a four-time recidivist and the maximum sentence for rape was life in prison. Further, the state provided the defendant with notice prior to trial that the state would seek to have the defendant sentenced as a recidivist, pursuant to O.C.G.A. § 17-10-7. Hall v. State, 292 Ga. App. 544, 664 S.E.2d 882, cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

Trial court erred in using the defendant's August 2001 felony convictions to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because, at the time of the defendant's sentencing for escape in October 2001, the August 2001 convictions were unavailable for recidivist treatment since those convictions were pending on appeal; the defendant was found guilty and sentenced on armed robberies in August 2001, the defendant appealed those convictions, and the convictions were affirmed three years later. Allen v. State, 286 Ga. 273, 687 S.E.2d 417 (2009).

Trial court properly sentenced the de-

Allegation and Proof of Prior Convictions (Cont'd)

fendant as a recidivist under O.C.G.A. § 17-10-7 following a shoplifting conviction because the record of the plea proceeding in a prior case wherein the defendant pled guilty belied the claim that the defendant was not adequately advised of the right to a jury trial, thus, the trial court did not err in considering, for purposes of sentencing, that prior conviction. Foster v. State, 319 Ga. App. 815, 738 S.E.2d 651 (2013).

Because the felony convictions not challenged by the defendant would have sufficed to render the defendant a recidivist and because both of the defendant's attacks on prior convictions for drug possession with intent to distribute lacked merit, the trial court did not err when the court considered those prior convictions and sentenced the defendant to serve 30 years without parole under O.C.G.A. §§ 16-13-30(b) and 17-10-7(c). Merritt v. State, 329 Ga. App. 871, 766 S.E.2d 217 (2014).

Evidence of previous conviction relevant to punishment for second conviction. — As to defendants charged with a felony punishable by labor in the penitentiary, evidence of a previous conviction and sentence for a felony is relevant evidence on the question of the punishment to be inflicted in the event of a conviction for a second felony. Kryder v. State, 212 Ga. 272, 91 S.E.2d 612, cert. denied, 352 U.S. 850, 77 S. Ct. 71, 1 L. Ed. 2d 61 (1956).

Introduction of former indictments, pleas of guilty, and sentences are the highest and best evidence of such facts. Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290 (1944).

Use of arrest photographs to demonstrate prior convictions. — Trial court did not abuse the court's discretion during the sentencing phase of the defendant's trial on charges of armed robbery and possession of a firearm during the commission of a felony when the court considered photographs that were taken when the defendant was arrested on another charge to determine that the defendant was the person convicted of that charge, even though the defendant was arrested and convicted under another name, or when the court found that the defendant was subject to a sentence of life in prison without parole because the defendant had prior felony convictions. Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16 (2004).

Allegation and proof of prior convictions generally. — Fact of a former sentence must be charged in the indictment if a second conviction would affect the grade of the offense, or require the imposition of a different punishment. McWhorter v. State, 118 Ga. 55, 44 S.E. 873 (1903).

If under this section it was provided that the maximum punishment is to be inflicted in the event the accused has been convicted of a prior felony, such fact becomes a part of the offense charged, and it was necessary to allege and prove the prior conviction. Berry v. State, 51 Ga. App. 442, 180 S.E. 635 (1935).

If prior felony convictions are intended to be proved for the purpose of obtaining a maximum sentence, the previous convictions must be alleged in the indictment as well as proved on the trial of the case. Kitchens v. State, 113 Ga. App. 663, 149 S.E.2d 373 (1966).

Trial court erred in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the trial court did not admit into the record two certified copies of the defendant's prior convictions tendered by the state or a third copy that the prosecution had been waiting to receive from the clerk's office, and defense counsel did not waive the requirement that the convictions be proven by the state. Tanksley v. State, 323 Ga. App. 299, 743 S.E.2d 585 (2013).

It is mandatory that previous convictions be set out in indictment. Croker v. Smith, 225 Ga. 529, 169 S.E.2d 787 (1969).

If the state elects to aver in a possession of firearm by felon count that the defendant has been convicted of more than one prior felony offense, such averment is descriptive of the manner in which the offense was committed and, as such, the state must make an honest attempt to prove the offense "as laid." State v. Free-

man, 198 Ga. App. 553, 402 S.E.2d 529 (1991).

Prior convictions not required in indictment. — Since 1974 when Georgia adopted judge sentencing (O.C.G.A. § 17-10-2) it is not required that the prior convictions be included in the indictment but only that the accused receive notice of the state's intention to seek recidivist punishment and of the identity of the prior convictions. Wainwright v. State, 208 Ga. App. 777, 432 S.E.2d 555 (1993).

When the prior convictions do no more than subject the defendant to a greater risk of the maximum sentence (O.C.G.A. § 17-10-7(a)) or even to a certainty of the maximum sentence (O.C.G.A. § 17-10-7(b)) for the crime as indicted, the prior convictions need not be alleged in the indictment; imposition of the maximum sentence has already been authorized by the grand jury's action, and adequate advance notice to the defendant is assured by O.C.G.A. § 17-10-2(a). Wainwright v. State, 208 Ga. App. 777, 432 S.E.2d 555 (1993).

Records of the defendant's pleas to two prior indictments tendered in aggravation of punishment were properly not treated as one offense since there was no evidence that the indictments were "consolidated for trial" as contemplated by O.C.G.A. § 17-10-7(d). Robinson v. State, 232 Ga. App. 280, 501 S.E.2d 536 (1998).

Since the state gave the defendant notice that the state intended to seek sentencing under the recidivist statute and, at sentencing, offered into evidence certified copies of previous convictions, imposition of an enhanced sentence was not invalid on grounds that the trial court never admitted the certified copies into evidence. Moore v. State, 250 Ga. App. 75, 550 S.E.2d 667 (2001).

Although the language in the convictions may not track Georgia's armed robbery statute, if a defendant's Missouri conviction's language describes that the defendant was in possession of a deadly weapon when the defendant forcefully and violently took valuables from the victim, such description was sufficient to prove that the defendant was convicted of an offense in Missouri, which would have been the serious violent felony of armed robbery had the offense occurred in Georgia pursuant to O.C.G.A. § 17-10-7(b)(2). Anderson v. State, 261 Ga. App. 456, 582 S.E.2d 575 (2003).

Trial court did not err in not including a recidivism count in the indictment as the defendant's prior convictions did not constitute facts increasing the defendant's punishment that were required to be submitted to a jury. Nordahl v. State, 344 Ga. App. 686, 811 S.E.2d 465 (2018), aff'd, 306 Ga. 15, 829 S.E.2d 99 (2019).

Failure to object to void sentence did not mean sentence not vacated on appeal. — If, at the time of a recidivist sentencing, the period of probation on the defendant's prior first offender sentence had expired with no revocation, the discharge was automatic and the first offender sentence was not a felony "conviction." The recidivist sentence was thus illegal, and since a challenge to the void sentence was not waived by the defendant's failure to object, the sentence was vacated. Headspeth v. State, 266 Ga. App. 414, 597 S.E.2d 503 (2004).

Defendant was properly sentenced under the recidivist statute, O.C.G.A. § 17-10-7(a), even though a certified copy of the prior conviction was not formally entered into evidence since the state put the defendant on notice that the state would offer evidence of the defendant's prior conviction, the defendant did not challenge the legal sufficiency of the prior conviction, and the defendant's own witness acknowledged that the defendant had a prior conviction. Thompson v. State, 266 Ga. App. 29, 596 S.E.2d 205 (2004).

Alford plea sufficient. — In a trial in which the state sought to show that the defendant was a recidivist for sentencing purposes, although the documents did not contain direct evidence of the defendant's plea in one of the prior convictions, the documents were sufficient to establish that the defendant entered an Alford plea, which was a guilty plea and was sufficient for purposes of O.C.G.A. § 17-10-7; for the one conviction at issue, the documents included an indictment which was left blank as to the plea section, a sentencing form which indicated that defendant entered an Alford plea, and an order of restitution. Wynn v. State, 271 Ga. App. 10, 609 S.E.2d 97 (2004).

Allegation and Proof of Prior Convictions (Cont'd)

Because the state: (1) conceded that the trial court erred by using two felony and three misdemeanor shoplifting convictions; (2) failed to meet the state's burden of proving that the defendant was represented by counsel before pleading guilty to those crimes; and (3) failed to show that the defendant was represented by counsel or waived such a right, on three previous misdemeanor shoplifting convictions, the trial court should not have used the convictions to enhance the defendant's shoplifting conviction into a felony; moreover, the defendant overcame presumption of regularity of the trial court's decision as two of the underlying felonies were the same ones which were ruled inadmissible. Simmons v. State, 278 Ga. App. 372, 629 S.E.2d 86 (2006).

Trial court erred in sentencing the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7(c) because the state did not introduce any evidence that the defendant had previously pled guilty or been convicted of any crime. Dobbs v. State, 302 Ga. App. 628, 691 S.E.2d 387 (2010).

Defendant sentenced to life in prison without parole, under O.C.G.A. §§ 16-13-30(d) and 17-10-7(c), based on the defendant's prior convictions stemming from guilty pleas, was not entitled to habeas relief on the basis of the defendant's trial counsel's failure to review the transcripts of the defendant's prior plea colloquies because: (1) no per se rule required counsel to review the transcripts; and (2) counsel otherwise adequately investigated the validity of the prior convictions. Barker v. Barrow, 290 Ga. 711, 723 S.E.2d 905, cert. denied, 568 U.S. 987, 133 S. Ct. 540, 184 L. Ed. 2d 354 (2012).

State did not "use up" prior felony conviction to prove element of crime. — Trial court's consideration of a prior felony conviction in imposing punishment under O.C.G.A. § 17-10-7(c) was proper because the state did not "use up" evidence of the prior felony conviction to establish a charge of firearm possession by a convicted felon charge; instead, the state only offered evidence of the defendant's previous felony indictment, not the conviction. Thompson v. State, 294 Ga. App. 768, 670 S.E.2d 226 (2008), cert. denied, No. S09C0482, 2009 Ga. LEXIS 252 (Ga. 2009).

First offender conviction had to be violated and adjudication of guilt entered. — Because it was unclear whether one of the defendant's convictions, which was a first offender conviction pursuant to O.C.G.A. § 42-8-60 et seq., was successfully completed, in which case there was no "conviction" as that term was defined under O.C.G.A. § 16-1-3(4) because there was no adjudication of guilt, or alternatively, whether the first offender sentence was violated and the trial court thereafter entered an adjudication of guilt and a sentence thereon, in which case the conviction could be counted as one of the three felonies for purposes of recidivist sentencing under O.C.G.A. § 17-10-7(c), a remand of the sentencing for further determination was required. Swan v. State, 276 Ga. App. 827, 625 S.E.2d 97 (2005).

Proof of validity of prior guilty plea. — In a prosecution for rape and aggravated sodomy, proof that the defendant's plea of guilty to possession of cocaine with intent to distribute required sentencing of the defendant as a recidivist. Miller v. State, 214 Ga. App. 393, 448 S.E.2d 20 (1994).

Trial court did not deprive the defendant of due process of law by admitting in evidence the defendant's prior guilty plea so as to make the defendant eligible for a recidivist sentence; even though a transcript of the plea proceeding was not available, the validity of the plea was shown by extrinsic evidence. Nash v. State, 233 Ga. App. 75, 503 S.E.2d 23 (1998), rev'd on other grounds, 271 Ga. 281, 519 S.E.2d 893 (1999).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because the evidence of the defendant's guilty plea in another state indicated that the defendant was represented by counsel when the defendant entered the plea and the defendant produced no evidence that the plea was not valid. Johnson v. State, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Remand for further sentencing proceedings was necessary because the state was

not given an opportunity to show that a prior conviction, based on a guilty plea, upon which the state relied during sentencing was constitutional. Grant v. State, 326 Ga. App. 121, 756 S.E.2d 255 (2014).

Certified copy of plea submitted. — Trial court did not err in admitting the defendant's prior guilty plea to armed robbery because the state tendered a certified copy of the guilty plea during the sentencing hearing and, thus, met the state's initial burden by proving the existence of the prior guilty plea and that the defendant was represented by counsel. Freeman v. State, 244 Ga. App. 393, 535 S.E.2d 349 (2000).

Trial court properly used a prior guilty plea to sentence the defendant as a recidivist when the state presented a certified copy of the plea that was signed and initialed by defense counsel along with a plea hearing transcript; even if the plea hearing transcript was uncertified and unauthenticated, the certified copy of the plea was admissible under former O.C.G.A. § 24-7-20 (see O.C.G.A. § 24-9-920), and the defendant had not produced evidence of invalidity once the fact of conviction was proved and the state showed that the defendant had been represented by counsel. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. 2007).

When the defendant was sentenced as a recidivist under O.C.G.A. § 17-10-7(d), the sentence was properly supported by certified copies of each of the four prior convictions. Hester v. State, 274 Ga. App. 276, 617 S.E.2d 232 (2005).

Trial court did not err in considering the defendant's prior guilty plea in sentencing the defendant as a recidivist after the defendant was convicted of felony theft by taking because the state, by tendering the certified copy of the plea, met the state's initial burden of proving that the defendant had entered the guilty plea. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

State may prove as many prior convictions as have occurred. — In alleging former conviction or plea of guilty by the defendant of similar offenses, the state is not limited to the alleging or proving of only one. It may allege and prove as many as have in fact occurred, or any portion thereof. Law v. State, 121 Ga. App. 106, 173 S.E.2d 98, appeal dismissed, 226 Ga. 591, 176 S.E.2d 80 (1970).

Convictions on separate counts of the same indictment count as one prior felony for purposes of recidivist sentencing. Fuller v. State, 233 Ga. App. 211, 504 S.E.2d 62 (1998).

Trial court erred in sentencing the defendant under O.C.G.A. § 17-10-7(c) because two of the defendant's prior convictions were pleas that had been consolidated for trial under § 17-10-7(d) and, thus, were deemed to be only one conviction. Stone v. State, 245 Ga. App. 728, 538 S.E.2d 791 (2000).

When the defendant was sentenced as a recidivist under O.C.G.A. § 17-10-7(d), the trial court properly considered two convictions arising from the same crime as one conviction for recidivist sentencing purposes, but the court was not required to consider convictions entered two years apart as one conviction because the probation granted for the earlier offense was revoked on the same day defendant was sentenced on the later offense. Hester v. State, 274 Ga. App. 276, 617 S.E.2d 232 (2005).

Offenses not consolidated for trial. — Trial court correctly concluded that a defendant's three prior offenses were not consolidated for trial under O.C.G.A. § 17-10-7(d). The three prior crimes involved different victims, and each conviction had a separate case number, indictment, and sentencing order. Barbee v. State, 308 Ga. App. 322, 707 S.E.2d 550 (2011).

Prior felony conviction resulting from guilty verdict. — Since the defendant was shown to have at least one prior felony conviction resulting from a guilty verdict rather than a guilty plea, and since the defendant was found guilty of another separate felony, it was not error to sentence the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7(a). Cribbs v. State, 204 Ga. App. 109, 418 S.E.2d 405, cert. denied, 204 Ga. App. 921, 418 S.E.2d 405 (1992).

First offender record properly considered. — Defendant's first offender re-

Allegation and Proof of Prior Convictions (Cont'd)

cord was properly considered at the defendant's sentencing hearing and evidence regarding the defendant's underlying behavior in connection with the first offender plea was not required. Williams v. State, 228 Ga. App. 622, 492 S.E.2d 290 (1997).

Admissibility of proof of extraneous crime. — To be admissible, proof of extraneous crime must tend to establish commission of the crime in question. Kitchens v. State, 113 Ga. App. 663, 149 S.E.2d 373 (1966).

Prior conviction may be used to show motive, scheme, or plan. — While the primary object of alleging and proving that the defendant, in a trial for larceny (now theft) of an automobile, had been previously convicted of numerous designated felonies and sentenced to confinement and labor in the penitentiary for each of those offenses, may be to make the defendant receive the maximum sentence under the provisions of this section, yet such proof, especially as to the defendant's previous conviction of the larceny of an automobile, is admissible to show motive, scheme, or plan. Weeks v. State, 66 Ga. App. 553, 18 S.E.2d 503 (1942).

If a particular group of tools has been used in a particular way in previous burglaries related in point of time, the evidence may be admissible to show modus operandi, or it may be shown that the tools in question have in fact been used by the defendant in the commission of the crime for the purpose of showing the intent accompanying the possession. Kitchens v. State, 113 Ga. App. 663, 149 S.E.2d 373 (1966).

Effect of written admission of prior conviction. — Written admission made to the court of the allegation in the indictment of a prior conviction by the defendant does not make it necessary to strike this allegation from the indictment nor make evidence of such fact inadmissible. Berry v. State, 51 Ga. App. 442, 180 S.E. 635 (1935).

If indicted as a recidivist on narcotics offense with prior convictions for nonnarcotics offenses, sentencing under this section was proper. Green v. State, 154 Ga. App. 295, 267 S.E.2d 898 (1980).

If indicted on narcotics charge with a prior narcotics conviction, the specific recidivist statute for narcotics offenders should be applied rather than the general recidivist statute. Green v. State, 154 Ga. App. 295, 267 S.E.2d 898 (1980).

Recidivist sentencing applied in drug possession conviction. — Since there had been three prior felony convictions, O.C.G.A. § 17-10-7 applied to a sentencing for possession of cocaine. Gray v. State, 254 Ga. App. 487, 562 S.E.2d 712 (2002).

Recidivist sentencing properly applied. — Trial court did not err in imposing recidivist sentencing because the state's evidence served as sufficient proof of the existence of the defendant's prior guilty pleas and that the defendant was represented by counsel when those pleas were taken. Horne v. State, 318 Ga. App. 484, 733 S.E.2d 487 (2012).

Driving motor vehicle after being declared habitual violator. — Defendant could not be sentenced under O.C.G.A. § 17-10-7(b) since the defendant's habitual violator convictions did not fall within the definition of "serious violent felony." Ball v. State, 233 Ga. App. 859, 506 S.E.2d 149 (1998).

Identity of names in prior and present indictments is prima facie proof. — Identity of names shown in two previous indictments with the name in the present indictment was sufficient in the instant case to establish prima facie that the defendant was the same man previously charged and sentenced. Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290 (1944).

Defendant may rebut evidence of previous conviction. — In a prosecution for a second felonious offense, if record evidence of a former conviction is introduced showing one of the same name as that of the defendant on trial, the defendant has the opportunity of showing that the defendant is not the individual named in the previous indictments, and until the defendant proves otherwise, the evidence would be taken as proof that the defendant is the person named in the previous indictments. It is not conclusive, but is

prima facie evidence of a former conviction. Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290 (1944).

If defendant does not rebut such identity, it is sufficiently established. — If the defendant is being prosecuted under a certain name, and the record evidence of a former conviction shows an individual of the same name to have been formerly convicted and sentenced in the same court for two felonies committed in the same county, and the defendant in the defendant's statement to the jury does not deny that the defendant is the person named in the former sentences, and there is no evidence to rebut this prima facie proof by the record evidence of identity, and this record evidence is undisputed, the identity of the defendant as the person named in the former sentences was thus sufficiently established. Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290 (1944).

Because the defendant did not present any evidence that one of the three prior convictions presented by the state for sentencing purposes was a first-offender sentence, the defendant was properly sentenced as a recidivist. Swan v. State, 275 Ga. App. 137, 619 S.E.2d 809 (2005).

Concordance of name. — In the absence of any denial by the defendant and no proof to the contrary, concordance of name is sufficient to show that the defendant and the individual previously convicted are the same person. Mincey v. State, 186 Ga. App. 839, 368 S.E.2d 796 (1988).

Judge may inspect record and act on own knowledge as to identity. — After a second conviction, the judge may inspect the record of the former trial, act on the judge's own knowledge, or hear evidence to satisfy the judge of the identity of the accused. McWhorter v. State, 118 Ga. 55, 44 S.E. 873 (1903).

Conviction with maximum sentence invalid if indictment silent as to prior convictions. — Conviction and sentence of an accused given the maximum punishment is illegal if the indictment contains no reference to the defendant's former convictions and sentences. Harris v. State, 40 Ga. App. 228, 149 S.E. 153 (1929).

Notice of prior offenses used for recidivist purposes. — Although it is not essential that the indictment set forth the prior offenses, if the indictment does not set forth prior offenses it is necessary that the record contain an "affirmative notice to defendant that his prior felony offenses would be used against him for recidivist purposes during sentencing." Ross v. State, 210 Ga. App. 455, 436 S.E.2d 496 (1993).

Defendant was not improperly sentenced under the general recidivist statute, O.C.G.A. § 17-10-7(c), as the defendant was served with notice that certified copies of the defendant's three prior felony convictions would be used against the defendant in sentencing as required by O.C.G.A. § 17-10-2(a); once the convictions were offered, the trial court was authorized to sentence the defendant under § 17-10-7. Walker v. State, 268 Ga. App. 669, 602 S.E.2d 351 (2004).

Trial court did not err in finding that the state provided sufficient notice of the state's intent to seek recidivist punishment because the state first provided the defendant with notice of the state's intent to seek recidivist punishment in January 2014; and the amended notice from June 2016 was provided well before the February 10, 2017 hearing, at which the defendant ultimately pled guilty, and the state provided specific details regarding the defendant's previous three convictions that the state intended to use in aggravation of punishment, including the fact that those offenses were considered felonies in their respective jurisdictions and would similarly be considered felonies in Georgia. Nordahl v. State, 344 Ga. App. 686, 811 S.E.2d 465 (2018), aff'd, 306 Ga. 15, 829 S.E.2d 99 (2019).

Recidivism indictment which contains a defect in the allegation of prior convictions is not rendered void by such defect, assuming that the defect was not brought to the attention of the jury during the guilt-innocence phase of the trial. Wooten v. State, 160 Ga. App. 747, 288 S.E.2d 94 (1981).

Prior convictions as a separate "count." — Placing a defendant's prior convictions in an indictment pursuant to O.C.G.A. § 17-10-7 did not constitute a separate and distinct "count" of the indictment so as to charge the defendant with

Allegation and Proof of Prior Convictions (Cont'd)

an offense. Parrish v. State, 160 Ga. App. 601, 287 S.E.2d 603 (1981).

Prior federal conviction for receiving, possessing, and concealing explosives, knowing the explosives have been stolen, was not necessarily conduct which would be considered felonious under the laws of Georgia, and that conviction cannot be considered a prior conviction within the meaning of O.C.G.A. § 17-10-7(b). Wallace v. State, 175 Ga. App. 685, 333 S.E.2d 874 (1985).

Prior out-of-state convictions. — Although the language of a Florida indictment did not track Georgia's armed robbery statute, the Florida indictment was sufficient to prove that the defendant was convicted of two offenses in Florida which would have each been the serious violent felony of armed robbery had the offenses been committed in Georgia. Smith v. State, 241 Ga. App. 770, 527 S.E.2d 608 (2000).

There was no merit to the defendant's contention that the trial court erred in sentencing the defendant to life in prison without parole under the recidivist provisions of O.C.G.A. § 17-10-7(b)(2) since the defendant was convicted of a serious violent felony, armed robbery, and the state produced evidence that the defendant had previously been convicted in Florida of the offense of armed robbery, which, if committed in Georgia, would also have been a serious violent felony as defined in O.C.G.A. § 17-10-6.1(a). Cordy v. State, 257 Ga. App. 726, 572 S.E.2d 73 (2002).

Fla. Stat. Ch. 812.13(2)(a) specifically provided that armed robbery was committed while robbing using "force, violence, assault," or intimidation and carrying a firearm or other deadly weapon, so the defendant's conviction of this crime, even though it was noted that the defendant did not carry the firearm involved in the offense, adequately supported the imposition of a life sentence without parole under O.C.G.A. § 17-10-7(b)(2) for defendant's subsequent offense. King v. State, 258 Ga. App. 872, 575 S.E.2d 679 (2002).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because it was shown that the defendant pled guilty in Alabama to theft of an automobile, and, under Georgia law, theft of a motor vehicle was a felony regardless of the value of the vehicle under O.C.G.A. § 16-8-12(a)(5)(A). Johnson v. State, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Defendant's case was remanded for resentencing after a conviction for criminal attempt to manufacture methamphetamine because the trial court considered an uncertified Arkansas docket sheet in aggravation of sentence and a Tennessee conviction that might not qualify as a prior felony in Georgia under the recidivist statute. Elliot v. State, 274 Ga. App. 73, 616 S.E.2d 844 (2005).

Because the state met the state's statutory burden of proving that the defendant had at least three prior out-of-state convictions for offenses that would have constituted felonies under Georgia law, the trial court was entitled to sentence the defendant as a fourth-time felony offender under O.C.G.A. § 17-10-7(c). Nelson v. State, 277 Ga. App. 92, 625 S.E.2d 465 (2005).

Trial court did not err in finding that the defendant's two Oklahoma convictions would have constituted felonies under Georgia law for purposes of sentencing under O.C.G.A. § 17-10-7(a); the state introduced copies of the applicable Oklahoma statutes and there was no basis for concluding that the trial judge was required to review certified copies of the Oklahoma statutes in order to reach the court's conclusions. Johnson v. State, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

With regard to a defendant's conviction for armed robbery and other crimes, the trial court did not err by sentencing the defendant under O.C.G.A. § 17-10-7(b) based on the existence of an out-of-state robbery with a dangerous weapon conviction because, for sentencing purposes, Georgia defines armed robbery as a serious violent felony and the out-of-state conviction for the crime of robbery with a dangerous weapon was properly treated as armed robbery under Georgia law. Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008).

Defense counsel was not ineffective for failing to object to the trial court's use of

prior felonies defendant committed in California to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(c), as the elements of Cal. Health & Safety Code §§ 11054(f), 11350(a) (possession of cocaine) were sufficiently similar to those of O.C.G.A. §§ 16-13-26(1)(D), 16-13-30(c); and the elements of Cal. Penal. Code § 211 (robbery) were sufficiently similar to those of O.C.G.A. § 16-8-40. Williams v. State, 296 Ga. App. 270, 674 S.E.2d 115 (2009).

Trial court did not err in sentencing the defendant as a recidivist because the records of an Alabama conviction showed that the defendant pled guilty to the offense of burglary in the third degree and received a sentence of four years imprisonment; the elements of the crime as charged in the Alabama indictment were similar to the elements required to commit the crime under O.C.G.A. § 16-7-1. Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Trial court properly imposed recidivist punishment pursuant to O.C.G.A. § 17-10-7 based on the defendant's prior federal conviction for conspiracy to transport stolen goods in interstate commerce, 18 U.S.C. §§ 371 and 2314, because the conviction's elements matched felony conspiracy to commit a crime under Georgia law as defined in O.C.G.A. § 16-4-8. Nordahl v. State, 306 Ga. 15, 829 S.E.2d 99 (2019).

Offenses heard on same day not "consolidated for trial." — When previous offenses were merely heard on the same day for convenience or efficiency, but were not in fact "consolidated for trial," the offenses constituted separate offenses for purposes of O.C.G.A. § 17-10-7(c), especially if a separate indictment was charged for each of the offenses and a separate sentence was handed down for each offense. Clarke v. State, 167 Ga. App. 402, 306 S.E.2d 702 (1983).

Prior convictions were not consolidated for trial under O.C.G.A. § 17-10-7(c) although the convictions involved separate indictments and pleas of guilty before the same judge on the same date, concurrent sentences in separate orders, and similar but separate probation orders. Moore v. State, 169 Ga. App. 24, 311 S.E.2d 226 (1983).

Since two convictions were the result of guilty pleas entered on the same date to two separate accusations, since the defendant was sentenced for each conviction, sentences to be served concurrently, and since a separate order of sentence was entered on each accusation, the trial court did not err in concluding that those two prior convictions had not been consolidated for trial within the meaning of O.C.G.A. § 17-10-7(c). Parker v. State, 170 Ga. App. 295, 316 S.E.2d 855 (1984), overruled on other grounds, Darty v. State, 188 Ga. App. 447, 373 S.E.2d 389 (1988).

Concurrent sentence entered on same day not consolidated. — Since the record reflected that the defendant was found guilty of armed robbery and pled guilty to possessing heroin on two separate dates and all three convictions were the result of separate indictments and a separate order of sentence was entered on each indictment, the fact that the sentences were entered on the same day and that the sentences on the possession charges ran concurrent with the armed robbery sentence did not require the conclusion that the three prior convictions had been "consolidated for trial" within the meaning of O.C.G.A. § 17-10-7. Philmore v. State, 263 Ga. 67, 428 S.E.2d 329 (1993); Mims v. State, 225 Ga. App. 331, 484 S.E.2d 37 (1997).

Although the latter two of a defendant's prior felonies were entered on the same day and resulted in the imposition of concurrent terms of imprisonment, as the sentences were based on burglaries that occurred on different dates and resulted in separate indictments against the defendant, the sentences were not deemed consolidated for trial under O.C.G.A. § 17-10-7(d), such that the offenses counted as separate felony offenses for purposes of recidivist sentencing under § 17-10-7(c). McSears v. State, 292 Ga. App. 804, 665 S.E.2d 890 (2008).

O.C.G.A. § 17-10-7(d) did not require the imposition of concurrent sentences for a defendant's convictions of armed robbery and aggravated assault. O.C.G.A. § 16-1-7 authorized separate sentences for the two crimes charged in the same prosecution because the crimes were not

Allegation and Proof of Prior Convictions (Cont'd)

included offenses. Redden v. State, 294 Ga. App. 879, 670 S.E.2d 552 (2008).

State need not prove that defendant's prior convictions are valid in order merely to allege the convictions in the indictment. Aldridge v. State, 158 Ga. App. 719, 282 S.E.2d 189 (1981).

State must prove prior convictions at sentencing hearing. Aldridge v. State, 158 Ga. App. 719, 282 S.E.2d 189 (1981).

Fact of prior conviction triggers section. — It is the fact of the prior conviction, not where or when the conviction occurred, that triggers O.C.G.A. § 17-10-7. Aldridge v. State, 158 Ga. App. 719, 282 S.E.2d 189 (1981).

Offenses occurring after charged offense. — Sentence of the defendant as a recidivist was not authorized since the offenses on which the state relied occurred after the offenses for which the defendant was being sentenced. Covington v. State, 226 Ga. App. 484, 486 S.E.2d 706 (1997).

Time for defendant to challenge validity of convictions on which recidivism charge is made is when state attempts to prove the convictions at sentencing. Aldridge v. State, 158 Ga. App. 719, 282 S.E.2d 189 (1981).

Defendant's failure to furnish transcript of prior proceeding. — If the defendant contended that the evidence submitted in assessing punishment as a recidivist was insufficient in light of the state's use of "uncounselled" convictions from another county, inasmuch as it was incumbent upon the defendant to provide a transcript of the proceeding (Chancery v. State, 256 Ga. 415, 349 S.E.2d 717 (1986)) and none was filed, the Court of Appeals had to assume that the evidence presented at the sentencing hearing supported the sentence imposed by the trial court. Midura v. State, 183 Ga. App. 523, 359 S.E.2d 416 (1987).

Use of prior convictions for guilt innocence phase and sentencing phase. — When the defendant was convicted of aggravated assault, the defendant's prior convictions for aggravated assault and criminal damage to property, which had been used during the guilt-innocence phase of the defendant's trial for impeachment purposes, could be used at sentencing because a repeat offender convicted of aggravated assault could be sentenced as a recidivist, under O.C.G.A. § 17-10-7(a), and there was no restriction in the aggravated assault statute, O.C.G.A. § 16-5-21, that limited the use of prior convictions to the guilt-innocence phase of trial such that the sentences could not be used again at the sentencing phase of trial. Carswell v. State, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

Trial court did not err in considering the defendant's earlier conviction for driving under the influence at sentencing after the court had already considered the same conviction during the guilt-innocence phase of the defendant's trial; nothing in O.C.G.A. § 17-10-7 prohibits prior convictions used in the guilt-innocence phase of trial from being used again at sentencing. Morgan v. State, 277 Ga. App. 670, 627 S.E.2d 413 (2006).

Because the defendant was acquitted of possession of a firearm by a convicted felon, two prior felony convictions were not used both to support a conviction on that charge and to enhance the defendant's burglary sentence under O.C.G.A. § 17-10-7(c). Raymond v. State, 298 Ga. App. 549, 680 S.E.2d 598 (2009), cert. denied, No. S09C1791, 2010 Ga. LEXIS 47 (Ga. 2010).

Defendant waived the defendant's objection to the trial court's consideration of a particular conviction in aggravation of sentencing under the recidivist statute, O.C.G.A. § 17-10-7, when the state had already used that conviction in support of the charge of possession of a firearm by a convicted felon because the defendant failed to object at sentencing to the exhibit containing the conviction. Thomas v. State, 305 Ga. App. 801, 701 S.E.2d 202 (2010).

Failure to object to the state's evidence of prior convictions. — Defendant's claim that the defendant should not have been sentenced as a recidivist under O.C.G.A. § 17-10-7(c) was rejected on appeal because defense counsel failed to object to the admissibility of the defendant's

prior felony convictions at the presentencing hearing. Williams v. State, 301 Ga. App. 731, 688 S.E.2d 650 (2009).

Sentence was not enhanced, nor was defendant sentenced as a recidivist. — With regard to a defendant's conviction for trafficking in cocaine, the trial court did not improperly consider similar transaction evidence of being arrested for trafficking in cocaine in 2004, as well as convictions that were reversed on appeal, in aggravation of the defendant's sentence because, although the state filed a notice of intent to seek recidivist punishment, the state did not offer certified copies of any convictions in evidence at sentencing and the defendant was not sentenced as a recidivist. Celestin v. State, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

Disclosure of Prior Convictions to Jury

Prior convictions must not be disclosed in first phase. — Under the two-step procedure, one must be indicted as a recidivist in order to impose recidivist punishment, but the recidivism of the accused must not be disclosed during the first phase of the trial, and may only be disclosed after conviction at the second phase of the trial. Making such a disclosure without a waiver during the first phase of the trial is reversible error. Bennett v. State, 132 Ga. App. 397, 208 S.E.2d 181 (1974).

Prior convictions properly admitted for both impeachment and sentencing purposes. — Defendant's claim on appeal that the trial court erred in admitting prior convictions for aggravated assault and possession of a firearm during the commission of a felony for the purpose of sentencing as a recidivist, pursuant to O.C.G.A. § 17-10-7(a), as the state "used up" the evidence of said prior convictions by introducing the convictions for impeachment purposes during the guilt-innocence phase of the trial, was rejected, as nothing prevented the use of the defendant's prior convictions for both impeachment and sentencing. Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, No. S08C1042, 2008 Ga. LEXIS 494 (Ga. 2008).

Reading indictment listing prior convictions valid. — Reading of an indictment which lists prior convictions of the accused, pursuant to this section, did not render the accused's conviction void. Willis v. Smith, 434 F.2d 1029 (5th Cir. 1970), cert. denied, 403 U.S. 932, 91 S. Ct. 2261, 29 L. Ed. 2d 711 (1971).

Absent objection. — Practice of including prior convictions in the indictment and reading the convictions to the jury before the determination of the issue of guilt or innocence in the crime charged, pursuant to this section, was not reversible error if there is no objection to the introduction of such evidence. Almond v. State, 128 Ga. App. 758, 197 S.E.2d 836 (1973).

Prior convictions must be read to sentence under section. — In order to sentence a prisoner according to this section, the prior convictions relied on must be placed in the indictment and read to the jury before the principal issue of guilt or innocence is determined. Landers v. Smith, 226 Ga. 274, 174 S.E.2d 427 (1970).

State's interests outweigh defendant's as to reading prior crimes to jury. — Under this section, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the state's purpose in permitting introduction of the evidence. Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938).

Defendants' interests are protected by limiting instructions, and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence. Cook v. Smith, 303 F. Supp. 90 (S.D. Ga. 1969), aff'd, 427 F.2d 1172 (5th Cir. 1970).

Use of term "recidivist." — Trial court should not have referred to the recidivist count of the indictment when the court administered the oath to the prospective jurors. However, because the court only said the word "recidivist" (the court did not read that count of the indictment), and because the defendant's prior

Disclosure of Prior Convictions to Jury (Cont'd)

record was introduced in evidence to prove another charge (i.e., possession of a firearm by a convicted felon), the brief reference to the recidivist count was harmless error. Holiday v. State, 258 Ga. 393, 369 S.E.2d 241, cert. denied, 488 U.S. 934, 109 S. Ct. 329, 102 L. Ed. 2d 346 (1988).

Probation or Suspension

Discussions in court as to parole. — Ability or inability to obtain early release does not relate to the defendant's character, the defendant's prior record, or circumstances of the defendant's offense; thus, the policy forbidding argument about such matters does not run afoul of either U.S. Const., amend. 8 or 14, and the trial court did not err in refusing to allow such argument. Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Trial court has authority to suspend or probate sentence imposed under this section. Cofer v. Hawthorne, 154 Ga. App. 875, 270 S.E.2d 84 (1980).

Former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7) did not compel a maximum sentence in confinement for second offenders, but gave the trial judge discretion to probate or suspend the maximum sentence pursuant to former Code 1933, § 27-2502 (see O.C.G.A. § 17-10-1). Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874 (1980).

Although O.C.G.A. § 17-10-7 mandates that a second offender must be sentenced to the maximum punishment for the offense of which convicted, there is no limitation on the trial court's authority under O.C.G.A. § 17-10-1 to grant probation of such a sentence. Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981); Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983).

Court has discretion to probate or suspend. — Although O.C.G.A. § 17-10-7(c) prohibits parole, the statute does not take away the discretion given to the trial court by O.C.G.A. § 17-10-7(a) to probate or suspend part of a sentence. Muhammad v. State, 242 Ga. App. 540, 529 S.E.2d 418 (2000).

Although O.C.G.A. § 17-10-7(c) prohibited parole, the statute did not dispense with the trial court's discretion to probate or suspend part of the defendant's sentence under O.C.G.A. § 17-10-7(a); therefore, the trial court was within the court's discretion to suspend a portion of the defendant's 20-year sentence. Hill v. State, 272 Ga. App. 280, 612 S.E.2d 92 (2005).

Since the defendant had prior felonies in addition to two prior burglary convictions, the defendant was not subject to the exclusive sentencing provisions of O.C.G.A. § 16-7-1(b) after being convicted of a third felony burglary; the additional felonies subjected the defendant to the general recidivist provisions of O.C.G.A. § 17-10-7(a), which gave the sentencing court discretion to suspend a portion of the sentence, and the state's appeal of the defendant's 20 year sentence, which included suspension of 12 years of the sentence after the defendant served 8 years, was rejected. State v. Chambers, 275 Ga. App. 666, 621 S.E.2d 588 (2005).

Since criminal statutes construed against state and in favor of liberty. — Criminal statutes must be strictly construed against the state and liberally in favor of human liberty. If a statute increasing a penalty is capable of two constructions, the statute should be construed so as to favor life and liberty. This being so, former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7) did not compel a maximum sentence in confinement for second offenders but gives the trial judge discretion to probate or suspend the maximum sentence pursuant to former Code 1933, § 27-2502 (see O.C.G.A. § 17-10-1). Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979).

Intent was to permit such suspension or probation. — Language of this section indicated that the General Assembly did not intend that a conviction of a second offense should result in a sentence that could not be suspended or probated. Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979).

Trial judge has no discretion to probate or suspend any portion of a life sentence. Wallace v. State, 175 Ga. App.

685, 333 S.E.2d 874 (1985).

Construction of subsections (a) and (c) regarding probation. — When the prosecutor informed the court that the defendant should be sentenced under "subsection (c)," the prosecutor was referring to O.C.G.A. § 17-10-7(c); however, the language of that subsection must be read along with O.C.G.A. § 17-10-7(a), which requires a trial court to impose the maximum sentence when an individual is convicted of a second "felony punishable by confinement in a penal institution" and further provides, however, that "the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense." Although subsection (c) prohibits parole, the subsection does not dispense with the trial court's discretion to probate or suspend part of a sentence under O.C.G.A. § 17-10-7(a). However, the defendant has not shown that the court failed to properly construe the law after the court reviewed the defendants' extensive criminal record and drug involvement and noted that probation would be an ineffective method of punishment and sentenced the defendant to 25 years. Pritchett v. State, 267 Ga. App. 303, 599 S.E.2d 291 (2004).

Discretion properly exercised. — If trial court, knowing that the court was required to impose maximum sentence, nevertheless asked the defendant if the defendant had any evidence to offer in mitigation, the court demonstrated that the court properly exercised the court's discretion to probate or suspend a portion of the recidivist sentence. Cox v. State, 205 Ga. App. 375, 422 S.E.2d 68 (1992).

Fact that the trial court did not probate part of the defendant's sentence was not dispositive since the court never indicated that the court could not consider probation after hearing the defendant's argument and citations at the resentencing hearing. Hunter v. State, 237 Ga. App. 803, 517 S.E.2d 534 (1999).

Discretion exceeded with probation for convicted hijacker. — Defendant convicted under the hijacking statute, O.C.G.A. § 16-5-44.1, who was originally sentenced to the maximum 20 years under the recidivist provisions of O.C.G.A. § 17-10-7, with ten of the 20 years to be served on probation, was properly re-sentenced because § 16-5-44.1 provides that the prescribed punishment "shall not be deferred, suspended, or probated." Stephens v. State, 245 Ga. App. 823, 538 S.E.2d 882 (2000).

Discretion exceeded. — Since the defendant was convicted of prior felonies and the offense of rape was also a felony under O.C.G.A. § 16-6-1(b), the trial court's imposition of a suspended sentence under O.C.G.A. § 17-10-1 was void because the trial court was required to give the defendant a life sentence under O.C.G.A. § 17-10-7(a). State v. Scott, 265 Ga. App. 387, 593 S.E.2d 923 (2004).

Because the trial court erroneously concluded that the court was required to sentence the defendant, a fifth-time recidivist, to the maximum of 20 years, and that under O.C.G.A. § 17-10-7(c) the court had no discretion to probate or suspend any portion of that sentence, resentencing was warranted. Page v. State, 287 Ga. App. 182, 651 S.E.2d 131 (2007).

Defendant's sentence for felony fleeing and attempting to elude was vacated because the trial court incorrectly determined that the recidivist punishment statute did not apply since the defendant had been confined in a prior case to a penal institution as the recidivist punishment statute did not mandate that the defendant's entire sentence be served in confinement. State v. Yohman, 348 Ga. App. 378, 823 S.E.2d 57 (2019).

Remand to consider probating portion of mandatory sentence. — Since the trial court did not exercise the court's discretion to consider probating the appellant's sentence for theft by taking, the sentence for that offense was reversed and remanded so the trial court could determine whether any portion of the appellant's mandatory sentence should be probated. Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983).

Probated sentence may be used to sentence defendant as recidivist. — Fact that part of the defendant's sentence on a prior felony was probated did not mean that the previous conviction could not be used to sentence the defendant as a recidivist. Johnson v. State, 272 Ga. App. 294, 612 S.E.2d 29 (2005).

Probation or Suspension (Cont'd)

Fourth-offender recidivists. — There is no limitation on the trial court's authority under O.C.G.A. § 17-10-1 to grant probation of sentence to a fourth offender recidivist who under O.C.G.A. § 17-10-7 is not eligible for parole until the maximum sentence has been served since probation is not parole. Brooks v. State, 165 Ga. App. 115, 299 S.E.2d 167 (1983); State v. Carter, 175 Ga. App. 38, 332 S.E.2d 349 (1985).

Banishing defendant from county. — Even though the defendant was sentenced under O.C.G.A. § 17-10-7(c), requiring that the defendant serve an entire 30-year sentence without the possibility of parole, imposition of a special condition of probation banishing the defendant from certain counties for 30 years was not unreasonable. Adams v. State, 241 Ga. App. 810, 527 S.E.2d 911 (2000).

Sentencing when offenses merged. — Trial court vacated the conviction and sentence for voluntary manslaughter recognizing correctly that the voluntary manslaughter should have merged into the felony murder. The only sentence that survives is the sentence for murder, and the trial court never pronounced a sentence pursuant to O.C.G.A. § 17-10-7(c) for that crime, nor does the written sentencing order reflect that the defendant is parole ineligible. Grimes v. State, 293 Ga. 559, 748 S.E.2d 441 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Constitutional limitations on power to parole. — As of January 1, 1995, there have been placed additional constitutional limitations on the power of the State Board of Pardons and Paroles to parole. The limitations include the inability to parole during the mandatory minimum sentence for the seven serious violent felonies set out in O.C.G.A. § 17-10-6.1, the inability to parole for sentences of life without parole as set out in O.C.G.A. §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in O.C.G.A. § 42-9-45(b), subject to the authority reserved by statute to the board in O.C.G.A. § 42-9-46 to consider for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, §§ 822 et seq., 830 et seq. 59 Am. Jur. 2d, Pardon and Parole, §§ 80 et seq., 98 et seq., 119 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and the Rights of the Accused, § 2436 et seq.

ALR. — Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 58 A.L.R. 20; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Overemphasis in proof of former conviction in connection with habitual criminal law, or unnecessary introduction of evidence in that regard, as prejudicial to accused, 144 A.L.R. 240.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense, 5 A.L.R.2d 1080.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender, 19 A.L.R.2d 227.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes, 24 A.L.R.2d 1247.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute, 31 A.L.R.2d 1186.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses, 80 A.L.R.2d 1196.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Validity, construction, and application of concurrent-sentence doctrine — state cases, 56 A.L.R.5th 385.

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction, 97 A.L.R.5th 293.

Construction and application of enhanced sentencing provision of Armed Career Criminal Act (ACCA), 18 U.S.C.A. § 924(e) — United States Supreme Court cases, 67 A.L.R. Fed. 2d 1.

17-10-8. Payment of fine in felony case; rebate or refund of fine not permitted upon revocation of probation.

(a) In a felony case, when a statutory fine amount is not set by law, upon conviction, the court may impose a fine not to exceed $100,000.00.

(b) In any case when probation is revoked, the defendant shall not be entitled to any rebate or refund of any part of the fine paid.

History. — Ga. L. 1957, p. 477, § 1; Ga. L. 1964, p. 496, § 1; Ga. L. 1979, p. 848, § 1; Ga. L. 1990, p. 1408, § 1; Ga. L. 2018, p. 550, § 2-7/SB 407.

The 2018 amendment, effective July 1, 2018, substituted the present provisions of this Code section for the former provisions, which read: "In any case where the judge may, by any law so authorizing, place on probation a person convicted of a felony, the judge may in his discretion impose a fine on the person so convicted as a condition to such probation. The fine shall not exceed $100,000.00 or the amount of the maximum fine which may be imposed for conviction of such a felony, whichever is greater. In any case where probation is revoked, the defendant shall not be entitled to any rebate or refund of any part of the fine so paid."

Cross references. — Probation generally, T. 42, C. 8.

Law reviews. — For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 45 (2018).

JUDICIAL DECISIONS

Power of trial judge to sentence generally. — O.C.G.A. §§ 17-10-1 and 17-10-8, when read together, provide that the judge fixing sentence shall prescribe a determinate sentence for a specific number of years within the limits set by law, may probate a noncapital felony sentence upon such terms as the judge deems proper, and may impose a fine upon the convicted party not to exceed $10,000 (or the fine fixed by law, whichever is greater). State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

Power to sentence corporation. — Pursuant to O.C.G.A. § 16-2-22(a), a corporation can be prosecuted for violating the law and a court may sentence a corporation to serve a term for years (even though such sentence be incapable of enforcement) and may suspend that sentence and impose a fine. State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

Fine distinguished from reparations to injured party. — Since a fine is payable to the state and reparation to the injured party, the two are distinct and cannot be substituted for each other to void a sentence. Biddy v. State, 138 Ga. App. 4, 225 S.E.2d 448 (1976).

Showing of wilfullness or inadequacy of alternative punishments required. — When payment of a fine or restitution is made a condition precedent to probation, a defendant's probation may not be revoked or withheld because of the defendant's failure to pay the fine or restitution without a showing of wilfullness on the defendant's part or inadequacy of alternative punishments. Day v. State, 188 Ga. App. 648, 374 S.E.2d 87 (1988), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Fine not authorized in every case. — O.C.G.A. § 17-10-8 does not authorize the imposition of a fine in every case when probation might have been given. Hendrix v. State, 199 Ga. App. 599, 405 S.E.2d 576 (1991).

Trial court may impose a fine when the trial court is authorized to and, in fact, does award "such probation." If the trial court does not award probation, the imposition of a fine in addition to a prison sentence is outside the trial court's discretion and not authorized. Hendrix v. State, 199 Ga. App. 599, 405 S.E.2d 576 (1991).

If the trial court does not award probation, the imposition of a fine in addition to a prison sentence is outside the trial court's discretion and not authorized. Wood v. State, 204 Ga. App. 467, 419 S.E.2d 534 (1992).

Upon conviction of a defendant of possession of cocaine with intent to distribute, the trial court was without authority to impose a fine, penalty fee, and D.A.T.E. fee; the penalty for the offense does not include monetary fines. Rawls v. State, 210 Ga. App. 408, 436 S.E.2d 527 (1993).

Unauthorized fines are void. — Since the defendants violated O.C.G.A. § 16-13-30(b) by possessing with intent to distribute a controlled substance and since O.C.G.A. § 16-13-30(h) does not authorize imposition of any fines, the trial court was without authority to impose a $5,000 fine on one defendant and $10,000 fines on each of the other defendants, thus, the fines imposed were void and stricken from the respective sentences. Castillo v. State, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

Though the section under which a defendant is convicted does not authorize a fine, O.C.G.A. § 17-10-8 allows the imposition of a fine as a condition precedent to probation for a felony conviction. Todd v. State, 172 Ga. App. 231, 323 S.E.2d 6 (1984).

Offense for which fine not otherwise authorized. — Although the authorized punishment for aggravated assault does not include a fine, O.C.G.A. § 17-10-8 authorizes a fine in any case in an amount up to $10,000.00 (1990 amendment increased maximum fine to $100,000.00) as a condition of probation. Shelton v. State, 161 Ga. App. 524, 289 S.E.2d 768 (1982).

Imposition of a $100,000 fine as a condition of probation on a sentence for attempting to traffic in cocaine was invalid, illegal, and void for the reason that since the offense of attempted trafficking in cocaine is punishable by imprisonment but contains no provision for a fine, the maximum fine which could be imposed as a condition of probation was $10,000 (1990 amendment increased maximum fine to $100,000.00). Holbert v. State, 177 Ga. App. 461, 340 S.E.2d 25 (1986).

Imposition of $5,000 fine proper for drug possession. — When a defendant was convicted of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30 and sentenced to the mandatory minimum of ten years' imprisonment, plus 30 years on probation, the trial court did not err in imposing a $5,000 fine as a condition of probation. O.C.G.A. § 17-10-8 permitted a trial court to impose a fine as a condition of probation. Marshall v. State, 291 Ga. App. 284, 661 S.E.2d 662 (2008).

Fine for Medicaid fraud deemed proper. — Defendant was properly fined $50,000 as a condition of defendant's ten years' probation for Medicaid fraud because, although the maximum statutory fine for the crime was $10,000, the trial court could impose a fine up to $100,000 as a probation condition pursuant to O.C.G.A. § 17-10-8. Kell v. State, 262 Ga. App. 489, 585 S.E.2d 915 (2003).

Imposition of fine not authorized. — Since the defendant was not placed on probation, imposition of $2,000.00 fine was not authorized and the defendant had to be resentenced. Young v. State, 163 Ga. App. 507, 295 S.E.2d 175 (1982).

Order for defendant to pay fines during incarceration was void. — Defendant's sentence for cocaine possession requiring the defendant to begin making monthly payments on fines, fees, and court costs during incarceration was a punishment that the law did not allow, and therefore was void. Pursuant to O.C.G.A. § 17-10-8, the defendant could only be ordered to make such payments as a condition of probation. Crane v. State, 302 Ga. App. 422, 691 S.E.2d 559 (2010).

Defendant's ability to pay to be determined. — Trial court was authorized to impose a $5,000 fine as a condition of probation in addition to incarceration; however, the court erred in imposing the fine without first determining the defendant's ability to pay. Eason v. State, 215 Ga. App. 614, 451 S.E.2d 820 (1994), overruled on other grounds, Turner v. State, 259 Ga. App. 902 (2003), recons. denied; overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019).

Cited in Payne v. State, 117 Ga. App. 92, 159 S.E.2d 459 (1968); Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977); Eubanks v. State, 144 Ga. App. 152, 241 S.E.2d 6 (1977); Dowdy v. State, 148 Ga. App. 498, 251 S.E.2d 571 (1978); Taylor v. State, 149 Ga. App. 362, 254 S.E.2d 432 (1979); Wright v. State, 154 Ga. App. 400, 268 S.E.2d 378 (1980); Printup v. State, 159 Ga. App. 574, 284 S.E.2d 82 (1981); Ray v. State, 181 Ga. App. 42, 351 S.E.2d 490 (1986); Lester v. State, 190 Ga. App. 59, 378 S.E.2d 364 (1989); Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

RESEARCH REFERENCES

ALR. — State court's power to place defendant on probation without imposition of sentence, 56 A.L.R.3d 932.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 A.L.R.3d 976.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs, 79 A.L.R.3d 1025.

Power of state court, during same term, to increase severity of lawful sentence — modern status, 26 A.L.R.4th 905.

Power of court to increase severity of unlawful sentence — modern status, 28 A.L.R.4th 147.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

17-10-8.1. Fee for legal defense services as condition of probation.

In any case in which a defendant receives legal defense services pursuant to Chapter 12 of Title 17 where the defendant has not paid the application fee required by Code Section 15-21A-6 and the court has not waived such fee at the time of sentencing, the court shall impose such fee as a condition of probation.

History. — Code 1981, § 17-10-8.1, enacted by Ga. L. 2006, p. 752, § 2/SB 503.

17-10-9. (For effective date, see note.) Specification by judge imposing sentence of time from which penal sentence to run; effect of appeal.

(a) In the imposition of sentence for violation of the penal laws, it shall be the duty of the judge to specify that the term of service under

the sentence shall be computed from the date of sentence if the defendant is confined in jail or otherwise incarcerated and has no appeal or motion for new trial pending.

(b) In cases which are appealed to the Georgia Court of Appeals or the Georgia Supreme Court for reversal of the conviction, the sentence shall be computed from the date the remittitur of the appellate court is made the judgment of the court in which the conviction is had, provided the defendant is not at liberty under bond but is incarcerated or in custody of the sheriff of the county where convicted. If the defendant was at liberty under bond during the pendency of the appeal, once the remittitur of the appellate court is made the judgment of the court in which the conviction is had, the prosecuting attorney shall have the burden of notifying the defendant of the commencement of the sentence within 90 days of such remittitur. When the prosecuting attorney fails to provide such notice, the sentence shall be computed from the date of such remittitur.

(c) If a defendant has been convicted and sentenced but, because of his or her failure or inability to post bond or bail for any reason, he or she has been incarcerated pending the prosecution of an appeal to any court, the time of the original imposition of his or her sentence until the time when the remittitur of the appellate court is made the judgment of the court in which the conviction is had shall be counted as time spent under sentence for all purposes.

History. — Ga. L. 1931, p. 165, § 1; Code 1933, § 27-2505; Ga. L. 1965, p. 230, § 1; Ga. L. 2020, p. 361, § 2/HB 984.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section as in effect until January 1, 2021, see the 2020 amendment note.

The 2020 amendment, effective January 1, 2021, designated the existing provisions as subsections (a) — (c); added the last two sentences in subsection (b); and, in subsection (c), inserted "or her" twice and "or she".

Law reviews. — For article discussing the constitutionality of imposing harsher sentences upon defendants found guilty in new trial after appeal, see 6 Ga. St. B.J. 183 (1969).

JUDICIAL DECISIONS

Intent. — Before enactment of former Code 1933, § 27-2505 (see O.C.G.A. § 17-10-9), sentences did not begin to run until the defendant was actually delivered to the penitentiary or chain gang and no credit was received for the time which may have been previously spent by such defendant in jail. It was this evil which that section sought to remedy. Aldredge v. Potts, 187 Ga. 290, 200 S.E. 113 (1938).

Under a rational construction of former Code 1933, § 27-2505 (see O.C.G.A. § 17-10-9), the statute's sole purpose was to give a defendant credit for time involuntarily spent in jail after sentence. Goble v. Reese, 214 Ga. 697, 107 S.E.2d 175 (1959).

Credit for time served. — Defendant was entitled to credit for time already served, notwithstanding the trial court's statement that no credit would be given since credit is computed and applied by the pre-sentence and post-sentence custodians, and a trial court cannot take the

credit away. Johnson v. State, 248 Ga. App. 454, 546 S.E.2d 562 (2001).

Defendant's claim for credit for time served was cognizable only in a mandamus or injunction action because the defendant did not contest the validity of the entry of the defendant's guilty plea and it was well beyond time to appeal any such claim. Beasley v. State, 255 Ga. App. 522, 566 S.E.2d 333 (2002).

Trial court erred in sentencing the defendant by specifying that the defendant's credit for time served would not begin until December 5, 2008, the date probation for another offense expired because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Georgia Department of Corrections to determine and award credit for time served. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

"Supreme Court" means Supreme Court of Georgia. — Only reasonable construction of the term "Supreme Court" in this section meant the Georgia Supreme Court and not the United States Supreme Court. Huff v. McLarty, 241 Ga. 442, 246 S.E.2d 302 (1978).

Applicability. — Provision in O.C.G.A. §§ 17-10-9 and 17-10-11 for crediting prison sentences with the time spent in confinement applies only to persons who would not be confined but for their charges which give rise to the sentence for which credit is sought. Spann v. Whitworth, 262 Ga. 21, 413 S.E.2d 713 (1992); Wilson v. State, 273 Ga. 97, 538 S.E.2d 429 (2000).

Section inapplicable when defendant not incarcerated and no appeal pending. — Since the defendant was not in jail or otherwise incarcerated at the time of the defendant's trial under the indictment, this section, relating to the time from which a sentence shall be computed, was inapplicable. Crosby v. Courson, 181 Ga. 475, 182 S.E. 590 (1935).

This section, which provided that it was the duty of judges to specify that the term of sentence shall be computed from the date of sentence in all cases when the defendant was incarcerated or had an appeal pending, did not apply since the defendant was not incarcerated and had no appeal pending. Norman v. State, 87 Ga. App. 442, 74 S.E.2d 131 (1953).

No credit if defendant at large pending appeal. — Obvious intent of this section was that a sentence shall not begin when the remittitur from the appellate court is made the judgment of the trial court for the defendants who are then still at large. Those defendants at large shall not receive credit for any time before entering upon the defendants' incarceration or other penalty. Huff v. McLarty, 241 Ga. 442, 246 S.E.2d 302 (1978); Serpentfoot v. State, 241 Ga. App. 35, 524 S.E.2d 516 (1999).

Sentence continues to run while being served on probation. Goble v. Reese, 214 Ga. 697, 107 S.E.2d 175 (1959).

Effect of state's delay in enforcing sentence. — Sentence is not voided because of the state's delay in attempting to enforce the sentence. Of course, there is some point at which the state's unreasonable delay will be deemed to prevent later enforcement of the sentence. Huff v. McLarty, 241 Ga. 442, 246 S.E.2d 302 (1978).

Trial court properly enforced the prison sentence imposed against the defendant, even though over six years had passed since the sentence's imposition, upon the state's motion for remand to the custody of the Department of Corrections, as the defendant did not offer to begin serving the sentence when the convictions entered were affirmed on appeal, but acquiesced in the delay of the execution of the sentence by continuing to report to the pretrial services department; hence, the defendant could not claim that the sentence began to run when the defendant should have, but failed to offer to serve the sentence. Cronan v. State, 282 Ga. App. 408, 638 S.E.2d 827 (2006), cert. denied, No. S07C0462, 2007 Ga. LEXIS 144 (Ga. 2007).

Offer of defendant to initiate sentence. — If the state makes no move to initiate the sentence, the defendant must offer oneself up if the defendant wishes the term to begin to run. An offer which is premature because the sentence may not yet be put into effect is ineffective and may not be deemed continuing. The defendant's offer must come at a time when the

sentence may lawfully be put into effect. Huff v. McLarty, 241 Ga. 442, 246 S.E.2d 302 (1978).

Cited in Crider v. Clark, 182 Ga. 371, 185 S.E. 326 (1936); Roberts v. Weeks, 182 Ga. 346, 185 S.E. 338 (1936); Dixon v. Beaty, 188 Ga. 689, 4 S.E.2d 633 (1939); Buice v. Bryan, 212 Ga. 508, 93 S.E.2d 676 (1956); James v. State, 120 Ga. App. 317, 170 S.E.2d 303 (1969); Smith v. Ault, 230 Ga. 433, 197 S.E.2d 348 (1973); Jones v. State, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

OPINIONS OF THE ATTORNEY GENERAL

What constitutes being "otherwise incarcerated." — In order to be "otherwise incarcerated" under this section, one must be confined by competent public authority or under due legal process. 1968 Op. Att'y Gen. No. 68-93.

Confinement of a defendant in a state hospital would not come within the legal definition of the term "otherwise incarcerated." 1968 Op. Att'y Gen. No. 68-93.

This section did not relate to time spent in jail prior to trial. 1970 Op. Att'y Gen. No. 70-127.

While this section provides that a sentence may not commence prior to the date of imposition, the statute did not affect computation of credit for time spent in jail awaiting trial. 1975 Op. Att'y Gen. No. 75-3.

Subsequent sentences run concurrently with unexecuted portion of previous sentence. — When a sentence is imposed to run concurrently with a sentence already being served, the subsequent sentence runs concurrently with the unexecuted portion of the previous sentence. 1975 Op. Att'y Gen. No. 75-3.

Effect of federal proceedings on state sentence. — State sentence begins to run on day and date of sentence and is not tolled by an informal release to the federal marshal and subsequent trial, conviction, and imprisonment in the federal penitentiary. 1945-56 Op. Att'y Gen. p. 513.

State prison sentence of an individual currently in the custody of federal authorities does not begin to run until the individual is released from the federal authorities and returned to the state penal system. 1967 Op. Att'y Gen. No. 67-191.

State sentence should be computed from the date of rendition unless the sentence specifies that the sentence is to run consecutively to the federal sentence. 1967 Op. Att'y Gen. No. 67-121.

Credit for time in jail while awaiting trial. — While O.C.G.A. § 17-10-9 provides that a sentence may not commence prior to the date of imposition, the statute does not affect computation of credit for time spent in jail awaiting trial. 1987 Op. Att'y Gen. No. 87-19.

Credit for time in custody of Department of Human Resources. — When custody of a felon 16 years of age is transferred by court order from the Department of Human Resources to the Department of Offender Rehabilitation, the sentence begins to run when the youth is placed under the custody of the Department of Human Resources. 1975 Op. Att'y Gen. No. 75-78.

In computing parole consideration eligibility, those persons who are sentenced in superior court on felony charges and are committed to the Division for Children and Youth (now Department of Human Resources) until their seventeenth birthday, are entitled to "jail time" or other time in custody in the same manner as adult offenders as required by this section. 1980 Op. Att'y Gen. No. 80-142.

Hospitalization for physical or mental disorder does not interrupt the running of the sentence. 1954-56 Op. Att'y Gen. p. 515.

Time between original sentence and grant of new trial. — Prisoner's sentence is credited with time intervening between the original sentence and granting of motion for new trial. 1948-49 Op. Att'y Gen. p. 287.

No credit for time pending appeal when not incarcerated or under supervision. — If appellant is neither incarcerated nor placed under supervision pending the appeal, the time spent awaiting completion of the appeal is not credited toward service of the sentence. 1975 Op. Att'y Gen. No. 75-30.

Effect of fixed antecedent computation dates. — Board of Corrections (now Board of Offender Rehabilitation) should disregard fixed antecedent computation dates in those cases in which no appeal has been taken and in which sentence has been imposed on or after July 1, 1970. 1970 Op. Att'y Gen. No. 70-176.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 706 et seq., 736, 740.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2183 et seq.

ALR. — Power to change time for commencement of sentence, 3 A.L.R. 1572.

Effect of attempt by court to fix the beginning or end of period of imprisonment, 69 A.L.R. 1177.

What constitutes commencement of service of sentence, depriving court of power to change sentence, 159 A.L.R. 161.

Right to credit for time served under erroneous or void sentence or invalid judgment of conviction necessitating new trial, 35 A.L.R.2d 1283.

Effect of invalidation of sentence upon separate sentence which runs consecutively, 68 A.L.R.2d 712.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Power of state court, during same term, to increase severity of lawful sentence — modern status, 26 A.L.R.4th 905.

Power of court to increase severity of unlawful sentence — modern status, 28 A.L.R.4th 147.

Effect of delay in taking defendant into custody after conviction and sentence, 76 A.L.R.5th 485.

17-10-9.1. Voluntary surrender to county jail or correctional institution; release of defendant.

(a) When a defendant who pleads nolo contendere or guilty or is convicted of an offense against the laws of this state other than:

(1) Treason;

(2) Murder;

(3) Rape;

(4) Aggravated sodomy;

(5) Armed robbery;

(5.1) Home invasion in any degree;

(6) Aircraft hijacking and hijacking a motor vehicle in the first degree;

(7) Aggravated child molestation;

(8) Manufacturing, distributing, delivering, dispensing, administering, selling, or possessing with intent to distribute any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(9) Violating Code Section 16-13-31, relating to trafficking in cocaine or marijuana;

(10) Kidnapping, arson, or burglary in any degree if the person, at the time such person was charged, has previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (9) of this subsection;

(11) Child molestation;

(12) Robbery;

(13) Aggravated assault; or

(14) Voluntary manslaughter

is sentenced to a term of confinement in a county jail or a correctional institution operated by or under the jurisdiction and supervision of the Department of Corrections, the sentencing judge may release the defendant pending the defendant's surrendering to a county jail or to a correctional institution designated by the Department of Corrections as authorized in this Code section. The sentencing court may release the defendant on bond or may release the defendant on the defendant's personal recognizance. This Code section shall not be construed to limit the court's authority in prescribing conditions of probation.

(b) Any defendant who has been released on bond and who has complied with all of the conditions of the bond and any other defendant who, in the opinion of the sentencing judge, is deemed worthy of the procedure to surrender voluntarily, may be eligible to participate in the program. However, the sentencing judge shall be the sole and final arbiter concerning eligibility and the defendant shall have no right to appeal such decision.

(c) When a defendant submits a request to the sentencing judge to be allowed to surrender voluntarily to a county jail or a correctional facility, the judge may consider the request and if, taking into the consideration the crime for which the defendant is being sentenced, the history of the defendant, and any other factors which may aid in the decision, the judge determines that the granting of the request will pose no threat to society, the defendant shall be remanded to the supervision of a community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42 by the judge and ordered to surrender voluntarily to a county jail designated by the court or to a correctional institution as thereafter designated by the Department of Corrections. The surrender date shall be a date thereafter specified as provided in subsection (d) of this Code section. The sentence of any defendant who is released pursuant to this Code section shall not begin to run until such person surrenders to the facility designated by the

court or by the department, provided that such person shall receive credit toward his or her sentence for time spent in confinement awaiting trial as provided in Code Section 17-10-11.

(d) In the event the defendant is ordered to surrender voluntarily to a county jail, the court shall designate the date on which the defendant shall surrender, which shall not be more than 120 days after the date of conviction. When the sentencing judge issues an order requiring a defendant to surrender voluntarily to a correctional institution, the Department of Corrections shall authorize the commitment and designate the correctional institution to which the defendant shall report and the date on which the defendant is to report, which date shall not be more than 120 days after the date of conviction. Upon such designation, the department shall notify the community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, as applicable, who shall notify the defendant accordingly. Subsistence and transportation expenses en route to the correctional institution shall be borne by the defendant.

(e) The provisions of this Code section shall not apply to any defendant convicted of a capital felony.

(f) If the defendant fails to surrender voluntarily as directed and required, the defendant may be charged with the offense of bail jumping pursuant to subsection (a) of Code Section 16-10-51 or the offense of escape pursuant to paragraph (3) of subsection (a) of Code Section 16-10-52 and, if convicted of such crimes, shall be punished as provided by law; or may be cited for contempt of court by the sentencing judge and, if convicted of contempt, the defendant shall be punished as provided in Code Section 15-6-8.

(g) The Department of Corrections is authorized and directed to promulgate such rules and regulations as may be necessary to effectuate the purposes of this Code section.

History. — Code 1981, § 17-10-9.1, enacted by Ga. L. 1989, p. 607, § 1; Ga. L. 1994, p. 1625, § 6; Ga. L. 2012, p. 899, § 8-10/HB 1176; Ga. L. 2014, p. 426, § 10/HB 770; Ga. L. 2015, p. 422, § 5-33/HB 310; Ga. L. 2017, p. 417, § 3-3/SB 104.

Editor's notes. — Ga. L. 1994, p. 1625, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Anti-motor Vehicle Hijacking Act of 1994.'"

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 216 (1989). For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 99 (1994). For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

17-10-10. Concurrent sentences.

(a) Where at one term of court a person is convicted on more than one indictment or accusation, or on more than one count thereof, and sentenced to imprisonment, the sentences shall be served concurrently unless otherwise expressly provided therein.

(b) Where a person is convicted on more than one indictment or accusation at separate terms of court, or in different courts, and sentenced to imprisonment, the sentences shall be served concurrently, one with the other, unless otherwise expressly provided therein.

(c) This Code section shall apply alike to felony and misdemeanor offenses.

(d) This Code section shall govern and shall be followed by the Department of Corrections in the computation of time that sentences shall run.

History. — Laws 1833, Cobb's 1851 Digest, p. 836; Code 1863, § 4539; Code 1868, § 4559; Code 1873, § 4653; Code 1882, § 4653; Penal Code 1895, § 1041; Penal Code 1910, § 1067; Code 1933, § 27-2510; Ga. L. 1956, p. 161, § 3; Ga. L. 1964, p. 494, §§ 1, 2; Ga. L. 1985, p. 283, § 1.

Law reviews. — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

JUDICIAL DECISIONS

Analysis

General Consideration
Separate Terms or Different Courts

General Consideration

Constitutionality. — Trial court erred in determining that a defendant's challenge to the constitutionality of O.C.G.A. § 17-10-10 was waived; however, the Supreme Court of Georgia rejected the defendant's challenges to consecutive sentences imposed under the statute on due process grounds, equal protection grounds, Sixth Amendment grounds, and rule of lenity grounds. Rooney v. State, 287 Ga. 1, 690 S.E.2d 804, cert. denied, 562 U.S. 854, 131 S. Ct. 117, 178 L. Ed. 2d 72 (2010).

Consecutive sentencing authorized when crimes separate and distinct. — This section gave the trial judge authority to impose consecutive sentences if separate and distinct crimes are charged. Hart

v. State, 137 Ga. App. 644, 224 S.E.2d 755 (1976).

It is within the discretion of the trial judge to impose consecutive sentences for separate offenses. Smith v. Ault, 230 Ga. 433, 197 S.E.2d 348 (1973); Hoerner v. State, 246 Ga. 374, 271 S.E.2d 458 (1980); Hambrick v. State, 256 Ga. 148, 344 S.E.2d 639 (1986).

Defendant who was convicted of simple battery and criminal trespass after the defendant attacked the defendant's spouse and the spouse's mother and broke the windshield and at least one other window on the spouse's car was not subjected to cruel and unusual punishment because the trial court imposed a sentence of 12 months' incarceration for each charge, and ordered that the defendant serve the sentences consecutively. Hill v. State, 259 Ga. App. 363, 577 S.E.2d 61 (2003).

Trial court properly imposed separate sentences on the defendant who was convicted of burglary, battery, kidnapping, and aggravated assault because those were separate crimes, and the court did not violate the defendant's rights under O.C.G.A. § 17-10-10 when the court required the defendant to serve the defendant's sentences consecutively. Woodson v. State, 268 Ga. App. 731, 605 S.E.2d 822 (2004).

After a defendant pled guilty to thirteen different criminal offenses, the trial court explained how the sentences on those various convictions would run, including sentences to three consecutive 20-year terms, and the defendant failed to show that the defendant's sentences were illegal because nothing in O.C.G.A. § 17-10-10 implicated the rule of lenity. Dowling v. State, 278 Ga. App. 903, 630 S.E.2d 143 (2006).

Trial court's imposition of four separate 20-year sentences upon the defendant for each of the four aggravated-assault convictions and ordering those sentences to be served consecutively was not excessive punishment because the 20-year sentence for each separate aggravated assault fell within the statutory range and the defendant failed to demonstrate that the punishment was so excessive in proportion to the offenses as to shock the conscience. Miller v. State, 351 Ga. App. 757, 833 S.E.2d 142 (2019).

Authority for consecutive or concurrent sentence is in court, not jury. — Authority to make a determination as to whether sentences will run consecutively or concurrently is in the court and not in the jury. Lee v. State, 107 Ga. App. 484, 130 S.E.2d 814 (1963).

Whether other sentences in same or different terms or courts. — It is within the discretion of the judge to impose consecutive sentences for separate offenses, and to authorize the sentence or sentences the judge imposes to be served consecutively to sentences imposed, whether by jury or judge, both within the same term of court or at a separate term of court or in a different court or courts. Heard v. State, 135 Ga. App. 685, 218 S.E.2d 866 (1975).

Section does not limit such discretion as to sentencing for separate crimes. — This section did not constitute a limitation upon the discretion of the trial court, derived from the common law, to set sentences imposed as a result of conviction for a new crime that is separate and distinct from an earlier sentence for a different crime to commence at the termination of any sentence previously imposed. Turner v. State, 151 Ga. App. 631, 260 S.E.2d 756 (1979).

Section does not limit discretion. — This section did not constitute a limitation upon the discretion of the trial court, derived from the common law, to set sentences imposed as a result of convictions for a new group of offenses that are separate and distinct from previous sentences to commence at the termination of all sentences previously imposed. Amerson v. Zant, 243 Ga. 509, 255 S.E.2d 34 (1979); Schamber v. State, 152 Ga. App. 196, 262 S.E.2d 533 (1979).

Use of word "sentences" contained in O.C.G.A. § 17-10-10(a) meant that the defendant should be sentenced separately for each count of a multicount indictment or accusation. To hold otherwise would make subsection (a) of that section meaningless, for if a court could impose one aggregate sentence for several counts of one indictment or accusation, there would be no need to determine, or specify,

General Consideration (Cont'd)

whether the sentences are to run concurrently or consecutively. Dilas v. State, 159 Ga. App. 39, 282 S.E.2d 690 (1981).

For case when concurrent sentence doctrine inapplicable because of nonmerger of offenses, see Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 425 (1979).

Misdemeanor sentences may be consecutive. — This section referred to felony cases only, but in misdemeanor cases the court may also provide that the terms shall be served consecutively. Murphy v. Lowry, 178 Ga. 138, 172 S.E. 457 (1933).

Judge sets the sentence for misdemeanors, and under subsections (b) and (c) of this section, can properly prescribe sentences to run consecutively and to commence running at the conclusion of the sentences imposed under felony counts, and any sentence the defendant is presently serving. Mealor v. State, 135 Ga. App. 682, 218 S.E.2d 683 (1975).

Authority as to instruction on sentences unchanged by amendments. — Nothing in Ga. L. 1956, p. 161, § 3 or Ga. L. 1964, p. 494, §§ 1 and 2 changes the authority of the court to determine whether the court should instruct the jury concerning concurrent and consecutive sentences, or provide itself that the sentences should run consecutively. Baker v. State, 127 Ga. App. 403, 194 S.E.2d 122 (1972).

Sentences concurrent by operation of law when verdict silent. — This section effected, by operation of law, the running of sentences concurrently when the original sentencing verdicts are silent on the matter. Atkins v. State, 132 Ga. App. 417, 208 S.E.2d 190 (1974).

Presence of defendant for pronouncement whether additional sentence consecutive or concurrent. — Determination of whether a sentence is to be served concurrently with or consecutively to another sentence which the defendant is serving at the time is a part of the second sentence and should be pronounced in the presence of the defendant. Fleming v. State, 113 Ga. App. 113, 147 S.E.2d 480 (1966).

Defendant can be absent when concurrent sentences pronounced. — It is not necessary that the prisoner be present in court or be represented by counsel for the entry of the concurrent sentences. Johnson v. Caldwell, 232 Ga. 200, 205 S.E.2d 857 (1974).

O.C.G.A. § 17-10-10 must yield to O.C.G.A. § 42-8-36, pertaining to reporting duties of probationers, if there is any conflict between the statutes. Downs v. State, 163 Ga. App. 485, 295 S.E.2d 152 (1982).

Ordering consecutive life sentence if jury does not indicate preference. — Trial court did not exceed the limits of the court's discretion in sentencing the defendant to four consecutive life terms for two counts of murder and two counts of armed robbery since the jury rejected the death penalty and recommended mercy without specifying that the life sentences run consecutively. Cargill v. State, 256 Ga. 252, 347 S.E.2d 559 (1986).

Modification of sentence held improper. — Modification of a defendant's oral sentence to make the defendant's sentence run consecutively to any sentence that the defendant was currently serving increased the defendant's punishment and violated the prohibition against double punishment or jeopardy. Pierce v. State, 184 Ga. App. 168, 361 S.E.2d 47 (1987).

Resentence proper. — Trial court did not err in resentencing the defendant to a probated sentence of ten years for a theft by receiving conviction, upon filing a motion under O.C.G.A. § 16-8-12, with such sentence to commence ten years after the beginning of a term of imprisonment for an armed robbery conviction as: (1) the revised sentence did not impermissibly increase the original sentence imposed; (2) the revised probated sentence effected no change in the probation term to be served following the confinement for armed robbery, as both the original and revised sentences provided for five years of probation, consecutive to the defendant's confinement; and (3) the defendant failed to show fulfillment of the maximum legal term for the theft by receiving conviction, or that any of the probation requirements had been satisfied. Fair v.

State, 281 Ga. App. 518, 636 S.E.2d 712 (2006), cert. denied, No. S07C0125, 2007 Ga. LEXIS 494 (Ga. 2007).

Amendment of sentence as denial of double jeopardy rights. — Trial court's amendment of a sentence to clarify that the sentence was to run consecutively with a prior life sentence constituted a denial of the defendant's double jeopardy rights since O.C.G.A. § 17-10-10 provides that sentences are presumed to run concurrently with preexisting sentences and the defendant had already begun serving the defendant's latest sentence prior to the court's amendment of the defendant's sentence. Schamber v. Newsome, 696 F. Supp. 1506 (N.D. Ga. 1988).

Legality of present confinement is the question under review in a habeas corpus proceeding. Patterson v. Smith, 227 Ga. 170, 179 S.E.2d 247 (1971).

Sentences which may be attacked in habeas corpus. — In a petition for writ of habeas corpus, if the petitioner's present confinement was under prior sentences and not under the sentences attacked, the petitioner could not attack sentences to be served consecutively with the prior sentences. Patterson v. Smith, 227 Ga. 170, 179 S.E.2d 247 (1971).

Appellate court is not empowered to modify sentences which are within statutory limits and lawfully imposed. Thomas v. State, 139 Ga. App. 364, 228 S.E.2d 386 (1976).

Consecutive sentences allowed. — Denial of the defendant's motion attacking the defendant's consecutive sentences for burglary as void was affirmed under O.C.G.A. § 17-10-10 sentences were to be served "concurrently unless otherwise expressly provided therein." Jones v. State, 271 Ga. App. 830, 610 S.E.2d 570 (2005).

Defendant's sentence of 20 years to serve for armed robbery, 20 years probation for aggravated assault, and 5 years probation for possession of a firearm during the commission of a felony, each to run consecutively, did not constitute cruel and unusual punishment in violation of the Eighth Amendment because the trial court's sentence fell within the statutory range of punishment, O.C.G.A. §§ 16-5-21(b), 16-8-41(b), and 16-11-106(b); under O.C.G.A. § 17-10-10(a), it was within the trial court's discretion to order that the defendant's sentences on armed robbery and aggravated assault run consecutively. McKenzie v. State, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Trial court did not err in imposing maximum and consecutive sentences on the defendant for the burglary and theft by taking convictions as the defendant's prior convictions for three or more felonies qualified the defendant to be sentenced as a recidivist, requiring the defendant to be sentenced to the maximum time allowed; the sentences were within the statutory ranges; and the trial court had the authority to require that the sentences run consecutively. Hamlett v. State, 350 Ga. App. 93, 828 S.E.2d 132 (2019), cert. denied, No. S19C1274, 2019 Ga. LEXIS 860 (Ga. 2019), cert. denied, No. A19C1275, 2019 Ga. LEXIS 890 (Ga. 2019).

Consecutive sentences for weapon possession. — Trial court's imposition of sentences of imprisonment on the defendant's conviction for possession of a firearm during the commission of a felony, in violation of O.C.G.A. § 16-11-106(b)(1), which were to run consecutively to all other sentences imposed in the defendant's criminal matter, was within the trial court's discretion under O.C.G.A. § 17-10-10, as the trial court was required to run the sentence consecutively to the underlying felony to that offense, and the trial court had discretion as to other sentences imposed. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Cited in Fortson v. Elbert County, 117 Ga. 149, 43 S.E. 492 (1903); Shamblin v. Penn, 148 Ga. 592, 97 S.E. 520 (1918); Sullivan v. Clark, 156 Ga. 706, 119 S.E. 913 (1923); Teasley v. Nelson, 164 Ga. 242, 138 S.E. 72 (1927); Ford v. Ellis, 182 Ga. 344, 185 S.E. 337 (1936); McLarry v. State, 72 Ga. App. 864, 35 S.E.2d 378 (1945); Morris v. Aderhold, 201 Ga. 533, 40 S.E.2d 747 (1946); Goble v. Reese, 214 Ga. 697, 107 S.E.2d 175 (1959); Balkcom v. Sellers, 219 Ga. 662, 135 S.E.2d 414 (1964); Cozzalino v. Watkins, 220 Ga. 624, 140 S.E.2d 875 (1965); Grimes v. Smith, 224 Ga. 434, 162 S.E.2d 388 (1968); Rowland v. State, 120 Ga. App. 248, 170

General Consideration (Cont'd)

S.E.2d 58 (1969); Heard v. State, 126 Ga. App. 62, 189 S.E.2d 895 (1972); Patterson v. Caldwell, 229 Ga. 321, 191 S.E.2d 43 (1972); Johnson v. State, 126 Ga. App. 757, 191 S.E.2d 614 (1972); Herring v. Ault, 230 Ga. 398, 197 S.E.2d 354 (1973); Wade v. State, 231 Ga. 131, 200 S.E.2d 271 (1973); Mathis v. State, 231 Ga. 401, 202 S.E.2d 73 (1973); Strong v. State, 232 Ga. 294, 206 S.E.2d 461 (1974); Nicholson v. State, 133 Ga. App. 819, 212 S.E.2d 474 (1975); Brown v. Ricketts, 233 Ga. 809, 213 S.E.2d 672 (1975); Epps v. State, 134 Ga. App. 429, 214 S.E.2d 703 (1975); Huff v. State, 135 Ga. App. 134, 217 S.E.2d 187 (1975); Sheffield v. State, 235 Ga. 507, 220 S.E.2d 265 (1975); Taylor v. State, 136 Ga. App. 317, 221 S.E.2d 224 (1975); Turner v. State, 235 Ga. 826, 221 S.E.2d 590 (1976); Dean v. State, 238 Ga. 537, 233 S.E.2d 789 (1977); Burke v. State, 248 Ga. 124, 281 S.E.2d 607 (1981); Jenkins v. Montgomery, 248 Ga. 696, 285 S.E.2d 706 (1982); State v. Wilkerson, 161 Ga. App. 185, 288 S.E.2d 137 (1982); Thomas v. Newsome, 821 F.2d 1550 (11th Cir. 1987); Jefferson v. State, 209 Ga. App. 859, 434 S.E.2d 814 (1993); McKenzie v. State, 250 Ga. App. 277, 549 S.E.2d 774 (2001); James v. State, 265 Ga. App. 689, 595 S.E.2d 364 (2004); In the Interest of J.R., 280 Ga. App. 143, 633 S.E.2d 447 (2006); Smith v. State, 289 Ga. App. 742, 658 S.E.2d 156 (2008); Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Separate Terms or Different Courts

Intent of subsection (b). — O.C.G.A. § 17-10-10(b) in no way indicates any intention to do more than give a method of construing sentences when one feature of the sentence has been omitted (that is, whether the intent of the sentence is to be consecutive or concurrent), and was inapplicable to a situation arising from escape or other fugitive status. Downs v. State, 163 Ga. App. 485, 295 S.E.2d 152 (1982).

Groups of offenses committed in a single crime spree are within the ambit of this section if convictions for such offenses have been obtained in separate courts or terms of court. Schamber v. State, 152 Ga. App. 196, 262 S.E.2d 533 (1979).

Subsection (b) of this section properly was to be construed as being applicable to groups of offenses committed in a single crime spree if convictions for such offenses have been obtained in separate courts or terms of court. Amerson v. Zant, 243 Ga. 509, 255 S.E.2d 34 (1979).

If convictions obtained on more than one indictment or accusation at separate terms of court or different courts, and sentenced to imprisonment, the judge does not have a duty to make such sentences run concurrently. Cozzolino v. Hubert, 222 Ga. 43, 148 S.E.2d 435 (1966).

If a person is convicted on more than one indictment in different courts and sentenced to imprisonment, it is within the discretion of the trial court to impose consecutive sentences. Daughtrey v. State, 138 Ga. App. 504, 226 S.E.2d 773 (1976).

No intent to give credit for sentences imposed by other sovereignties. — There is only reference to "different courts" and there is no expression of the General Assembly that sentences imposed by courts of different sovereignties are to be credited as service of sentences for offenses against this state. Grimes v. Greer, 223 Ga. 628, 157 S.E.2d 260 (1967).

Section inapplicable to such sentences. — Provisions of this section did not apply to sentences imposed by courts of different sovereignties, such as two states, or a state and the United States. Huddleston v. Ricketts, 233 Ga. 112, 210 S.E.2d 319 (1974).

Service of sentence for a federal offense cannot satisfy a sentence for state offense by operation of this section. Grimes v. Greer, 223 Ga. 628, 157 S.E.2d 260 (1967).

State sentence consecutive to federal sentence absent expression to contrary. — State's oral sentence, in the absence of an expression that the sentence was to be served concurrently with the federal sentence, runs consecutively to the federal sentence under this section. Taylor v. Green, 229 Ga. 164, 190 S.E.2d 66 (1972).

Sentences imposed by different courts are not automatically assumed concurrent if the orders are silent, and the defendant is not released at the termination of the longer sentence. Hightower v. Hollis, 121 Ga. 159, 48 S.E. 969 (1904).

Incarceration by political subdivision after escape from state. — Prisoner who escapes from state incarceration and is then arrested and incarcerated by a political subdivision of the state is still incarcerated under the power of the same sovereign, and there is no valid reason to toll the running of that prisoner's existing sentence until the prisoner is actually in the physical custody of a Department of Corrections facility. Spann v. Whitworth, 262 Ga. 21, 413 S.E.2d 713 (1992).

OPINIONS OF THE ATTORNEY GENERAL

Interpretation of declaration that sentence is to be "computed from this date." — A new sentence declaring that it is to be "computed from this date," received by a prisoner having one or more outstanding sentences, is consecutive. Statements such as "to be computed from this date," standing alone, are not sufficient to overcome the presumptive rule of construction created by this section. 1958-59 Op. Att'y Gen. p. 260.

Effect of imposing additional consecutive sentence when part of current sentence remains. — Since ambiguity in a criminal sentence is to be construed in favor of a defendant, if a defendant is sentenced to six one-year sentences to be served consecutively, and while serving the third of these one-year sentences escapes and is, upon apprehension, given a three-year sentence to be served consecutively to the "sentence now being served," the third one-year sentence is the one "then" being served and is the proper sentence to use for computational purposes; therefore, the three-year escape sentence will be served concurrently with the last three one-year sentences. 1973 Op. Att'y Gen. No. 73-42.

Applicability. — This section, which provided that unless otherwise stated, sentences from different courts or different terms of court shall be served concurrently, applies only to sentences from courts of this state. 1973 Op. Att'y Gen. No. 73-148.

Affirmed consecutive sentences not amendable to run concurrently. — Sentences imposed to be served consecutively may not, after affirmance on appeal beyond the expiration of the term, be amended so as to run concurrently. 1945-47 Op. Att'y Gen. p. 115.

Payment of fine as probating sentence. — If a prisoner is sentenced to two consecutive sentences or fines, then the payment of the fine in one sentence will probate that sentence, after which the second sentence would be in force and the prisoner detained unless the fine was paid. 1962 Op. Att'y Gen. p. 119.

Transfer of inmate for treatment of mental disease. — State Board of Corrections (now Board of Offender Rehabilitation) can transfer an inmate to a facility of the Department of Human Resources for treatment as a mentally diseased inmate. If the inmate is declared sane prior to completion of the inmate's existing sentence, the inmate can be returned to stand trial for outstanding charges. 1970 Op. Att'y Gen. No. 70-72.

Commitment to mental institution does not breach service of sentence. — This section did not enable a subsequent order of committal to a state mental institution to breach the service of an existing sentence. To allow otherwise would deprive the inmate of the opportunity to complete service of the inmate's existing sentence until the inmate was again returned to the custody of the State Board of Corrections (now Board of Offender Rehabilitation). 1970 Op. Att'y Gen. No. 70-72.

During period when both sentence and commitment are operative, terms of subsequent criminal sentence govern. 1975 Op. Att'y Gen. No. 75-20.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 706 et seq. 21A Am. Jur. 2d, Criminal Law, § 806 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2397 et seq.

ALR. — When sentences imposed by same court run concurrently or consecutively; and definiteness of direction with respect thereto, 70 A.L.R. 1511.

Are sentences on different counts to be regarded as for a single term or for separate terms as regards pardon, parole, probation, suspension, or commutation, 107 A.L.R. 634.

Sentences by different courts as concurrent, 57 A.L.R.2d 1410.

Effect of invalidation of sentence upon separate sentence which runs consecutively, 68 A.L.R.2d 712.

Recovery of cumulative statutory penalties, 71 A.L.R.2d 986.

Propriety of general sentence covering several counts in information or indictment not exceeding in aggregate the sentences which might have been imposed cumulatively under the several counts, 91 A.L.R.2d 511.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Validity, construction, and application of concurrent-sentence doctrine — state cases, 56 A.L.R.5th 385.

Construction and application of U.S.S.G. § 5g1.3(b), requiring federal sentence to run concurrently to undischarged state sentence when state sentence has been fully taken into account in determining offense level for federal offense — particular events preceding federal sentence and sentencing credit, 32 A.L.R. Fed. 2d 191.

17-10-11. (For effective date, see note.) Granting of credit generally; exceptions; use in determining parole eligibility; applicability of Code section.

(a) Except as provided in subsection (b) of this Code section, upon conviction for an offense, a person shall be given full credit for each day spent in confinement in any penal institution or facility and in any institution or facility for treatment or examination for a disability, as such term is defined in Code Section 37-1-1, infirmity, or other physical condition, including:

(1) Pretrial confinement, for any reason, since the date of arrest for the offense which is the subject of the sentence; and

(2) Posttrial confinement awaiting the remittitur from an appellate court or transfer to the Department of Corrections or other court ordered institution or facility.

(b) The court may exclude credit for time served in pretrial confinement when its sentence:

(1) Requires the person to complete a program at a probation detention center as set forth in Code Section 42-8-35.4;

(2) Allows the person to participate in a work release program as set forth in Code Section 42-1-4; or

(3) Is for a misdemeanor offense for time spent in confinement in a jurisdiction other than the one in which the arrest for such offense occurred.

(c) The credit or credits set forth in subsection (a) of this Code section shall be applied toward the convicted person's sentence and shall be considered by the State Board of Pardons and Paroles in determining the eligibility of such person for parole.

(d) This Code section shall apply to sentences for all crimes, whether classified as violations, misdemeanors, or felonies, and to all courts having criminal jurisdiction located within the boundaries of this state.

History. — Ga. L. 1970, p. 692, §§ 1, 2; Ga. L. 1972, p. 742, § 1; Ga. L. 2010, p. 1147, § 9/HB 1104; Ga. L. 2020, p. 361, § 3/HB 984.

Delayed effective date. — This Code section, as set out above, becomes effective January 1, 2021. For version of this Code section as in effect until January 1, 2021, see the 2020 amendment note.

The 2020 amendment, effective January 1, 2021, substituted the present provisions of subsections (a) and (c) for the former provisions of subsection (a), which read: "Each person convicted of a crime in this state shall be given full credit for each day spent in confinement awaiting trial and for each day spent in confinement, in connection with and resulting from a court order entered in the criminal proceedings for which sentence was imposed, in any institution or facility for treatment or examination of a physical or mental disability. The credit or credits shall be applied toward the convicted person's sentence and shall also be considered by parole authorities in determining the eligibility of the person for parole."; added subsection (b); redesignated former subsection (b) as present subsection (d); and substituted "shall apply" for "applies" near the beginning of subsection (d).

JUDICIAL DECISIONS

This section contemplates credit only for time served during proceedings for which sentence received. Tucker v. Stynchcombe, 239 Ga. 356, 236 S.E.2d 623 (1977).

Applicability. — Provision in O.C.G.A. §§ 17-10-9 and 17-10-11 for crediting prison sentences with the time spent in confinement applies only to persons who would not be confined but for their charges which give rise to the sentence for which credit is sought. Spann v. Whitworth, 262 Ga. 21, 413 S.E.2d 713 (1992); Wilson v. State, 273 Ga. 97, 538 S.E.2d 429 (2000).

Trial court cannot modify a sentence to reflect credit for time served prior to sentence being imposed; the responsibility for computing credit for time served awaiting trial not being upon the trial court. Casario v. State, 169 Ga. App. 515, 313 S.E.2d 772 (1984); Warren v. State, 246 Ga. App. 894, 543 S.E.2d 38 (2000).

Procedure for claiming credit. — Defendant's claim was cognizable only in a mandamus or injunction action because the defendant did not contest the validity of the entry of the guilty plea, and it was well beyond time to appeal any such claim. Beasley v. State, 255 Ga. App. 522, 566 S.E.2d 333 (2002).

Defendant's claim that the trial court did not give the defendant credit for time the defendant spent in pretrial confinement when the court sentenced the defendant after the defendant pled guilty to charges of possession of cocaine with intent to distribute and possession of marijuana with intent to distribute was cognizable only in a mandamus or injunction action against the Commissioner of the Georgia Department of Corrections, or in a petition for habeas corpus, not in a

motion to modify the defendant's sentence, and the trial court properly dismissed the defendant's motion to modify the defendant's sentence. Maldonado v. State, 260 Ga. App. 580, 580 S.E.2d 330 (2003).

Trial court's order denying the defendant's motion for credit for time served in pretrial confinement was vacated as the defendant's remedy lied solely with the Department of Corrections and not the courts, and then if the defendant remained aggrieved thereafter, a mandamus or injunction action could be pursued. Edwards v. State, 283 Ga. App. 305, 641 S.E.2d 193 (2007).

Because the defendant raised the issues of sentencing credit in a motion for jail-credit time and not in a petition for mandamus, the motion was a nullity and should have been dismissed by the trial court and because it was a nullity there was nothing left to appeal. Warbington v. State, 303 Ga. 649, 814 S.E.2d 351 (2018).

Sentencing order need not reflect consideration of confinement pending trial. — A fair reading of the provisions of Ga. L. 1972, p. 742, § 1 (see O.C.G.A. § 17-10-11) and Ga. L. 1972, p. 742, §§ 2 and 3 (see O.C.G.A. § 17-10-12) indicates that while a trial court should give consideration for time spent in confinement pending trial, these sections do not require the trial court affirmatively to reflect that consideration in the language of the sentence imposed. Turner v. State, 151 Ga. App. 631, 260 S.E.2d 756 (1979).

Trial court did not exceed the court's authority in sentencing the defendant to 48 hours confinement without credit for time served because the amount of credit given for time served is computed by the pre-sentence custodian, is awarded by the post-sentence custodian, and the trial court was, therefore, not involved in this matter. Diaz v. State, 245 Ga. App. 380, 537 S.E.2d 784 (2000).

Board of Offender Rehabilitation has duty to award credit day for day. — Even if the trial court considers the time spent in pretrial confinement, and gives a defendant favorable treatment therefor, Ga. L. 1972, p. 742, §§ 2 and 3 (see O.C.G.A. § 17-10-12) affirmatively places the duty upon the Board of Offender Rehabilitation to award the defendant day for day credit for time served prior to trial. Turner v. State, 151 Ga. App. 631, 260 S.E.2d 756 (1979).

Amount of credit for time served prior to sentencing is to be computed by the convict's presentence custodian, and the duty to award the credit for time served prior to trial is upon the Department of Offender Rehabilitation (now Department of Corrections). Casario v. State, 169 Ga. App. 515, 313 S.E.2d 772 (1984); Warren v. State, 246 Ga. App. 894, 543 S.E.2d 38 (2000).

Credit for time spent in drug court program. — Credit towards the defendant's sentence for time spent in the drug court program was not warranted because such credit was not part of the plea agreement, which provided that the defendant would be sentenced to ten years, with four to serve and six on probation if the defendant failed to complete the drug program, and the defendant was neither under a sentence nor in confinement while the defendant participated in the drug program. Fleming v. State, 297 Ga. 606, 774 S.E.2d 594 (2015).

Credit improperly denied. — Judgment, denying the defendant credit for 16 months the defendant served in jail while awaiting trial, was in conflict with the statute and it was ordered the judgment be modified to comply with requirements of law. Addo v. State, 212 Ga. App. 163, 441 S.E.2d 486 (1994).

Trial court erred in refusing to give the defendant credit for the number of days that the defendant served in custody from the date of arrest on a bench warrant for failure to appear at a scheduled court hearing until the date of trial. Allen v. State, 244 Ga. App. 377, 535 S.E.2d 347 (2000).

Because O.C.G.A. § 17-10-11(a) provided that the defendant was entitled to credit for the full time served prior to sentencing in connection with the charges, because the Department of Corrections apparently relied upon the trial court's handwritten notation in calculating the defendant's sentencing credit, and as the notation was a gratuitous misdirection that had the effect of improperly taking credit away from the defendant,

the trial court erred in denying the defendant's motion to correct the error. Cochran v. State, 315 Ga. App. 488, 727 S.E.2d 125 (2012), cert. denied, No. S12C1384, 2013 Ga. LEXIS 82 (Ga. 2013).

Reviewability on appeal. — Defendant's claim on direct appeal that the defendant was not properly credited for time served while awaiting trial was not properly before the appellate court as issues regarding the amount of time credited were within the purview of the Georgia Department of Corrections, pursuant to O.C.G.A. §§ 17-10-11(a) and 17-10-12, and relief should have been sought from the department; as the trial court in the court's written sentencing order did not give gratuitous misdirection to the correctional custodians, the issue was not reviewable. Cutter v. State, 275 Ga. App. 888, 622 S.E.2d 96 (2005).

Because the amount of credit the defendant was entitled to receive was to be computed by a pre-sentence custodian, and the duty to award the credit for time served prior to trial fell upon the Department of Corrections, an appeal from an order denying the defendant clarification of an imposed sentence was not properly before the appeals court; moreover, any dissatisfaction with that relief would not be part of the defendant's direct appeal from the original conviction, but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections. Smashey v. State, 282 Ga. App. 293, 638 S.E.2d 431 (2006).

Cited in Noble v. State, 132 Ga. App. 755, 209 S.E.2d 30 (1974); Fong v. State, 149 Ga. App. 456, 254 S.E.2d 460 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Purpose. — Remedial change made by this section was to allow credit for jail time served before formal implementation of the sentence. 1973 Op. Att'y Gen. No. 73-1.

This section was applicable to sentences imposed on and after July 1, 1970. 1970 Op. Att'y Gen. No. 70-85.

This section was not retroactive and did not apply to jail time prior to sentences arising before July 1, 1970, the date the law became effective. 1973 Op. Att'y Gen. No. 73-1.

Effect of fixed antecedent computation dates. — Board of Corrections (now Board of Offender Rehabilitation) should disregard fixed antecedent computation dates in those cases in which no appeal has been taken and in which sentence has been imposed on or after July 1, 1970. 1970 Op. Att'y Gen. No. 70-176.

Credit for time in confinement awaiting trial. — Provision for credit for time spent in confinement awaiting trial was intended to apply only to confinement resulting from the charges for which the sentence in question was ultimately imposed. 1975 Op. Att'y Gen. No. 75-3.

Amount of credit for time spent in confinement awaiting trial provided for in this section was intended to be limited to credit for days spent in custody in connection with the offense or acts for which sentence was imposed. 1975 Op. Att'y Gen. No. 75-3.

This section was not intended to allow credit on a sentence for time spent awaiting trial on a separate and unrelated charge, and a prisoner was not entitled to credit on the prisoner's sentence for such time. 1975 Op. Att'y Gen. No. 75-3.

Individual must be given credit for the time spent in jail while not serving any other sentence. In fact, not allowing credit for such time served would be in violation of O.C.G.A. § 17-10-11. 1987 Op. Att'y Gen. No. 87-19.

When a sentence is imposed to run concurrently with one already being served, the subsequent sentence runs concurrently with the unexecuted portion of the previous sentence. 1975 Op. Att'y Gen. No. 75-3.

Credit for time served against consecutive sentences. — Defendants serving consecutive sentences, who have earned credit for time served against the consecutive sentences, must be given credit for that time against the consecutive sentences. 1987 Op. Att'y Gen. No. 87-19.

Credit for confinement when suspended sentence is revoked. — This section was intended to credit a defen-

dant, whose suspended sentence is revoked, with the time the defendant spent in jail prior to the defendant's original trial and prior to the defendant's revocation. 1973 Op. Att'y Gen. No. 73-1.

When a suspension of jail sentence occurred before July 1, 1970, the effective date of this section, and a revocation occurred afterwards, credit was allowed for prerevocation jail time occurring after the effective date. 1973 Op. Att'y Gen. No. 73-1.

Determination of credit when probation revoked. — After revocation of a probated sentence, in determining the remaining balance of the sentence, the defendant is credited with time on probation. However, to prevent the defendant from receiving double credit for this time, jail time credit should not be awarded toward the period of confinement ordered after revocation of a probated sentence. 1973 Op. Att'y Gen. No. 73-1.

Credit for time awaiting extradition. — Defendant is entitled to receive credit for time spent in confinement awaiting extradition. 1973 Op. Att'y Gen. No. 73-5.

When good-time allowances and deductions may be computed. — With the limited exception of Ga. L. 1969, p. 606, § 1 (see O.C.G.A. § 42-6-5), relating to temporary custody of convicted inmates in county facilities, good-time allowances and deductions therefrom can only be computed when inmates are under the jurisdiction and control of the institutions operated by the Department of Offender Rehabilitation. 1972 Op. Att'y Gen. No. 72-61.

When credit can be taken away for misbehavior. — With the limited exception of Ga. L. 1969, p. 606, § 1 (see O.C.G.A. § 42-6-5), neither sheriffs nor the Department of Offender Rehabilitation can take jail credit away from inmates who have misbehaved in jails prior to the inmates being sent to correctional institutions. 1972 Op. Att'y Gen. No. 72-61.

Power to devise forms and to require submission of information. — Director of corrections (now commissioner of offender rehabilitation) is authorized to devise and distribute such forms as may be necessary to implement Ga. L. 1972, p. 742, §§ 1—3 (see O.C.G.A. §§ 17-10-11 and 17-10-12). The director (now commissioner) may require that data concerning the number of days an inmate spent in jail prior to trial be transmitted to the Board of Corrections (now Board of Offender Rehabilitation) upon forms approved and distributed by the board. 1970 Op. Att'y Gen. No. 70-127.

Credits for defendant sentenced in one county and loaned to second county for prosecution. — Individual who is sentenced in county A and then "loaned" to county B for prosecution is entitled to credit for jail time certified by the individual's county B custodian against both sentences, if concurrent, but if the individual's county B sentence is made consecutive, the individual will not receive credit against the county B sentence for the individual's county B jail time. 1983 Op. Att'y Gen. No. 83-21.

An inmate who is removed by court order to a county jail for prosecution or sentencing is entitled to credit against both the inmate's previous sentence(s) and the inmate's new sentence(s), if concurrent, for certified jail time the inmate serves in connection with the new sentence(s). 1983 Op. Att'y Gen. No. 83-21.

Credit for time served in escape status. — Inmate is not entitled to credit for time served in a county jail while in escape status, even if the Department of Offender Rehabilitation (now Corrections) is made aware of the inmate's whereabouts. 1983 Op. Att'y Gen. No. 83-21.

Escapee captured and sentenced in another state. — Inmate who escapes from the custody of the Department of Offender Rehabilitation (now Department of Corrections) and, while on escape, is captured and sentenced in another state remains in escape status until returned to Georgia and is not entitled to credit against the inmate's Georgia sentence(s) for time served in the other state. 1983 Op. Att'y Gen. No. 83-21.

If jail time is certified pursuant to O.C.G.A. § 17-10-12 in connection with prosecution of an escapee prior to the escapee's return to the custody of the Department of Offender Rehabilitation (now Department of Corrections), the

prisoner is entitled to jail time credit only against the new sentence(s). 1983 Op. Att'y Gen. No. 83-21.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 490, 491. 59 Am. Jur. 2d, Pardon and Parole, § 77 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2359 et seq. 67A C.J.S. (Rev), Pardon and Parole, § 46 et seq.

ALR. — Time which convict spends in hospital as credit on his sentence, 62 A.L.R. 246.

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities, 18 A.L.R.2d 511; 90 A.L.R.3d 408.

Effect of delay in taking defendant into custody after conviction and sentence, 98 A.L.R.2d 687.

Right to credit for time spent in custody prior to trial or sentence, 77 A.L.R.3d 182.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as a condition of pretrial release, 29 A.L.R.4th 240.

Liability of private operator of "halfway house" or group home housing convicted prisoners before final release for injury to third person caused by inmate, 9 A.L.R.5th 969.

Effect of delay in taking defendant into custody after conviction and sentence, 76 A.L.R.5th 485.

17-10-12. Affidavit specifying number of days spent in confinement; disposition of affidavit; granting of credit to defendant.

(a) The custodian of the defendant shall be required to make an affidavit specifying the number of days which the defendant has spent in confinement in his custody and furnish the affidavit to the clerk of the court within five days after sentence is imposed if the defendant is convicted. The affidavit of the custodian of the defendant shall be made a part of the official record of the trial.

(b) The clerk of the court shall transmit a copy of the custodian's affidavit to the Department of Corrections when the defendant has been sentenced to the custody of the department. The Department of Corrections shall give the defendant credit for the number of days spent in confinement prior to conviction and sentence, as reflected in the custodian's affidavit, before forwarding the record to the State Board of Pardons and Paroles.

(c) Where the defendant has been sentenced to the custody of an official other than the commissioner of corrections, the clerk of the court shall transmit the custodian's affidavit to the proper authorities who shall give the defendant credit for the number of days spent in custody prior to conviction and sentence.

(d) For service under this Code section, the clerk shall receive the fee prescribed in Code Section 15-6-77 from the funds of the county, except where the clerk is on a salary.

History. — Ga. L. 1970, p. 692, §§ 3, 4; Ga. L. 1972, p. 742, §§ 2, 3; Ga. L. 1977, p. 1098, § 7; Ga. L. 1985, p. 283, § 1; Ga. L. 1990, p. 8, § 17.

JUDICIAL DECISIONS

It is trial judge's responsibility to impose legally proper sentence, one which does not exceed the maximum authorized and is certain enough to allow the Board of Offender Rehabilitation (now Department of Corrections) and the State Board of Pardons and Paroles to compute the sentence and all the credits and losses that the law authorizes or mandates. Swain v. State, 157 Ga. App. 868, 278 S.E.2d 743 (1981).

Sentence need not reflect consideration of time in confinement awaiting trial. — Fair reading of the provisions of Ga. L. 1972, p. 742, §§ 1-3 (see O.C.G.A. §§ 17-10-11 and 17-10-12) indicates that while a trial court should give consideration for time spent in confinement pending trial, the statutes do not require the trial court affirmatively to reflect that consideration in the language of the sentence imposed. Turner v. State, 151 Ga. App. 631, 260 S.E.2d 756 (1979).

Trial court cannot modify a sentence to reflect credit for time served prior to sentence being imposed, the responsibility for computing credit for time served awaiting trial not being upon the trial court. Casario v. State, 169 Ga. App. 515, 313 S.E.2d 772 (1984); Warren v. State, 246 Ga. App. 894, 543 S.E.2d 38 (2000).

Board of Offender Rehabilitation has duty to award credit day for day. — Even if the trial court considers the time spent in pretrial confinement and gives a defendant favorable treatment therefor, this section affirmatively places the duty upon the Board of Offender Rehabilitation to award the defendant day for day credit for time served prior to trial. Turner v. State, 151 Ga. App. 631, 260 S.E.2d 756 (1979).

Amount of credit is to be computed by the convict's presentence custodian, and the duty to award the credit for time served prior to trial is upon the Department of Offender Rehabilitation (now Department of Corrections). Casario v. State, 169 Ga. App. 515, 313 S.E.2d 772 (1984); Warren v. State, 246 Ga. App. 894, 543 S.E.2d 38 (2000).

Judge has no authority to interfere with credit issued by administrative entities. — Trial court erred in sentencing the defendant by specifying that the defendant's credit for time served would not begin until December 5, 2008, the date probation for another offense expired because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Georgia Department of Corrections to determine and award credit for time served. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Court correctly dismissed a petition for mandamus against the State Board of Pardons and Paroles and the board's chairperson, seeking an order requiring them to recompute the petitioner's sentences resulting from the petitioner's convictions as a habitual violator. The duty to award credit for time served lies with the Department of Corrections, not the board. Further, mandamus lies against an official to require the performance of a clear legal duty, but does not reach the office. Harper v. State Bd. of Pardons & Paroles, 260 Ga. 132, 390 S.E.2d 592 (1990).

Court clerk did not have a duty to compute or give credit for jail time; therefore, a prisoner's petition for mandamus to compel the clerk to correct documents concerning time that the prisoner spent in the county jail did not state a justiciable issue. Grant v. Byrd, 265 Ga. 684, 461 S.E.2d 871 (1995).

Procedure for claiming credits. — Trial court's order denying the defendant's

motion for credit for time served in pretrial confinement was vacated as the defendant's remedy lied solely with the Department of Corrections and not the courts, and then if the defendant remained aggrieved thereafter, a mandamus or injunction action could be pursued. Edwards v. State, 283 Ga. App. 305, 641 S.E.2d 193 (2007).

Trial court properly denied the defendant's motion to modify the defendant's sentence; under O.C.G.A. § 17-10-12, it was the duty of the department of corrections, not the trial court, to award credit for time served prior to trial; if the defendant was aggrieved by the department's calculations, the defendant should have sought relief from the department, then pursued mandamus or injunctive relief if the defendant was not satisfied. Anderson v. State, 290 Ga. App. 890, 660 S.E.2d 876 (2008).

Because the defendant raised the issues of sentencing credit in a motion for jail-credit time and not in a petition for mandamus, the motion was a nullity and should have been dismissed by the trial court and because it was a nullity there was nothing left to appeal. Warbington v. State, 303 Ga. 649, 814 S.E.2d 351 (2018).

Reviewability on appeal. — Defendant's claim on direct appeal that the defendant was not properly credited for time served while awaiting trial was not properly before the appellate court as issues regarding the amount of time credited were within the purview of the Georgia Department of Corrections, pursuant to O.C.G.A. §§ 17-10-11(a) and 17-10-12, and relief should have been sought from the department; as the trial court in the court's written sentencing order did not give gratuitous misdirection to the correctional custodians, the issue was not reviewable. Cutter v. State, 275 Ga. App. 888, 622 S.E.2d 96 (2005).

Because the amount of credit the defendant was entitled to receive was to be computed by a pre-sentence custodian, and the duty to award the credit for time served prior to trial fell upon the Department of Corrections, an appeal from an order denying the defendant clarification of an imposed sentence was not properly before the appeals court; moreover, any dissatisfaction with that relief would not be part of the defendant's direct appeal from the original conviction, but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections. Smashey v. State, 282 Ga. App. 293, 638 S.E.2d 431 (2006).

OPINIONS OF THE ATTORNEY GENERAL

This section is applicable to sentences imposed on and after July 1, 1970. 1970 Op. Att'y Gen. No. 70-85.

Power to devise forms and to require data be submitted upon such forms. — Director of corrections (now commissioner of offender rehabilitation) is authorized to devise and distribute such forms as may be necessary to implement Ga. L. 1970, p. 692, §§ 1-4 (see O.C.G.A. §§ 17-10-11 and 17-10-12). The director (now commissioner) may require that data concerning the number of days an inmate spent in jail prior to trial be transmitted to the Board of Corrections (now Board of Offender Rehabilitation) upon forms approved and distributed by the board. 1970 Op. Att'y Gen. No. 70-127.

Board of Offender Rehabilitation is not authorized to grant credits without the custodian's affidavit. 1970 Op. Att'y Gen. No. 70-127.

Credits for defendant sentenced in one county and loaned to second county for prosecution. — Individual who is sentenced in county A and then "loaned" to county B for prosecution is entitled to credit for jail time certified by the individual's county B custodian against both sentences, if concurrent, but if the individual's county B sentence is made consecutive, the individual will not receive credit against the county B sentence for the individual's county B jail time. 1983 Op. Att'y Gen. No. 83-21.

Inmate who is removed by court order to

a county jail for prosecution or sentencing is entitled to credit against both the inmate's previous sentence(s) and the inmate's new sentence(s), if concurrent, for certified jail time the inmate serves in connection with the new sentence(s). 1983 Op. Att'y Gen. No. 83-21.

Credit for time served while in escape status. — Inmate is not entitled to credit for time served in a county jail while in escape status, even if the Department of Offender Rehabilitation (now Department of Corrections) is made aware of the inmate's whereabouts. 1983 Op. Att'y Gen. No. 83-21.

Escapee captured and sentenced in another state. — Inmate who escapes from the custody of the Department of Offender Rehabilitation (now Department of Corrections) and, while on escape, is captured and sentenced in another state remains in escape status until returned to Georgia and is not entitled to credit against the inmate's Georgia sentence(s) for time served in the other state. 1983 Op. Att'y Gen. No. 83-21.

If jail time is certified pursuant to O.C.G.A. § 17-10-12 in connection with prosecution of an escapee prior to the escapee's return to the custody of the Department of Offender Rehabilitation (now Department of Corrections), the prisoner is entitled to jail time credit only against the prisoner's new sentence(s). 1983 Op. Att'y Gen. No. 83-21.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 729 et seq. 21A Am. Jur. 2d, Criminal Law, § 843 et seq. 59 Am. Jur. 2d, Pardon and Parole, §§ 80 et seq., 98 et seq., 119 et seq. .

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2359 et seq. 67A C.J.S. (Rev), Pardon and Parole, § 46 et seq.

ALR. — Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities, 18 A.L.R.2d 511.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 A.L.R.3d 781.

17-10-13. Legal adjudication of guilt in court having jurisdiction to precede assessment of punishment.

The punishments prescribed by this Code shall be assessed only after a legal adjudication of guilt in a court having jurisdiction.

History. — Penal Code 1895, § 20; Penal Code 1910, § 20; Code 1933, § 27-2509.

Law reviews. — For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006).

JUDICIAL DECISIONS

Former Code 1933, §§ 89-9907 and 89-9908 (see O.C.G.A. § 45-11-4), dealing with malpractice in office, must be construed with former Code 1933, § 27-2509 (see O.C.G.A. § 17-10-13). When thus construed, former Code 1933, §§ 89-9907 and 89-9908 meant that any of the officers charged with the offense therein named shall, upon a legal conviction in a court having jurisdiction, be punished as for a misdemeanor and removed from office. Cargile v. State, 67 Ga.

App. 610, 21 S.E.2d 326 (1942).

Former Code 1933, §§ 89-9907 and 89-9908 (see O.C.G.A. § 45-11-4) meant that former Code 1933, § 27-2509 (see O.C.G.A. § 17-10-13) was made sufficiently definite to meet the requirements of a valid penal law when construed with other provisions of the code. Cargile v. State, 67 Ga. App. 610, 21 S.E.2d 326 (1942).

Cited in Cargile v. State, 194 Ga. 20, 20 S.E.2d 416 (1942); Jackson v. Houston, 200 Ga. 399, 37 S.E.2d 399 (1946); DeFrancis v. Manning, 246 Ga. 307, 271 S.E.2d 209 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 467 et seq., 478 et seq. 21A Am. Jur. 2d, Criminal Law, § 831 et seq.

ALR. — Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 87 A.L.R.4th 384.

17-10-14. Committal of person under 17 convicted of felony.

(a) Notwithstanding any other provisions of this article and except as otherwise provided in subsection (b) of this Code section, in any case where a person under the age of 17 years is convicted of a felony and sentenced as an adult to life imprisonment or to a certain term of imprisonment, such person shall be committed to the Department of Juvenile Justice to serve such sentence in a detention center of such department until such person is 17 years of age at which time such person shall be transferred to the Department of Corrections to serve the remainder of the sentence. This Code section shall apply to any person convicted on or after July 1, 1987, and to any person convicted prior to such date who has not been committed to an institution operated by the Department of Corrections.

(b) If a child is transferred to superior court pursuant to Code Section 15-11-561 and convicted of aggravated assault as defined in Chapter 5 of Title 16, the court may sentence such child to the Department of Corrections. Such child shall be housed in a designated youth confinement unit until such person is 17 years of age, at which time such person may be housed in any other unit designated by the Department of Corrections.

History. — Code 1981, § 17-10-14, enacted by Ga. L. 1987, p. 1335, § 1; Ga. L. 1990, p. 1930, § 7; Ga. L. 1992, p. 1983, § 19; Ga. L. 1994, p. 1012, § 27; Ga. L. 1997, p. 1453, § 1; Ga. L. 2000, p. 20, § 8; Ga. L. 2013, p. 294, § 4-18/HB 242; Ga. L. 2015, p. 540, § 1-16/HB 361.

Editor's notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to

all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 81 (1994).

JUDICIAL DECISIONS

Custody of juvenile until 21 years. — Ordering that the juvenile remain in the Department of Juvenile Justice custody until the juvenile reaches 21 years of age is neither authorized by O.C.G.A. § 49-4A-9(e) or any other provision of Georgia law. Ga. Dep't of Juvenile Justice v. Eller, 338 Ga. App. 247, 789 S.E.2d 412 (2016).

While O.C.G.A. § 49-4A-9(b) provides the superior court broad discretion to modify the court's orders for the welfare of any child subject to the court's jurisdiction, the plain language of subsection (e) limits that discretion once that child becomes 17 years of age. Ga. Dep't of Juvenile Justice v. Eller, 338 Ga. App. 247, 789 S.E.2d 412 (2016).

Judgment of the trial court directing the Department of Juvenile Justice (DJJ) to hold in its custody a criminal defendant prosecuted as an adult for a crime committed as a juvenile, until the defendant turned 21 years old, was reversed because ordering that the defendant remain in DJJ custody until reaching 21 years of age was neither authorized by O.C.G.A. § 49-4A-9(e) or any other provision of Georgia law. Ga. Dep't of Juvenile Justice v. Eller, 338 Ga. App. 247, 789 S.E.2d 412 (2016).

Cited in State v. Hudson, 303 Ga. 348, 812 S.E.2d 270 (2018).

17-10-15. AIDS transmitting crimes; requiring defendant to submit to HIV test; report of results.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) A victim or the parent or legal guardian of a minor or incompetent victim of a sexual offense as defined in Code Section 31-22-9.1 or other crime which involves significant exposure as defined by subsection (f) of this Code section may request that the agency responsible for prosecuting the alleged offense request that the person arrested for such offense submit to a test for the human immunodeficiency virus and consent to the release of the test results to the victim. If the person so arrested declines to submit to such a test, the judge of the superior court in which the criminal charge is pending, upon a showing of probable cause that the person arrested for the offense committed the alleged crime and that significant exposure occurred, may order the test to be performed in compliance with the rules adopted by the Department of Public Health. The cost of the test shall be borne by the victim or by the arrested person, in the discretion of the court.

(c) Upon a verdict or plea of guilty or a plea of nolo contendere to any AIDS transmitting crime, the court in which that verdict is returned or plea entered shall require the defendant in such case to submit to an HIV test within 45 days following the date of such verdict or plea.

(d) Any person required under this Code section to submit to the HIV test who fails or refuses to submit to the test shall be subject to such measures deemed necessary by the court in which the order was entered, verdict was returned, or plea was entered to require involuntary submission to the HIV test, and submission thereto may also be made a condition of suspending or probating any part of that person's sentence for the AIDS transmitting crime.

(e) If a person is required by this Code section to submit to an HIV test and is thereby determined to be infected with HIV, that determination and the name of the person shall be reported to:

(1) The Department of Public Health, which shall disclose the name of the person as necessary to provide counseling to each victim of that person's AIDS transmitting crime if that crime is other than one specified in subparagraph (a)(3)(J) of Code Section 31-22-9.1 or to any parent or guardian of any such victim who is a minor or incompetent person;

(2) The court which ordered the HIV test, which court shall make that report a part of that person's criminal record. That report shall be sealed by the court; and

(3) The officer in charge of any penal institution or other facility in which the person has been confined by order or sentence of the court for purposes of enabling that officer to confine the person separately from those not infected with HIV.

(f) For the purpose of subsection (b) of this Code section, "significant exposure" means contact of the victim's ruptured or broken skin or mucous membranes with the blood or body fluids of the person arrested for such offense, other than tears, saliva, or perspiration, of a magnitude that the Centers for Disease Control and Prevention have epidemiologically demonstrated can result in transmission of the human immunodeficiency virus.

(g) The state may not use the fact that a medical procedure or test was performed on a person under this Code section or use the results of the procedure or test in any criminal proceeding arising out of the alleged offense.

History. — Code 1981, § 17-10-15, enacted by Ga. L. 1988, p. 1799, § 4; Ga. L. 1991, p. 974, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214; Ga. L. 2012, p. 775, § 17/HB 942; Ga. L. 2020, p. 55, § 2/SB 372.

The 2020 amendment, effective July

1, 2020, substituted "subsection (f)" for "subsection (g)" in the first sentence of subsection (b); deleted the former second sentence of subsection (c) which read: "The clerk of the court in such case shall mail, within three days following the date of that verdict or plea, a copy of that verdict or plea to the Department of Public Health."; deleted former subsection (d), which read: "The Department of Public Health, within 30 days following receipt of the court's order under subsection (b) of this Code section or within 30 days following receipt of the copy of the verdict or plea under subsection (c) of this Code section, shall arrange for the HIV test for the person required to submit thereto."; redesignated former subsections (e) through (h) as present subsections (d) through (g), respectively; and deleted "arranged pursuant to subsection (d) of this Code section" following "to the test" near the beginning of subsection (d).

Cross references. — Child committing delinquent act constituting AIDS transmission crime including testing and reporting, § 15-11-603.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, a comma was deleted following "this Code section" in the first sentence of subsection (b).

Editor's notes. — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection."

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 49 (1992).

JUDICIAL DECISIONS

Subsection (b) constitutional. — O.C.G.A. § 17-10-15(b) does not violate the Fourth Amendment because the government's interest outweighs the individual's and because the results are kept confidential and cannot be used against the individual in a criminal prosecution; nor does § 17-10-15(b) violate the right to privacy under the due process clause of the Fourteenth Amendment or the state or federal equal protection clauses. Adams v. State, 269 Ga. 405, 498 S.E.2d 268 (1998).

RESEARCH REFERENCES

ALR. — Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Validity and propriety under circumstances of court-ordered HIV testing, 87 A.L.R.5th 631.

17-10-16. Sentence to imprisonment for life without parole authorized; ineligibility for parole or leave programs.

(a) Notwithstanding any other provision of law, a person who is convicted of an offense committed after May 1, 1993, for which the death penalty may be imposed under the laws of this state may be sentenced to death, imprisonment for life without parole, or life imprisonment as provided in Article 2 of this chapter.

(b) Notwithstanding any other provision of law, any person who is convicted of an offense for which the death penalty may be imposed and who is sentenced to imprisonment for life without parole shall not be eligible for any form of parole during such person's natural life unless the State Board of Pardons and Paroles or a court of this state shall, after notice and public hearing, determine that such person was innocent of the offense for which the sentence of imprisonment for life without parole was imposed. Such person shall not be eligible for any work release program, leave, or any other program administered by the Department of Corrections the effect of which would be to reduce the term of actual imprisonment to which such person was sentenced.

History. — Code 1981, § 17-10-16, enacted by Ga. L. 1993, p. 1654, § 3.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, "May 1, 1993," was substituted for "the effective date of this Code section" in subsection (a).

Editor's notes. — Ga. L. 1993, p. 1654, § 7, effective May 1, 1993, provides: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, a defendant whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act provided that: (1) jeopardy for the offense charged has not attached and the state has filed with the trial court notice of its intention to seek the death penalty or (2) the defendant has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking the death penalty after remand."

Ga. L. 1993, p. 1654, § 8, effective May 1, 1993, provides: "Except as provided in Section 6 of this Act [Code Section 17-10-32.1], the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act nor shall this Act be construed as repealing Code Sections 17-10-30, 17-10-31, or 17-10-32 of the Official Code of Georgia Annotated."

Ga. L. 1993, p. 1654, § 9, effective May 1, 1993, provides: "No person shall be sentenced to life without parole unless such person could have received the death penalty under the laws of this state as such laws have been interpreted by the United States Supreme Court and the Supreme Court of Georgia."

Law reviews. — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 183 (1993).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 17-10-16 does not violate the equal protection clause of the Fourteenth Amendment because the statute places the discretion to withhold the presentation of a life-without-parole sentence in cases of

crimes committed before May 1, 1993, in the hands of the prosecutor. Freeman v. State, 264 Ga. 27, 440 S.E.2d 181 (1994).

O.C.G.A. § 17-10-16 does not violate Ga. Const. 1983, Art. IV, Sec. II, Para. II, Ga. Const. 1983, Art. IV, Sec. VII, Para. II, and Ga. Const. 1983, Art. I, Sec. II, Para. III because the statute imposes legislative restrictions on the power of the Board of Pardons and Paroles to grant parole. Freeman v. State, 264 Ga. 27, 440 S.E.2d 181 (1994).

Legislature's power to prescribe punishment for crime includes the power to make ineligibility for parole part of the punishment. Moore v. Ray, 269 Ga. 457, 499 S.E.2d 636 (1998).

Ex post facto application. — Application of O.C.G.A. § 17-10-16 to the defendant did not violate ex post facto prohibitions since the defendant expressly elected the application and that section did not establish a greater penalty or alter the situation to the defendant's disadvantage. Brantley v. State, 268 Ga. 151, 486 S.E.2d 169, cert. denied, 522 U.S. 985, 118 S. Ct. 449, 139 L. Ed. 2d 384 (1997).

When a defendant pled guilty to rape and the state did not seek the death penalty, it was error to impose a sentence of life without parole under O.C.G.A. § 16-6-1(b); under case law and O.C.G.A. § 17-10-16(a), a life sentence without parole was authorized only in cases when the state first sought the death penalty. Velazquez v. State, 283 Ga. App. 863, 643 S.E.2d 291 (2007), aff'd, 238 Ga. 206, 657 S.E.2d 838 (2008).

Cited in Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (1994); State v. Velazquez, 283 Ga. 206, 657 S.E.2d 838 (2008); State v. Velazquez, 283 Ga. 206, 657 S.E.2d 838 (2008); Moore v. State, 303 Ga. 743, 814 S.E.2d 676 (2018).

OPINIONS OF THE ATTORNEY GENERAL

Constitutional limitations on power to parole. — As of January 1, 1995, there have been placed additional constitutional limitations on the power of the State Board of Pardons and Paroles to parole. The limitations include the inability to parole during the mandatory minimum sentence for the seven serious violent felonies set out in O.C.G.A. § 17-10-6.1, the inability to parole for sentences of life without parole as set out in O.C.G.A. §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in O.C.G.A. § 42-9-45(b), subject to the authority reserved by statute to the board in O.C.G.A. § 42-9-46 to consider for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

17-10-16.1. Seeking death penalty not prerequisite to life without parole sentence.

A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state.

History. — Code 1981, § 17-10-16.1, enacted by Ga. L. 2011, p. 752, § 17/HB 142.

Editor's notes. — This Code section is reflective of uncodified provisions from Ga. L. 2009, p. 223, § 10.

JUDICIAL DECISIONS

State was permitted to seek a sentence of life without parole since the murder occurred one year after the law was changed to permit such a sentence. Heywood v. State, 292 Ga. 771, 743 S.E.2d 12 (2013).

17-10-17. Sentencing of defendants guilty of crimes involving bias or prejudice; identification of increased sentence.

(a) As used in this Code section, the term "designated misdemeanor" means:

(1) Simple assault as defined in Code Section 16-5-20;

(2) Simple battery as defined in Code Section 16-5-23;

(3) Battery as defined in Code Section 16-5-23.1;

(4) Criminal trespass as defined in Code Section 16-7-21; and

(5) Misdemeanor theft by taking as defined in Code Section 16-8-2.

(b) Subject to the notice requirement provided in Code Section 17-10-18 and in enhancement of the penalty imposed, if the trier of fact determines beyond a reasonable doubt that the defendant intentionally selected any victim or group of victims or any property as the object of the offense because of such victim's or group of victims' actual or perceived race, color, religion, national origin, sex, sexual orientation, gender, mental disability, or physical disability, the judge imposing sentence shall:

(1) If the offense for which the defendant was convicted is a designated misdemeanor, impose a sentence of imprisonment for a period of not less than six nor more than 12 months, and a fine not to exceed $5,000.00; or

(2) If the offense for which the defendant was convicted is a felony, impose a sentence of imprisonment for a period of not less than two years, and a fine not to exceed $5,000.00.

(c) The judge shall state when he or she imposes the sentence the amount of the increase of the sentence based on the application of subsection (b) of this Code section.

History. — Code 1981, § 17-10-17, enacted by Ga. L. 2020, p. 10, § 1/HB 426.

Effective date. — This Code section became effective July 1, 2020.

Cross references. — Rights of citizens generally, § 1-2-6. Bias crime report, § 17-4-20.2.

Editor's notes. — This Code section formerly pertained to sentencing and parole of defendants guilty of crimes involving bias or prejudice. The former Code section was based on Ga. L. 2000, p. 224, § 1 and was repealed by Ga. L. 2020, p. 10, § 1/HB 426, effective July 1, 2020.

JUDICIAL DECISIONS

Former O.C.G.A. § 17-10-17, as enacted, was unconstitutionally vague. — Absent some qualification on "bias or prejudice," former O.C.G.A. § 17-10-17 was so vague that persons of common intelligence must necessarily guess at the statute's meaning and differ as to the statute's application and, thus, former § 17-10-17 was too vague to justify the imposition of enhanced criminal punish-

ment for its violation and additionally, former § 17-10-17 could not be upheld because the statute impermissibly delegated basic policy matters to police officers, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications; therefore, the sentence enhancement that the defendants selected the defendants' victims because of racial bias and prejudice violated defendants' due process rights under U.S. Const., amend. 1, 5, 8, and 14 and the corresponding state constitutional provisions; accordingly, the defendants' sentence enhancements were reversed. Botts v. State, 278 Ga. 538, 604 S.E.2d 512 (2004).

Cited in Palmaka v. State, 280 Ga. App. 761, 634 S.E.2d 883 (2006); Laseter v. State, 294 Ga. App. 12, 668 S.E.2d 495 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d., Civil rights, § 21 et seq.

17-10-18. Notification to seek enhanced penalty.

At any time after the filing of an indictment or accusation but not later than the arraignment, the state shall notify the defendant of its intention to seek the enhanced penalty or penalties authorized by Code Section 17-10-17. The notice shall be in writing and shall allege the specific factor or factors authorizing an enhanced sentence in the case pursuant to Code Section 17-10-17.

History. — Code 1981, § 17-10-18, enacted by Ga. L. 2000, p. 224, § 1.

Editor's notes. — Ga. L. 2000, p. 224, § 2, not codified by the General Assembly, provided in part that this Code section is applicable to offenses committed on or after July 1, 2000.

17-10-19. Determination of defendant's guilt; object of the offense; enhancement of sentence.

(a) In a case where notice has been given pursuant to Code Section 17-10-18, the trier of fact shall initially determine the defendant's guilt on the charge or charges. If the trier of fact finds the defendant guilty of such charge or charges, the trial shall immediately be recommenced to receive evidence as is relevant to determine whether the defendant intentionally selected the victim or the property of the victim as the object of the offense as set forth in the notice given pursuant to Code Section 17-10-18.

(b) If the trier of fact determines beyond a reasonable doubt that the defendant so acted, the judge shall enhance the sentence imposed in accordance with the provisions of Code Section 17-10-17.

History. — Code 1981, § 17-10-19, enacted by Ga. L. 2000, p. 224, § 1.

Editor's notes. — Ga. L. 2000, p. 224, § 2, not codified by the General Assembly,

provided in part that this Code section is applicable to offenses committed on or after July 1, 2000.

17-10-20. Collection of fines and restitution in criminal cases.

(a) In any case in which a fine or restitution is imposed as part of the sentence, such fine and restitution shall constitute a judgment against the defendant. Upon the request of the prosecuting attorney, it shall be the duty of the clerk of the sentencing court to issue a writ of fieri facias thereon and enter it on the general execution docket of the superior court of the county in which such sentence was imposed. Such fieri facias may also be entered on the general execution docket in any county in which the defendant owns real property.

(b) If, in imposing sentence, the court sets a time certain for such fine or restitution to be paid in full, no execution shall issue upon the writ of fieri facias against the property of the defendant until such time as the time set by the court for payment of the fine or restitution shall have expired.

(c) If the fine or restitution is not paid in full, such judgment may be enforced by instituting any procedure for execution upon the writ of fieri facias through levy, foreclosure, garnishment, and all other actions provided for the enforcement of judgments in the State of Georgia and in other states and foreign nations where such judgment is afforded full faith and credit under the Uniform Foreign Money Judgments Act or domestication thereof.

(d) If the fine is not paid in full by the expiration of the time set by the court for payment of the fine, the governing authority of the county or municipality entitled to such fine may institute procedures to enforce such judgment as provided by subsection (c) of this Code section.

(e) If the restitution is not paid in full by the expiration of the time set by the court for payment of the restitution, the prosecuting attorney or the victim entitled to receive such restitution may institute procedures to enforce such judgment as provided by subsection (c) of this Code section.

(f) Notwithstanding the provisions of Code Section 9-12-60, a judgment entered on the general execution docket pursuant to this Code section shall not become dormant during any period when the defendant is incarcerated and for seven years thereafter. Such judgment shall be subject to revival in the same manner as provided for dormant judgments under Code Section 9-12-60.

(g) No fees, costs, or other charges authorized by law in civil cases shall be charged by a clerk of superior court for entering a judgment

arising out of a criminal case on the general execution docket or for any action brought by the state to enforce such judgment.

(h) The provisions of this Code section shall be supplemental to any other provision of law applicable to the collection of fines or restitution in criminal cases.

History. — Code 1981, § 17-10-20, enacted by Ga. L. 2005, p. 88, § 4/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Law reviews. — For note, "Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System," see 48 Ga. L. Rev. 227 (2013).

17-10-21. Vacating of sentence for trafficking victim defendants.

(a)(1) A defendant convicted of an offense and sentenced as a direct result of the defendant being the victim of an offense of trafficking under Code Section 16-5-46 may petition the court imposing the sentence to vacate such conviction. Such court shall maintain the jurisdiction, power, and authority to vacate such conviction and sentence.

(2) The defendant shall serve the petition provided for under paragraph (1) of this subsection upon the prosecuting attorney, and such petition:

(A) Shall be submitted on a form promulgated by the Attorney General;

(B) Shall be submitted no earlier than six months following conviction and sentencing for a misdemeanor offense or no earlier than one year following completion of the sentence for a felony offense;

(C) Shall be submitted with a copy of his or her criminal history background check report conducted by the Georgia Crime Information Center that has been completed no more than three business days prior to the filing of the petition; provided, however, that the defendant shall not be charged a fee by the Georgia Crime Information Center for a report produced for purposes of this Code section; and

(D) May include documentation of a defendant's status as a victim of an offense of trafficking under Code Section 16-5-46 at the time of the offense; provided, however, that official documentation shall not be required to obtain relief under this Code section. Such documentation shall create a rebuttable presumption that the defendant was a victim of trafficking under Code Section 16-5-46.

As used in this subparagraph, the term "official documentation" includes, but is not limited to, the following:

(i) A copy of an official record, certification, or eligibility letter from a federal, state, tribal, or local proceeding showing that the defendant was a victim of trafficking under Code Section 16-5-46;

(ii) An affidavit, a letter, or sworn testimony from a member of the clergy, medical professional, member of a victim services organization, or certified, licensed, or registered professional from whom the defendant has sought assistance, counseling, or legal counsel related to his or her victimization; or

(iii) Any other evidence that the court determines is of sufficient credibility or probative value.

(3) No defendant with an outstanding warrant issued by a jurisdiction in this state or any other state or by the United States shall file a petition provided for under paragraph (1) of this subsection.

(4) If the prosecuting attorney, to the court, consents in writing to the vacatur of such conviction or fails to respond to such petition within 30 days of service, the court imposing the conviction and sentence shall, without notice or hearing, issue an order vacating the conviction and sentence and shall also issue an order restricting access to criminal history record information for such offense.

(5)(A) If the prosecuting attorney, to the court, objects in writing to the petition, the court shall hold a hearing within 90 days of the filing of the petition. The court shall hear evidence and determine, by a preponderance of the evidence, whether the defendant committed such offense as a direct result of being the victim of an offense of trafficking under Code Section 16-5-46. If the court finds, by a preponderance of the evidence, that the defendant committed such offense as a direct result of being the victim of an offense of trafficking under Code Section 16-5-46, the court may issue an order vacating the conviction and sentence.

(B) If such order to vacate is issued, the court shall also issue an order restricting access to criminal history record information for such offense and no fee shall be charged by the Georgia Crime Information Center or any other entity for restricting access to criminal history record information under this paragraph.

(C) As used in this paragraph, the term "restrict" shall have the same meaning as set forth in Code Section 35-3-37.

(b) When the petition provided for under subsection (a) of this Code section is filed, it shall be filed under seal.

(c) For any sentence vacated pursuant to this Code section, any fines and fees paid by the defendant under such sentence shall be returned to the defendant in the amount paid by the defendant.

(d) For purposes of considering such petition, testimony from the defendant or any other party may be taken by the court by remote electronic means.

History. — Code 1981, § 17-10-21, enacted by Ga. L. 2020, p. 90, § 2/SB 435.

Effective date. — This Code section became effective June 29, 2020.

Editor's notes. — Ga. L. 2020, p. 90, § 1/SB 435, not codified by the General Assembly, provides: "This Act shall be known and may be cited as 'The Survivors First Act.'"

ARTICLE 2

DEATH PENALTY GENERALLY

Cross references. — Constitutional guarantee against deprivation of life without due process, Ga. Const. 1983, Art. I, Sec. I, Para. I.

Law reviews. — For article, "Death Penalty," see 66 Mercer L. Rev. 51 (2014). For annual survey on death penalty law, see 70 Mercer L. Rev. 73 (2018).

For note on 2000 amendments of O.C.G.A. §§ 17-10-33, 17-10-38, 17-10-41, and 17-10-44, see 17 Ga. St. U.L. Rev. 116 (2000). For note, "An Aggravating Adolescence: An Analysis of Juvenile Convictions as Statutory Aggravators in Capital Cases," see 51 Ga. L. Rev. 673 (2017).

U.S. Code. — Stay of execution, Federal Rules of Criminal Procedure, Rule 38.

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary in any degree or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person

in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The offense of murder, rape, or kidnapping was committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery; or

(12) The murder was committed during an act of domestic terrorism.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

History. — Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3; Ga. L. 1996, p. 748, § 15; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11; Ga. L. 2006, p. 379, § 22/HB 1059; Ga. L. 2012, p. 899, § 8-11/HB 1176; Ga. L. 2017, p. 536, § 4-1/HB 452.

Cross references. — Time limitation on prosecutions for crimes punishable by death, § 17-3-1. Presentence hearings in death penalty cases, § 17-10-2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, the period was deleted at the end of paragraph (b)(10).

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: "(b) The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article opposing capital punishment in Georgia, see 15 Ga. St. B.J. 159 (1979). For article supporting capital punishment in Georgia, see 16 Ga. St. B.J. 48 (1979). For article surveying Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980). For article, "Constitutional Criminal Litigation," see 32 Mercer L. Rev. 993 (1981). For article, "Executing Those Who Kill Blacks: An Unusual Case Study," see 37 Mercer L. Rev. 911 (1986). For survey of 1985 Eleventh Circuit cases on constitutional criminal procedure, see 37 Mercer L. Rev. 1275 (1986). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "The Search for a Consistent and Constitutional Death Penalty Law in Georgia," see 6 Ga. State U.L. Rev. 369 (1990). For article, "Defending the Death Penalty Case: What Makes Death Different?," see 42 Mercer L. Rev. 695 (1991). For article on resolving the conflict in the capital sentencing cases, see 26 Ga. L. Rev. 323 (1992). For annual survey article, "Georgia Death Penalty Law," see 52 Mercer L. Rev. 29 (2000). For survey article on death penalty decisions from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 175 (2003). For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004). For annual survey of death

penalty decisions, see 57 Mercer L. Rev. 139 (2005). For review of death penalty cases, see 57 Mercer L. Rev. 479 (2006). For annual survey of death penalty law, see 58 Mercer L. Rev. 111 (2006). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008). For annual survey on death penalty law, see 61 Mercer L. Rev. 99 (2009). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For annual survey on death penalty, see 65 Mercer L. Rev. 93 (2013). For article, "Death Penalty," see 66 Mercer L. Rev. 51 (2014). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 17 (2017).

For note discussing statutory aggravating circumstances and the death penalty, see 35 Mercer L. Rev. 1443 (1984). For note "McCleskey v. Kemp: An Equal Protection Challenge to Capital Punishment," see 39 Mercer L. Rev. 675 (1988). For symposium on the death penalty, see 14 Ga. St. U.L. Rev. 329 (1998). For note, "Reviewing the Georgia Supreme Court's Efforts at Proportionality Review," see 39 Ga. L. Rev. 631 (2005). For note, "Uncertain Waters: Tennard v. Dretke Provides Swells of Protection for the Mentally Deficient But May Cause Rising Tides of Frivolous Claims," see 56 Mercer L. Rev. 1483 (2005). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007). For note, "A Promise Unfulfilled: Challenges to Georgia's Death Penalty Statute Post Furman," see 33 Ga. St. U.L. Rev. 839 (2017). For note, "Protecting Access to the Great Writ: Equitable Tolling, Attorney Negligence, and AEDPA," see 51 Ga. L. Rev. 647 (2017). For note, "Give It to Me, I'm Worth It: The Need to Amend Georgia's Record Restriction Statute to Provide Ex-Offenders with a Second Chance in the Employment Sector," see 52 Ga. L. Rev. 267 (2017).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment on Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979). For case comment, "Booth v. Maryland: Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials," see 21 Ga. L. Rev. 1191 (1987). For comment, "Capital Punishment: New Weapons in the Sentencing Process," see 24 Ga. L. Rev. 423 (1990).

JUDICIAL DECISIONS

Analysis

General Consideration
Mitigating Circumstances
Aggravating Circumstances
1. In General
2. Prior Convictions
3. Crime Committed While Engaged in Commission of Other Crimes
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances
5. Murder of Peace Officer, Corrections Employee, or Fireman for Purpose of Avoiding, Arrest or Custody
6. Causing or Directing Another to Commit Murder or Committing Murder as Agent or Employee
7. Great Risk of Death to More than One Person

General Consideration

Constitutionality. — This section was constitutional absent any contrary ruling by the United States Supreme Court. Spencer v. State, 236 Ga. 697, 224 S.E.2d 910, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 302 (1976).

General Consideration (Cont'd)

This section was not unconstitutional. Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976); Young v. State, 237 Ga. 852, 230 S.E.2d 287 (1976); Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979); Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980); Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980); Cromartie v. State, 270 Ga. 780, 514 S.E.2d 205 (1999), cert. denied, 528 U.S. 974, 120 S. Ct. 419, 145 L. Ed. 2d 327 (1999).

Constitutionality of this section was reaffirmed. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S. Ct. 508, 50 L. Ed. 2d 599 (1976).

As to constitutionality, see Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3221, 49 L. Ed. 2d 1217 (1976); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975).

Structure of the Georgia death penalty is constitutional. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Georgia statutes relating to the imposition of the death penalty are constitutional. Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

Georgia death penalty laws are not unconstitutional. Welch v. State, 254 Ga. 603, 331 S.E.2d 573 (1985).

Practice of death-qualification of jurors is not unconstitutional. Welch v. State, 254 Ga. 603, 331 S.E.2d 573 (1985).

Complex statistical study that indicated a risk that racial considerations enter into capital sentencing determinations did not prove that a particular defendant's capital sentence was unconstitutional under the Eighth Amendment or the equal protection clause of the Fourteenth Amendment. McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

O.C.G.A. § 16-5-1, the murder statute, and O.C.G.A. § 17-10-30, which authorizes a death sentence for murder, are not unconstitutional. Speed v. State, 270 Ga. 688, 512 S.E.2d 896 (1999).

O.C.G.A. § 17-10-30, enumerating the statutory aggravating factors in a death penalty case, was not unconstitutional under U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XI as applied in the defendant's case; the jury found beyond a reasonable doubt the existence of the statutory aggravating circumstances, there was no requirement that the jury find non-statutory aggravating factors beyond a reasonable doubt, and the non-statutory aggravating evidence presented by the state was reliable and admissible. Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Georgia death penalty statutes were not unconstitutional under the Sixth Amendment as the jury had to find beyond a reasonable doubt the statutory aggravating circumstances necessary to make a defendant eligible for the death penalty, pursuant to O.C.G.A. § 17-10-30; there was no requirement that nonstatutory aggravating evidence be proven beyond a reasonable doubt. Nance v. State, 280 Ga. 125, 623 S.E.2d 470 (2005).

O.C.G.A. § 17-10-30(b)(8) bears a rational relationship to the legitimate state purposes of providing deterrence of possible harm to peace officers and, thus, of protecting officers. Accordingly, the statutory aggravating circumstance does not violate equal protection under U.S. Const., amend. XIV or Ga. Const. 1983, Art. I, Sec. I, Para. II. Fair v. State, 288 Ga. 244, 702 S.E.2d 420 (2010).

Defendants equal protection challenge under U.S. Const., amend. XIV and Ga. Const. 1983, Art. I, Sec. I, Para. II failed since the defendants were similarly situated to the defendants against whom the state sought the death penalty under one or more of the statutory aggravating circumstances as provided in O.C.G.A. § 17-10-30(b). The trial court did not err in refusing to apply strict scrutiny analysis in considering the defendants' equal protection challenge on the basis that the punishment prescribed by the criminal statute involves an interference with a

fundamental right. The proper inquiry was whether the behavior involved a fundamental right, and the obvious answer was that the behavior did not. Fair v. State, 288 Ga. 244, 702 S.E.2d 420 (2010).

Unconstitutionality of portion of prior law did not invalidate otherwise supportable sentence. — Decision in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), holding unconstitutional that portion of O.C.G.A. § 17-10-30 which allowed for the death penalty if a murder is committed by a person with a substantial history of assaultive criminal convictions (deleted in 1981 codification), did not invalidate the defendant's death sentence since the jury listed the aggravating circumstances in both paragraphs (b)(1) and (b)(9) of § 17-10-30 as the basis for imposing the death penalty. Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982).

Use of same fact to support multiple circumstances. — State may urge the presence of O.C.G.A. § 17-10-30(b)(2) and (b)(7) aggravating circumstances even though aggravated battery is a fact supporting both circumstances. Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 292 (1992).

Death penalty not arbitrarily or discriminatorily administered. — Record did not support the defendant's contention that the Georgia death penalty statute is being administered arbitrarily or discriminatorily. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984).

Death penalty procedure not cruel and unusual. — Georgia's death penalty procedure is not unconstitutional as a cruel and unusual mechanism for the award of the death penalty in violation of U.S. Const., amend. 8. Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Death penalty is not cruel and inhuman punishment. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1218 (1976), execution of death sentence stayed pending action on rehearing petition, 497 U.S. 1048, 111 S. Ct. 11, 111 L. Ed. 2d 826 (1990).

Death penalty is not subject to constitutional attack under U.S. Const., amends. 8 and 14. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

Section not unconstitutionally vague. — This section was not void for vagueness and for not providing a sufficiently clear and objective standard necessary to control the jury's discretion in imposing the death penalty. Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978).

This section was not unconstitutionally vague. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979), rev'd on other grounds, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

This section was not overbroad and vague in violation of the due process clauses of the federal and state constitutions. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

Section does not deny equal protection. — Constitutional challenge of this section as a violation of equal protection was without merit. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1218 (1976), execution of death sentence stayed pending action on rehearing petition, 497 U.S. 1048, 111 S. Ct. 11, 111 L. Ed. 2d 826 (1990).

Double jeopardy prohibitions inapplicable to sentence hearings. — Double jeopardy provisions of the federal and state constitutions (U.S. Const., amend. 5, and Ga. Const. 1976, Art. I, Sec. I, Para. XV [see Ga. Const. 1983, Art. I, Sec. I, Para. XVIII]) do not apply to sentence hearings in capital felony cases under O.C.G.A. § 17-10-30. Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), cert. denied, 456 U.S. 919, 102 S. Ct. 1778, 72 L. Ed. 2d 180 (1982).

Enumerated aggravating circumstances are not offenses for double jeopardy purposes. — Statutory aggravating circumstances set forth in subsection (b) of this section were not offenses within the meaning of the double jeopardy clause, but are charged a jury in order to guide the jury in the jury's determination of whether a defendant should be given a life or a death sentence. Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442

General Consideration (Cont'd)

U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Aggravating circumstances need not be alleged in indictment. — Defendant's argument that the statutory aggravating circumstances alleged by the state under O.C.G.A. § 17-10-30 to support a death sentence had to be included in the indictment failed. Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Applicability of § 17-10-2. — Sentencing proceedings in death penalty cases are governed not only by O.C.G.A. § 17-10-30, but also by O.C.G.A. § 17-10-2, which authorizes the factfinder to hear additional evidence in aggravation, including the record of any prior criminal convictions. Although a defendant's character is not an issue at the guilt phase of the trial, it is an issue at the sentencing phase. Lee v. State, 258 Ga. 82, 365 S.E.2d 99, cert. denied, 488 U.S. 879, 109 S. Ct. 195, 102 L. Ed. 2d 165 (1988).

Ga. L. 1973, p. 159, providing for the death penalty, deals with only one subject. — This section, providing for the imposition of the death penalty, deals with only one subject and is not violative of the Georgia Constitution. McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

System of dispensation of the death penalty provided by the state does not offend the principles of decisions of the United States Supreme Court. Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1975).

Capital offenses occurring after March 28, 1973 not indicted under § 17-10-7. — If a capital crime occurs after March 28, 1973, the effective date of former Code 1933, § 27-2534.1 (see O.C.G.A. § 17-10-30), the accused should not be indicted under the general recidivist statute, former Code 1933, § 27-2511 (see O.C.G.A. § 17-10-7). Clemmons v. State, 233 Ga. 187, 210 S.E.2d 657 (1974).

Death penalty must conform to section to be affirmed. — Death penalties imposed must conform to the standards set forth in this section to authorize affirmance. Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978).

Mere conjecture does not support death penalty. — Because the state failed to substantiate the state's allegation that the defendant would likely kill a prison guard if sentenced to life in prison, the trial court erred in imposing the death sentence as such rationale amounted to mere conjecture. Henry v. State, 278 Ga. 617, 604 S.E.2d 826 (2004).

Death penalty must conform to section to be constitutional. — The death penalty in a case must conform to the standards set forth if it is to pass the test of constitutionality. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

This section permitted use of some discretion. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

Prosecutor's discretion. — In the defendant's trial for the murder of a bystander during a brawl at a teen party, the prosecutor had discretion under O.C.G.A. § 17-10-30 to pursue the death penalty, and the trial court did not have authority to evaluate any factual disputes regarding the alleged aggravating circumstances prior to trial. Franklin v. State, 303 Ga. 165, 810 S.E.2d 118 (2018).

Jurors properly seated. — Trial court did not improperly seat six jurors in a death penalty case as: (1) the first juror testified that, despite the juror's acquaintance with the victim's family, the juror could act impartially, listen to the evidence, and decide the case based upon the facts and arguments placed before the juror; (2) a second juror stated that the juror's acquaintance with a family member of the victim would have no bearing on the juror's consideration of the case and that the juror would base the juror's decisions solely on the evidence placed before the juror at trial; and (3) four jurors testified that the jurors could fairly consider all possible punishments for the crime, not just the death penalty. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Juror who merely "leans" one way or the other with regard to imposition of the death penalty before hearing any evi-

dence is not disqualified. This proposition applies with particular force to a juror who "leans" toward a life sentence before hearing any evidence since a death penalty cannot be imposed absent evidence to support a finding of at least one statutory aggravating circumstance. Jarrell v. State, 261 Ga. 880, 413 S.E.2d 710 (1992).

Jury instruction to continue proper. — Trial court properly instructed the jury in the sentencing phase that the jury's "verdict as to penalty (had to) be unanimous," and subsequently directed the jury to continue the jury's deliberations after the jury informed the trial court that the jury could not reach a unanimous verdict; the jury was expected to consider the evidence and to attempt to reach unanimity "one way or the other" on the issue of a sentence and, if possible, to unanimously recommend a sentence. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Jurors properly excused for conscientious objection to death penalty. — Trial court did not err by excusing jurors who expressed a conscientious objection to the death penalty and, to the extent that this contention was not rendered moot because the defendant did not receive the death penalty, the contention lacked merit as a trial court did not abuse the court's discretion by excusing jurors in a death penalty case who indicated that the jurors were wholly opposed to the death penalty under any circumstances. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Two issues to consider in imposing death sentence. — This state's system for deciding whether a death sentence is to be given requires the jury to consider two issues in the sentencing phase. First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

Supreme Court should determine whether death penalty generally imposed in similar cases. — Duty of the Supreme Court of Georgia is not to determine that less than a death sentence was never imposed in a case with some similar characteristics but rather to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not wantonly and freakishly imposed. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1218 (1976), execution of death sentence stayed pending action on rehearing petition, 497 U.S. 1048, 111 S. Ct. 11, 111 L. Ed. 2d 826 (1990).

Plea bargaining and arraignment in capital cases. — Since a plea of guilty was entered in a capital felony case and the state sought the death penalty under former Code 1933, § 27-2534.1 (see O.C.G.A. § 17-10-30), plea bargaining was not involved nor could plea bargaining ever be involved. Therefore, former Code 1933, § 27-1404 (see O.C.G.A. § 17-7-93) would have no purpose under such a circumstance. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

No automatic right to withdraw guilty plea. — Guilty plea, voluntarily and knowingly entered in a capital felony case other than treason or aircraft hijacking, wherein the state seeks the death penalty, may not be withdrawn as a matter of right. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Death penalty not invalid merely because defendant did not have intent to kill. — Supreme Court decision in Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), does not require declaring unconstitutional any aggravating circumstance which, on its face, might allow a jury to impose a death sentence on someone who had no intent to kill. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Death penalty not unauthorized in domestic murder cases. — Although lesser sentences than death are fre-

General Consideration (Cont'd)

quently imposed in domestic murder cases, it does not follow that the death penalty would not be authorized for the murder of one spouse by another under any circumstances. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

"Depravity" finding not required. — Nothing in death penalty statute, O.C.G.A. § 17-10-30, requires that death penalty be set aside in every case unless the defendant can be characterized as "depraved." Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Individualized consideration of cases by juries. — Capital punishment is possible only in a small number of explicitly defined subclasses of homicide cases; but as to such cases, the jury is allowed to give the case before the jury individualized consideration of circumstances of the crime and of the defendant. Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Trial court does not err by refusing to direct verdict of life imprisonment simply because state presents no additional evidence at sentencing phase of the trial. Welch v. State, 254 Ga. 603, 331 S.E.2d 573 (1985).

Failure to transcribe closing arguments not error. — Failure to transcribe such things as argument, absent a showing of harm, does not amount to a constitutional violation sufficient to require vacating a death sentence. Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

Trial court's failure to transcribe the closing arguments at a sentencing hearing does not prevent reviewing courts from examining the imposition of a death sentence with full disclosure of the basis for the sentence when the record containing the transcript of the imposition of sentence does not refer to any undisclosed aspect of the proceeding on which the judge relied in imposing sentence. Moore v. Balkcom, 716 F.2d 1511 (11th Cir.), supplemented by 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 773 (1984).

What evidence admissible against defendant generally. — Any lawful evidence which tends to show the motive of the defendant, the defendant's lack of remorse, the defendant's general moral character, and the defendant's predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Information as to character and circumstances of defendant constitutionally required. — In capital cases, it is constitutionally required that the sentencing authority have information sufficient to enable the authority to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Information as to character is indispensable prerequisite to reasoned determination. — Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

All aspects of defendant's crimes, defendant's character, and defendant's attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact-finder in determining an appropriate sentence. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Improper arguments during sentencing does not render sentencing unfair. — Although four of the arguments made by the prosecutor in the sentencing phase of a capital murder trial were improper — an unsupported reference to oral sodomy upon the victim, a discussion of future parole, an attempt to place the burden of future danger solely upon the jury, and a discussion of the prosecutor's policy in regard to requesting the death

penalty — the arguments did not render the sentencing fundamentally unfair, given the circumstances of the murder (involving the victim being kidnapped, robbed, and clubbed to death), the reasonable inference of rape, the defendant's previous conviction of a vicious capital crime, and testimony about the defendant's desire to kill again. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985), cert. denied, 478 U.S. 1022, 106 S. Ct. 3340, 92 L. Ed. 2d 743 (1986).

Improper for prosecutor to suggest impropriety of mercy. — In the sentencing phase of a capital murder prosecution in which the state's case against the defendant was made almost completely by the codefendant, the prosecutor's extremely improper use of century-old Georgia Supreme Court cases to suggest the impropriety of mercy rendered the sentencing proceeding fundamentally unfair. Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1020, 106 S. Ct. 3333, 92 L. Ed. 2d 738 (1986).

Prosecutor presumed to have acted constitutionally. — Absent a specific showing that the prosecutor was motivated by race or some other factor in considering whether to seek the death penalty, it is presumed that the prosecutor acted constitutionally. Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502, cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

Inquiry into prosecutor's discretion prohibited unless unconstitutional actions. — Absent a showing that the district attorney acted in an unconstitutional manner with respect to the defendant's case, the defendant may not inquire into the prosecutor's exercise of discretion in seeking the death penalty against the defendant. Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (1994).

Testimony from other district attorneys regarding the manner in which the death penalty is sought in their circuits, or the manner in which plea bargains are reached, would be insufficient to show that the district attorney acted in an unconstitutional manner in seeking the death penalty for defendant. Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (1994).

No ineffective assistance of counsel. — Prisoner's counsel was not ineffective in not developing mitigating circumstances after receiving notice that the state was seeking the death penalty under O.C.G.A. § 17-10-30(7) because the prisoner had requested that counsel not contact relatives and did not provide counsel with leads for such information. Further, counsel was not required under Ga. Unif. Super. Ct. R. 31.4 and Strickland to request an independent evaluation as to the prisoner's competency in that such a request would not have accomplished counsel's goal of a determination of whether there was a psychological or neurological explanation for the prisoner's behavior on the night of the murder. Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008), cert. denied, 555 U.S. 1183, 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009).

Death penalty not precluded if evidence circumstantial. — This section was not written so as to preclude the imposition of the death penalty if the evidence was circumstantial. Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Section concerned notice of evidence admitted for first time at presentence hearing, and had absolutely nothing to do with the idea of giving notice of an attempt to prove aggravating circumstances during the guilt phase of trial. Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979), cert. denied, 444 U.S. 1103, 100 S. Ct. 1068, 62 L. Ed. 2d 788 (1980).

Evidence which was admissible in the guilt/innocence phase is admissible in resentencing trial. Hance v. State, 254 Ga. 575, 332 S.E.2d 287, cert. denied, 474 U.S. 1038, 106 S. Ct. 606, 88 L. Ed. 2d 584 (1985).

Evidence was sufficient to support death penalty. — See Jones v. State, 249 Ga. 605, 293 S.E.2d 708 (1982); Hittson v. State, 264 Ga. 682, 449 S.E.2d 586 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2005, 131 L. Ed. 2d 1005 (1995); Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000); Jones v. State, 273 Ga. 231, 539 S.E.2d 154 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 94, 151 L. Ed. 2d

General Consideration (Cont'd)

54 (2001), recons. denied, overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Federal habeas court, in assessing the proportionality review of the state supreme court, did not think that it "shocked the conscience" to impose the death sentence for the shotgun slayings of a man's wife and mother-in-law. Godfrey v. Francis, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd, 836 F.2d 1557 (11th Cir.), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Juries are not required to balance aggravating circumstances against mitigating circumstances. Ford v. State, 257 Ga. 461, 360 S.E.2d 258 (1987), cert. denied, 485 U.S. 943, 108 S. Ct. 1124, 99 L. Ed. 2d 284 (1988).

Georgia's post-Furman capital punishment statute does not provide for the balancing of aggravating and mitigating circumstances. Once a single aggravating circumstance is shown, all aggravating and mitigating circumstances are relevant and considered by the jury, but those circumstances are not weighed against each other. Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995).

State may not inform jury that death sentence may be reviewed and set aside. — It is reversible error for the prosecutor to mention to the jury in the prosecutor's arguments during the death penalty phase that any sentence of death will be reviewed by the trial judge and the Supreme Court, and that the sentence can be set aside. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

Jury should be properly instructed if jury exposed to comments on appellate review. — If the jury is exposed to comments about appellate review of the death penalty, the trial court should explain to the jury that it is the responsibility of each juror to decide whether the defendant will be executed, and that the jury cannot pass that responsibility on to anyone else. The jury should be told to decide on the penalty as if there was no possibility of any review of the sentence. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

Comments suggesting jury can pass on responsibility for death sentence. — Jury is given the heavy burden of making the decision of whether the defendant will live or die. Comments about appellate safeguards on the death penalty suggest to the jury that the jury can pass the responsibility for the death sentence on to the Georgia Supreme Court. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

State may argue rules and regulations as to pardons and paroles. — Prosecuting attorney can lawfully argue the rules and regulations of the Board of Pardons and Paroles and the possibility of a pardon or parole. Bland v. State, 211 Ga. 178, 84 S.E.2d 369 (1954).

Rules and regulations may be read at request of jury. — If the court, at the special request of the jury, read and instructed the jury as to the published rules and regulations of the Board of Pardons and Paroles concerning paroles and pardons without objection from the accused, it was not error to thus give the law concerning paroles and pardons. Bland v. State, 211 Ga. 178, 84 S.E.2d 369 (1954).

Permitting Bible in jury room was constitutional error. — It was constitutional error for the court to permit the Christian Bible to go into the jury room at the request of the jurors apparently for consultation in connection with the jury's deliberations after a murder trial. Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

Associating with state's witness. — If state's witness was assigned to guard the jury and in the performance of this duty rode with jury to the jury's lodgings, dined with the jury, and associated extensively with the jury at the jury's lodgings, conviction required reversal and remand for retrial. Radford v. State, 263 Ga. 47, 426 S.E.2d 868 (1993).

No presumption of innocence at presentence trial. — Defendant in a capital case stands before the trial court or jury in a presentence trial a convicted felon with no presumption of innocence. Fair v. State, 245 Ga. 868, 268 S.E.2d 316,

cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Test of adequacy of jury charge. — In considering the adequacy of a jury charge on the sentencing phase of the trial, the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that the juror should consider all the facts and circumstances of the case as presented during both phases of the trial, which necessarily include any mitigating and aggravating facts, and then, even though the juror might find one or more of the statutory aggravating circumstances to exist, would know that the juror might recommend life imprisonment. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L. Ed. 2d 699 (1978).

Failure to clearly charge jury that jury can recommend life sentence. — Death penalty must be set aside if the trial judge fails to make clear in the charge to the jury that the jury can recommend a life sentence even if the jury finds the existence of a statutory aggravating circumstance. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977), but see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998).

If a court fails to make clear to the jury that the jury could recommend a life sentence even if the jury found the existence of a statutory aggravating circumstance, the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that the juror should consider all the facts and circumstances of the case as presented during both phases of the trial, and then, even though the juror might find one or more of the statutory aggravating circumstances to exist, would know that the juror might recommend life imprisonment. Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978).

Capital sentencing instructions which do not clearly guide a jury in the jury's understanding of mitigating circumstances and their purpose, and of the option to recommend a life sentence although aggravating circumstances are found, violate the Eighth Amendment. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

Initial finding of life sentence is in effect acquittal of whatever is necessary to impose death penalty. Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), cert. denied, 456 U.S. 919, 102 S. Ct. 1778, 72 L. Ed. 2d 180 (1982).

Death sentence impermissible after life sentence reversed. — Defendants who are sentenced to life imprisonment in capital felony sentencing hearing cannot after reversal be sentenced to death for same offense. Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), cert. denied, 456 U.S. 919, 102 S. Ct. 1778, 72 L. Ed. 2d 180 (1982).

Sufficiency of form of verdict. — Jury verdict needs only to have a finding of circumstances and ultimate issues, not facts. Nor is there error by the jury in repeating the same wording given to the jury in the written charge. If the wording stated is what the jury found, and there is no contrary indication in the transcript of trial, the jury did not err in the jury's finding. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), modified on other grounds, 243 Ga. 244, 253 S.E.2d 707 (1979).

Although the jury's verdict did not specify the supporting capital felony, the only one charged was kidnapping with bodily injury and absent objection to the form of the verdict, the jury's finding was sufficiently clear to allow the Supreme Court to rationally review the verdict. Ward v. State, 262 Ga. 293, 417 S.E.2d 130 (1992), cert. denied, 506 U.S. 1084, 113 S. Ct. 1061, 122 L. Ed. 2d 366 (1993).

Elements of circumstances included in verdict. — Although the verdict's word order did not track the statute exactly, the verdict includes all the essential elements of the circumstances and therefore is a valid finding of a O.C.G.A. § 17-10-30(b)(7) circumstance. Hall v. State, 261 Ga. 778, 415 S.E.2d 158 (1991).

Jury verdict which quoted verbatim the state's notice of intent to seek the death penalty failed to satisfy the standards of O.C.G.A. § 17-10-30(c) requiring that the sentence of death imposed in the case be reversed. Page v. State, 256 Ga. 191, 345 S.E.2d 600 (1986), cert. denied, 485 U.S. 907, 108 S. Ct. 1082,

General Consideration (Cont'd)

99 L. Ed. 2d 240 (1988).

What offenses not capital felonies for appellate jurisdiction purposes. — Convictions of rape, armed robbery, and kidnapping with bodily injury if no death results are not capital felonies for appellate jurisdictional purposes and appeals in such cases go to the Court of Appeals. Cook v. State, 242 Ga. 657, 251 S.E.2d 230 (1978).

Conviction for armed robbery standing alone will not authorize the death penalty, and for appellate jurisdictional purposes, armed robbery is no longer a capital felony. Simmons v. State, 149 Ga. App. 830, 256 S.E.2d 79 (1979).

Moot issue. — If the defendant was not given the death penalty, the trial court's refusal to prohibit the state from seeking the death penalty, and all issues with respect thereto, have become moot. Cash v. State, 258 Ga. 460, 368 S.E.2d 756 (1988).

Rearraignment to seek death penalty. — State's failure to provide death penalty notice prior to the original arraignment does not preclude the state from seeking the death penalty through rearraignment. State v. Terry, 257 Ga. 473, 360 S.E.2d 588 (1987).

Trial court was not authorized to sentence defendant to life in prison without possibility of parole. — Upon certiorari review before the Supreme Court of Georgia, the Court of Appeals of Georgia properly vacated a rape sentence entered by the trial court, holding that the defendant was incorrectly sentenced to a term of life in prison without the possibility of parole, as the state failed to give notice that the state intended to seek the death penalty, and the trial court failed to find that any aggravating circumstance under O.C.G.A. § 17-10-30 existed, pursuant to O.C.G.A. § 17-10-32.1 (repealed); thus, the trial court was not authorized to sentence the defendant to life in prison without the possibility of parole. State v. Velazquez, 283 Ga. 206, 657 S.E.2d 838 (2008).

Resentencing. — If the jury imposes the death penalty, and the death penalty is vacated on legal grounds as opposed to grounds that the evidence is insufficient to support the verdict, the state may seek the death penalty on resentencing. Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398 (1983); Patrick v. State, 249 Ga. 708, 293 S.E.2d 329, cert. denied, 459 U.S. 1089, 103 S. Ct. 575, 74 L. Ed. 2d 936 (1982).

Opening statement at penalty phase of capital case. — Sentencing phase of a death penalty trial is a "criminal matter" and therefore the defendant is entitled to make an opening statement and the trial court erred in refusing to honor defense counsel's choice as to when to make the statement; however the error was harmless in light of the straightforward mitigation theory. O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008).

Cited in Echols v. State, 231 Ga. 633, 203 S.E.2d 165 (1974); Ford v. State, 232 Ga. 511, 207 S.E.2d 494 (1974); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975); Barrow v. State, 235 Ga. 635, 221 S.E.2d 416 (1975); Mason v. State, 236 Ga. 46, 222 S.E.2d 339 (1976); Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976); Pulliam v. State, 236 Ga. 460, 224 S.E.2d 8 (1976); Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976); Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976); Street v. State, 237 Ga. 307, 227 S.E.2d 750 (1976); Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); Young v. State, 239 Ga. 53, 236 S.E.2d 1 (1977); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Gaddis v. State, 239 Ga. 238, 236 S.E.2d 594 (1977); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Campbell v. State, 240 Ga. 352, 240 S.E.2d 828 (1977); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977); Gibson v. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977); Presnell v. Georgia, 439 U.S. 14, 99 S. Ct. 235, 58 L. Ed. 2d 207 (1978); Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Griggs v. State, 241 Ga. 317, 245 S.E.2d 269 (1978); Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978); Alderman v. State, 241 Ga. 496, 246

S.E.2d 642 (1978); Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978); Godfrey v. Georgia, 444 U.S. 897, 100 S. Ct. 204, 62 L. Ed. 2d 133 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979); Ruffin v. State, 242 Ga. 95, 252 S.E.2d 472 (1979); Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979); Holton v. State, 243 Ga. 312, 253 S.E.2d 736 (1979); Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979); Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979); Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979); Gibson v. Ricketts, 244 Ga. 482, 260 S.E.2d 877 (1979); Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979); Tucker v. State, 245 Ga. 68, 263 S.E.2d 109 (1980); McClesky v. State, 245 Ga. 108, 263 S.E.2d 146 (1980); Patrick v. State, 245 Ga. 417, 265 S.E.2d 553 (1980); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980); Stevens v. State, 245 Ga. 583, 266 S.E.2d 194 (1980); Hance v. State, 245 Ga. 856, 268 S.E.2d 339; Dampier v. State, 245 Ga. 882, 268 S.E.2d 349 (1980); Alderman v. Austin, 498 F. Supp. 1134 (S.D. Ga. 1980); Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981); Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981); Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981); Waters v. State, 248 Ga. 355, 283 S.E.2d 238 (1981); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981); Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981); Zant v. Stephens, 456 U.S. 410, 102 S. Ct. 1856, 72 L. Ed. 2d 222 (1982); Krier v. State, 249 Ga. 80, 287 S.E.2d 531 (1982); Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982); Brown v. State, 250 Ga. 66, 295 S.E.2d 727 (1982); Chappell v. State, 164 Ga. App. 77, 296 S.E.2d 629 (1982); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983); Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983); Chambers v. State, 250 Ga. 856, 302 S.E.2d 86 (1983); McCorquodale v. Balkcom, 705 F.2d 1553 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983); Moore v. Zant, 722 F.2d 640 (11th Cir. 1983); Cape v. Francis, 558 F. Supp. 1207 (M.D. Ga. 1983); Fleming v. Zant, 560 F. Supp. 525 (M.D. Ga. 1983); Mitchell v. Hopper, 564 F. Supp. 780 (S.D. Ga. 1983); Potts v. Zant, 575 F. Supp. 374 (N.D. Ga. 1983); Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984); Finney v. State, 253 Ga. 346, 320 S.E.2d 147 (1984); Drake v. Francis, 727 F.2d 990 (11th Cir. 1984); Dix v. Newsome, 584 F. Supp. 1052 (N.D. Ga. 1984); Johnson v. Kemp, 585 F. Supp. 1496 (S.D. Ga. 1984); Devier v. State, 253 Ga. 604, 323 S.E.2d 150 (1984); Ingram v. State, 253 Ga. 622, 323 S.E.2d 801 (1984); Walker v. State, 254 Ga. 149, 327 S.E.2d 475 (1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985); Butler v. State, 254 Ga. 637, 332 S.E.2d 654 (1985); Cook v. State, 255 Ga. 565, 340 S.E.2d 843 (1986); Rogers v. State, 256 Ga. 139, 344 S.E.2d 644 (1986); Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986); Page v. State, 257 Ga. 538, 361 S.E.2d 153 (1987); Cohen v. State, 257 Ga. 544, 361 S.E.2d 373 (1987); Frazier v. State, 257 Ga. 690, 362 S.E.2d 351 (1987); Skipper v. State, 257 Ga. 802, 364 S.E.2d 835 (1988); Lipham v. State, 257 Ga. 808, 364 S.E.2d 840 (1988); Hughes v. State, 258 Ga. 10, 364 S.E.2d 864 (1988); Blankenship v. State, 258 Ga. 43, 365 S.E.2d 265 (1988); Newland v. State, 258 Ga. 172, 366 S.E.2d 689 (1988); Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988); Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988); Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988); Morrison v. State, 258 Ga. 683, 373 S.E.2d 506 (1988); Foster v. State, 258 Ga. 736, 374 S.E.2d 188 (1988); Jarrells v. State, 258 Ga. 833, 375 S.E.2d 842 (1989); Leach v. State, 259 Ga. 33, 376 S.E.2d 667 (1989); Kinsman v. State, 259 Ga. 89, 376 S.E.2d 845 (1989); Potts v. State, 259 Ga. 96, 376 S.E.2d 851 (1989); Hatcher v. State, 259 Ga. 274, 379 S.E.2d 775 (1989); Miller v. State, 259 Ga. 296, 380 S.E.2d 690 (1989); Pitts v. State, 259 Ga. 745, 386 S.E.2d 351 (1989); Baxter v. Kemp, 260 Ga. 184, 391 S.E.2d 754 (1990); Spencer v.

General Consideration (Cont'd)

State, 260 Ga. 640, 398 S.E.2d 179 (1990); Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991); Ferrell v. State, 261 Ga. 115, 401 S.E.2d 741 (1991); Christenson v. State, 261 Ga. 80, 402 S.E.2d 41 (1991); Gibson v. State, 261 Ga. 313, 404 S.E.2d 781 (1991); Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991); Todd v. State, 261 Ga. 766, 410 S.E.2d 725 (1991); Bennett v. State, 262 Ga. 149, 414 S.E.2d 218 (1992); Hance v. Zant, 981 F.2d 1180 (11th Cir.); Osborne v. State, 263 Ga. 214, 430 S.E.2d 576 (1993); Burgess v. State, 264 Ga. 777, 450 S.E.2d 680 (1994); Jones v. State, 267 Ga. 592, 481 S.E.2d 821 (1997); High v. Turpin, 14 F. Supp. 2d 1358 (S.D. Ga. 1998); Stephens v. State, 270 Ga. 354, 509 S.E.2d 605 (1998); Jackson v. State, 270 Ga. 494, 512 S.E.2d 241 (1999); Gulley v. State, 271 Ga. 337, 519 S.E.2d 655 (1999); Morrow v. State, 272 Ga. 691, 532 S.E.2d 78 (2000); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000); Colwell v. State, 273 Ga. 634, 544 S.E.2d 120 (2001); Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000); Fults v. State, 274 Ga. 82, 548 S.E.2d 315 (2001); Rhode v. State, 274 Ga. 377, 552 S.E.2d 855 (2001); Lewis v. State, 275 Ga. 194, 563 S.E.2d 839 (2002); White v. State, 275 Ga. 678, 571 S.E.2d 786 (2002); Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16 (2004); Buttram v. State, 280 Ga. 595, 631 S.E.2d 642 (2006); Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007); Hall v. Terrell, 285 Ga. 448, 679 S.E.2d 17 (2009); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012); Humphrey v. Nance, 293 Ga. 189, 744 S.E.2d 706 (2013); Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Mitigating Circumstances

Discretion of sentencing authority. — Sentencing authority possesses unbridled discretion to consider any perceived mitigating circumstances. The sentencing authority then can assign what the sentencing authority deems the appropriate weight to particular mitigating circumstances. Moreover, with unbridled consideration of mitigating circumstances the sentencing authority may consider something to be mitigating that others might consider aggravating. Moore v. Balkcom, 716 F.2d 1511 (11th Cir.), supplemented by 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 773 (1984).

It is not necessary that the court identify mitigating circumstances offered by the defendant. Davis v. State, 255 Ga. 598, 340 S.E.2d 869, cert. denied, 479 U.S. 871, 107 S. Ct. 245, 93 L. Ed. 2d 170 (1986); Clark v. State, 275 Ga. 220, 563 S.E.2d 865 (2002).

Trial court need not use words "mitigating circumstances" in instruction. — When juries are instructed in sentencing to consider all the facts and circumstances which have appeared at both phases of the trial, this necessarily includes any mitigating circumstances which the defendant has shown, or argued, or both; therefore, the trial court does not err in failing to use the talismanic words, "mitigating circumstances," nor does the court err in failing to charge specifically that certain evidence is to be deemed mitigating. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

"Mitigating circumstances" not defined. — General Assembly in this section meant to empower jurors to consider as mitigating anything the jurors find to be mitigating, without limitation or definition. Sprivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L. Ed. 2d 699 (1978).

Mitigating circumstances are referred to in former Code 1933, §§ 27-2503 and 27-2534.1 (see O.C.G.A. §§ 17-10-2 and 17-10-30), which are wholly silent on what mitigating circumstances shall be. The conclusion is thus inescapable that the legislature meant to empower the jury to consider as mitigating anything the jury found to be mitigating, without limitation or definition. This is a constitutionally valid procedure. Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Mitigating circumstances are not required to be singled out in the charge to the jury, because the law of

this state nowhere defines mitigating circumstances. Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

In the sentencing trial, it is not required that specific mitigating circumstances be singled out by the court in giving instructions to the jury. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

"Extenuating or mitigating circumstances." — Evidence of "extenuating or mitigating circumstances" allowed by former Code 1933, §§ 27-252503 and 27-2534.1 (see O.C.G.A. §§ 17-10-2 and 17-10-30) relates to evidence about the particular defendant and does not include evidence involving the death penalty in general. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980).

In all but the rarest cases. — United States Const., amends. 8 and 14 require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980).

Evidence which is inadmissible under the rules of evidence is admissible in some instances if offered as mitigation in the sentencing phase of a capital felony trial. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Constitution requires that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment; rather, the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule and in close cases the doubt should be resolved in favor of admissibility. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Instruction that jury can consider "anything" in mitigation not error. — Trial court does not err in failing to specifically instruct the jury that as to mitigating circumstances the jury can consider "anything, without limitation or definition," if the court's instruction conveys to the jury that the jury's authority to recommend mercy is unlimited and not circumscribed by the court's definition of mitigating circumstances. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Mitigating circumstances to be presented to a jury in a Georgia death penalty case include circumstances surrounding the commission of the crime as contrasted with the life history of the petitioner preceding the period of time possibly relevant to the commission of the offense in question. Fleming v. Zant, 560 F. Supp. 525 (M.D. Ga. 1983), aff'd, 748 F.2d 1435 (11th Cir. 1984), cert. denied, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986).

Georgia law instructs the judge and jury in a capital case to consider any mitigating circumstances in determining whether to impose the death penalty. Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011).

Admission of polygraph examination. — Rule that the results of a polygraph examination were not admissible in a Georgia criminal trial absent a stipulation of the parties was not to be inflexibly applied to the sentencing phase of a capital case to preclude a defendant from

Mitigating Circumstances (Cont'd)

introducing the favorable results of such an examination as mitigation evidence, but this did not require the admission of favorable polygraph test results in the sentencing phase of every Georgia capital case, as the trial court was to exercise the court's discretion to determine if the results were sufficiently reliable to be admitted. Height v. State, 278 Ga. 592, 604 S.E.2d 796 (2004).

Evidence of penalties imposed in other capital cases properly refused. — Trial court properly refused to allow the defendant in a death penalty case to present to the jury evidence of penalties imposed in other cases. Wilson v. State, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983).

Defendant in a capital murder trial must be allowed to proffer any evidence of mitigation submitted as a basis for a sentence less than death. Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, Peek v. Kemp, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Relative's request for leniency admissible in mitigation. — Grandfather's testimony that the grandfather does not wish to see a grandson die is admissible in mitigation at the sentencing phase of a death penalty case. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Recommendation of mercy need not be supported by mitigating circumstances. — Jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Age (youth) is a mitigating circumstance. Lewis v. State, 246 Ga. 101, 268 S.E.2d 915 (1980).

Constitutionality of giving written instructions but without written instructions as to mitigation. — Portion of this section that required the trial court to give in writing to the jury the statutory instructions does not violate due process and equal protection under U.S. Const., amends. 5 and 14, and without a concurrent right to send written instructions to the jury as to mitigating circumstances, the aggravating circumstances are not prejudicially emphasized, because the written material furnished to the jury is purely of a procedural nature and amounts to nothing more than a written formulation of the jury's potential verdicts. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Failure to instruct jury as to mitigating circumstances. — If the trial court fails to charge the jury, in the absence of a request, on the law and existence of mitigating circumstances during the sentencing phase of the trial, the death penalty must be set aside. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977), but see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998).

Contradictory and confusing instruction required setting aside sentence. — Under Georgia's death sentencing scheme, the Eighth and Fourteenth Amendments require that the trial judge clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death. When the instruction, taken as a whole, at best was contradictory and confusing as to the jury's function if the jury determined that an aggravating circumstance was present, as the jury was told that upon finding an aggravating circumstance the jury's verdict would be death, but it is possible to lift isolated phrases from the jury instruction and find in those phrases an indication that a death sentence need not have inexorably flowed from a finding of an aggravated circumstance, on the whole, the instruction falls far short of providing clear and explicit information to the jury that the jury had the option not to recommend a sentence of death and the defendant's death sentence must therefore be

set aside. Moore v. Kemp, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987), aff'd, 972 F.2d 319 (11th Cir. 1992).

State must provide funds for production of mitigating evidence. — Capital defendant's right to present evidence in mitigation places an affirmative duty on the state to provide the funds necessary for production of that evidence. Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, Peek v. Kemp, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

State must furnish the services of a psychologist or psychiatrist in those capital cases deemed appropriate by the state trial court. Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, Peek v. Kemp, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Error to exclude mitigating evidence. — Trial court erred in excluding mitigating evidence consisting of the defendant's love poem written for the defendant's spouse, the childhood photographs, and photographs of the defendant's child and stepchildren. Barnes v. State, 269 Ga. 345, 496 S.E.2d 674 (1998), cert. denied, 525 U.S. 969, 119 S. Ct. 419, 142 L. Ed. 2d 341 (1998).

Jury instruction. — Trial court is not required to instruct the jury that there is no requirement that evidence of mitigating circumstances must be established beyond a reasonable doubt. Parker v. Turpin, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), aff'd sub nom. Parker v. Head, 244 F.3d 831 (11th Cir. 2001).

Aggravating Circumstances

1. In General

Jury must find statutory aggravating circumstance before recommending sentence of death. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Each aggravating circumstance must satisfy constitutional standard. — Each statutory aggravating circumstance under the death penalty statute must satisfy a constitutional standard derived from the principles of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), itself, for a system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman, supra, could occur. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Same case, same victim. — Aggravating circumstances found in O.C.G.A. § 17-10-30(b)(2) and (b)(7) may both be found by a jury within the same case involving the same victim and facts. Waldrip v. State, 267 Ga. 739, 482 S.E.2d 299, cert. denied, 522 U.S. 917, 118 S. Ct. 305, 139 L. Ed. 2d 235 (1997).

Overlapping circumstances. — Aggravating circumstances, such as O.C.G.A. § 17-10-30(b)(4) and (b)(6), are not invalid because the circumstances might overlap to some extent. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984).

Double jeopardy. — Trial court properly convicted and sentenced the defendant on charges of armed robbery and burglary because the fact that those acts served as aggravating circumstances in relation to the defendant's murder charge pursuant to O.C.G.A. § 17-10-30(b) did not trigger double jeopardy. Jones v. State, 279 Ga. 854, 622 S.E.2d 1 (2005).

Recovering things of monetary value. — Because any rational factfinder, given the evidence as presented, could have found the O.C.G.A. § 17-10-30(b)(4) aggravating factor present, there was sufficient evidence to allow a jury to find the defendant committed the murder for the purpose of receiving things of monetary value. Baxter v. Thomas, 45 F.3d 1501 (11th Cir.), cert. denied, 516 U.S. 946, 116 S. Ct. 385, 133 L. Ed. 2d 307 (1995).

Aggravating Circumstances (Cont'd)
1. In General (Cont'd)

Instruction under paragraph (b)(7) did not justify federal habeas corpus relief. — Jury instruction based on O.C.G.A. § 17-10-30(b)(7) and requiring a finding of both depravity of mind and torture to the victim did not justify federal habeas corpus relief. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), cert. denied, 467 U.S. 1219, 104 S. Ct. 2667, 81 L. Ed. 2d 372 (1984).

Paragraph (b)(7) finding requires conjunctive delivery. — O.C.G.A. § 17-10-30(b)(7) jury findings should be returned in the conjunctive to ensure unanimity concerning the necessary elements of this paragraph's circumstances. Hill v. State, 263 Ga. 37, 427 S.E.2d 770, reh'g denied, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 708(1994); habeas corpus proceeding, remanded, Turpin v. Hill, 269 Ga. 302, 498 S.E.2d 52 (1998), cert. denied, 510 U.S. 950, 114 S. Ct. 396, 126 L. Ed. 2d 344 (1993).

Paragraph (b)(7) factors identified in checklist. — Trial court properly instructed the jury on the relationship of the clauses in paragraph (b)(7) of O.C.G.A. § 17-10-30. Moreover, the verdict form accurately reflected the language of the statute; and the jury marked the form in such a way as to indicate that the jury found the existence of all of the (b)(7) factors beyond a reasonable doubt. It cannot be said that the verdict form was erroneous simply because the form set forth the (b) (7) factors in the form of a checklist. Sears v. State, 270 Ga. 834, 514 S.E.2d 426 (1999).

Evidence presented at the guilt phase of the trial is properly considered by the jury in establishing the existence of statutory aggravating circumstances. Welch v. State, 254 Ga. 603, 331 S.E.2d 573 (1985).

Once statutory aggravating circumstance found, all evidence considered. — Once the jury finds at least one statutory aggravating circumstance beyond a reasonable doubt, the jury may consider all the evidence that has been presented in both phases of the case. Ross v. State, 254 Ga. 22, 326 S.E.2d 194, cert. denied, 472 U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 623 (1985).

Finding of any statutory aggravating circumstance makes the defendant eligible for a sentence of death, and the jury must, considering all the evidence, determine whether to impose such a sentence or to impose a life sentence instead. Moore v. Kemp, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987), aff'd, 972 F.2d 319 (11th Cir. 1992).

Autopsy photographs admissible. — Autopsy photographs of the victim's body were admissible to show aggravated battery in conjunction with the aggravating circumstances in O.C.G.A. § 17-10-30(b)(2) and (b)(7). Waldrip v. State, 267 Ga. 739, 482 S.E.2d 299, cert. denied, 522 U.S. 917, 118 S. Ct. 305, 139 L. Ed. 2d 235 (1997).

State not limited to proof of particular aggravating circumstance relied upon. — In a capital felony presentence trial, the state is not limited to the introduction of evidence to support the particular statutory aggravating circumstances the state is relying upon. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

State is not limited to presenting evidence of statutory aggravating circumstances. Hightower v. State, 259 Ga. 770, 386 S.E.2d 509 (1989), cert. denied, 498 U.S. 882, 111 S. Ct. 230, 112 L. Ed. 2d 184 (1990).

Failure of one aggravating circumstance does not invalidate others. — When two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982); Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981), cert. denied, 456 U.S. 938, 102 S. Ct. 1995, 72 L. Ed. 2d 457

(1982); Mathis v. State, 249 Ga. 454, 291 S.E.2d 489 (1982), cert. denied, 463 U.S. 1214, 103 S. Ct. 3552, 77 L. Ed. 2d 1399 (1983).

If several aggravating factors are considered in arriving at a sentencing determination and one of those factors is improper, the improper factor is likely to be harmless error in instances when no mitigating factors are shown. Davis v. Zant, 721 F.2d 1478 (11th Cir. 1983), modified, 752 F.2d 1515 (11th Cir.), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed. 2d 707 (1985).

The O.C.G.A. § 17-10-30(b)(10) statutory aggravating circumstance found as to each of two murder victims was not supported by the evidence based on the state's argument that killing a witness to a crime was a means of avoiding, interfering with, or preventing lawful arrest, and that once a defendant obtained the victims' ATM cards and PINs, the defendant murdered the victims because the defendant knew that the defendant would be apprehended if the victims were left alive. However, the invalidation of this statutory aggravating circumstance did not affect the death sentences imposed. Humphreys v. State, 287 Ga. 63, 694 S.E.2d 316, cert. denied, 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010), overruled in part by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Failure of only aggravating factor. — Only one aggravating factor was presented to and considered by the jury which imposed the death sentence in the defendant's first trial for murder. Since the ground failed, on appeal, for constitutional insufficiency of the evidence, the state could not, should the state choose to try the defendant again, seek to reimpose the death penalty. Godfrey v. Francis, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd, 836 F.2d 1557 (11th Cir.), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Failure to find aggravating circumstance does not constitute acquittal. — If multiple aggravating circumstances are submitted to the jury, a finding by the jury of less than all of the aggravating circumstances does not constitute an acquittal of the aggravating circumstances not listed by the jury. Spraggins v. State, 255 Ga. 195, 336 S.E.2d 227 (1985), cert. denied, 476 U.S. 1120, 106 S. Ct. 1982, 90 L. Ed. 2d 664 (1986).

Limitation on habeas corpus relief. — As long as one valid statutory aggravating circumstance exists in a death penalty case, a federal habeas court should not grant relief unless the evidence or factor in question was constitutionally inappropriate. Collins v. Francis, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Proper instructions. — Giving of instructions on murder committed during an armed robbery, O.C.G.A. § 17-10-30(b)(2), and murder committed for pecuniary gain, § 17-10-30(b)(4), was proper because the aggravating circumstances referred to were separate and distinct. Simpkins v. State, 268 Ga. 219, 486 S.E.2d 833 (1997); Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502, cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

Trial court properly discharged the court's duty at sentencing of providing the jury with a list of the statutory aggravating circumstances authorized by the evidence. Clark v. State, 275 Ga. 220, 563 S.E.2d 865 (2002).

Petitioner death row inmate failed to establish that no fairminded jurist could conclude that the inmate was not prejudiced by the inmate's trial lawyers' failure at the sentencing phase to present additional evidence of the petitioner's limited intelligence and the inmate's troubled, abusive childhood because, in addition to four statutory aggravating circumstances — (1) the inmate murdered a deputy sheriff, O.C.G.A. § 17-10-30(b)(8); (2) the inmate murdered the deputy sheriff while trying to avoid arrest, O.C.G.A. § 17-10-30(b)(10); (3) the inmate murdered the deputy sheriff while committing armed robbery, O.C.G.A. § 17-10-30(b)(2); and (4) the inmate murdered the deputy sheriff after the inmate had already been convicted of a capital felony, O.C.G.A. § 17-10-30(b)(1) — the jury heard evidence about the inmate's long history of violence against others. Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230 (11th Cir. 2012).

Aggravating Circumstances (Cont'd)
1. In General (Cont'd)

Instruction as to invalid circumstance. — Death sentence was not impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance, a "substantial history of serious assaultive criminal convictions," for the underlying evidence was nevertheless fully admissible at the sentencing phase under O.C.G.A. § 17-10-2(a), the instructions did not place particular emphasis on the role of statutory aggravating circumstances in the jury's ultimate decision, and any possible impact could not fairly be regarded as a constitutional defect in the sentencing process, as nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making a jury's sentencing determination, even though the defendant's prior history of noncapital convictions could not by itself provide sufficient justification for imposing the death sentence. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Rule that a general verdict must be set aside if the jury was instructed that the jury could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground, does not require that a death sentence be vacated, when the jury did not merely return a general verdict stating that the jury had found at least one aggravating circumstance, but expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Erroneous instruction not reversible error. — Although the court erroneously stated to the jury that kidnapping is a capital felony, when kidnapping with bodily injury is a capital felony but kidnapping is not, the erroneous instruction did not amount to reversible error. Ward v. State, 262 Ga. 293, 417 S.E.2d 130 (1992), cert. denied, 506 U.S. 1084, 113 S. Ct. 1061, 122 L. Ed. 2d 366 (1993).

Because O.C.G.A. § 17-10-30(b)(2) sets forth only one statutory aggravating circumstance, the trial court erred by using a verdict that suggested otherwise; however, the error was harmless because the death penalty would still have been authorized if the several overlapping findings had been merged, and the jury was not instructed to weigh the number of statutory aggravating circumstances but, instead, was properly charged that the jury could impose a sentence less than death for any or no reason. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Introduction of evidence relating to nonstatutory grounds. — Trial judge did not err by permitting the state to introduce court records of prior convictions for burglary and assault since the jury based the death sentence on other proper, specified statutory aggravating circumstances. Green v. Zant, 738 F.2d 1529 (11th Cir.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984).

Five aggravators supported death sentence for malice murder. — Death sentence based on O.C.G.A. § 17-10-30(b)(2), (b)(4), (b)(7), and O.C.G.A. § 17-10-35(c)(1), (c)(3) aggravators for malice murder was supported by sufficient evidence, was not the result of ineffective counsel or an improperly selected jury, and was not disproportionate to other depraved, wantonly vile, and tortuous murders. Defendant's counsel's withholding of alleged mitigating evidence (by presenting the evidence to the trial court under seal) so that the state could not use that evidence against the defendant in the event of a new trial could not be used to assess whether counsel was ineffective for withholding the evidence. Franks v. State, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Consideration of nonstatutory with statutory aggravating circumstance not error. — Because a judge found the statutory aggravating circumstance of armed robbery, then considered the nonstatutory aggravating circumstance of the murder being committed in the vic-

tim's home, coming to the conclusion that the statutory aggravating circumstance and the location of the murder and robbery so aggravated the crime as to outweigh all mitigating circumstances involved in the case, such an evaluation comported with the constitutional requirement of an individualized sentencing decision, and thus the judge did not commit constitutional error in imposing the death sentence. Moore v. Balkcom, 716 F.2d 1511 (11th Cir.), supplemented by, 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 773 (1984).

Evidence is not inadmissible in aggravation simply because the evidence does not pertain to a specific statutory aggravating circumstance. Although the death penalty cannot be imposed unless the jury finds at least one of the statutory aggravating circumstances enumerated in O.C.G.A. § 17-10-30(b), the state is not limited to proof only of the enumerated statutory aggravating circumstances. Hicks v. State, 256 Ga. 715, 352 S.E.2d 762, cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987).

If the O.C.G.A. § 17-10-30(b)(4) statutory aggravating circumstance was the only statutory aggravating circumstance contended for by the state, but the state offered, as additional evidence in aggravation, proof that the defendant had a prior record of conviction for assault with intent to murder and for burglary, and the defendant contended the jury improperly considered the two noncapital felony convictions as statutory aggravating circumstances, thereby giving undue emphasis to this prior record in making the jury's determination as to sentence, in view of the court's specific instructions that the defendant's prior record did not constitute statutory aggravating circumstances, and the jury's subsequent return of a verdict showing that the jury understood these supplemental instructions, the mere fact that some of the aggravating circumstances were improperly designated "statutory" in the jury's initial verdict clearly had an inconsequential impact on the jury's decision regarding the death penalty. Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987).

Reasonable doubt is essential test in finding of existence of aggravating circumstance. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 446 U.S. 988, 100 S. Ct. 2975, 64 L. Ed. 2d 847 (1980).

Reasonable doubt test ensures administration of death penalty is constitutional. — Requirement that the jury find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before imposing the death penalty is sufficient to ensure that the death penalty is administered in a constitutional manner. Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2017, 60 L. Ed. 2d 388 (1979).

Charge as to aggravating circumstances generally. — Judge does not err in furnishing the jury multiple copies of the judge's instruction pursuant to the statutory requirement that the instructions be given in charge and in writing to the jury for the jury's deliberation. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).

This section demanded no more than a written list of the statutory aggravating circumstances which the trial court had orally charged. Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Judge must charge aggravating circumstances supported by evidence. — Under this section, the judge was required to charge the jury in a capital punishment case on any of the statutory aggravating circumstances which are supported by the evidence. Williams v. State, 237 Ga. 399, 228 S.E.2d 806 (1976).

If the indictment fails to allege aggravating circumstances upon which the state would rely in seeking the death penalty, the state may nevertheless impose the death penalty if the state has notified the defendant of the state's intention to seek such penalty. Blankenship v. State, 247 Ga. 590, 277 S.E.2d 505 (1981), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988), overruled on other grounds, Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993) and, overruled on other grounds, McClellan v. State, 274

Aggravating Circumstances (Cont'd)
1. In General (Cont'd)

Ga. 819, 561 S.E.2d 82 (2002).

Sufficient evidence of aggravating circumstance. — Evidence supported the court's charges on, and the jury's findings of, the following aggravating circumstances: that the defendant committed murder while engaged in the commission of other capital felonies, rape and kidnapping with bodily injury; and that the murder was wantonly vile and horrible in that the murder involved torture and depravity of mind. Wellons v. State, 266 Ga. 77, 463 S.E.2d 868 (1995).

Trial court did not err by denying a defendant's motion to quash an indictment based on Apprendi v. New Jersey, 530 U. S. 466 (2000), and Ring v. Arizona, 536 U. S. 584 (2002), because the face of the indictment did not contain the statutory aggravators for the death penalty; the state was not required to list the statutory aggravators in the indictment. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Evidence supported findings of aggravated circumstances. — See Young v. State, 251 Ga. 153, 303 S.E.2d 431 (1983), cert. denied, 464 U.S. 1057, 104 S. Ct. 740, 79 L. Ed. 2d 198 (1984); Holiday v. State, 258 Ga. 393, 369 S.E.2d 241 (1988); Pruitt v. State, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

Evidence was sufficient to find O.C.G.A. § 17-10-30(b)(2), (4), and (7) murder aggravators of commission while engaged in aggravated battery on the victim for the purpose of receiving monetary value, murder involving depravity and an aggravated battery to the victim since the victim, who was defendant's close friend, was beaten to death with a hammer and choked, followed by the defendant taking the victim's car, phone, and money. McPherson v. State, 274 Ga. 444, 553 S.E.2d 569 (2001), cert. denied, 537 U.S. 870, 123 S. Ct. 277, 154 L. Ed. 2d 118 (2002).

Because the jury's recommendation of death for the defendant's murder conviction was sufficiently based on other valid statutory aggravating factors, the fact that the jury returned a disjunctive finding of torture, depravity of mind, or an aggravated battery to the victim, whereas this finding should have been returned in the conjunctive to ensure unanimity concerning the necessary elements of the circumstances under O.C.G.A. § 17-10-30(b)(7), no reversal was required. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007).

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant's motive in murdering the victims was to avoid the defendant's own unlawful arrest as the evidence showed that the defendant failed to report to the defendant's probation officer, left the area after the murder, and had no intention of complying with the terms of probation. Hulett v. State, 296 Ga. 49, 766 S.E.2d 1 (2014), cert. denied, 135 S. Ct. 2358, 192 L. Ed. 2d 153 (U.S. 2015).

When a jury recommends a death sentence, the jury must designate in writing the aggravating circumstance or circumstances which the jury has found beyond a reasonable doubt. This written finding should recite all the essential, pertinent elements of the statutory aggravating circumstances found by the jury. At a minimum, the jury's intent must be shown with sufficient clarity that the Supreme Court can rationally review the jury's finding. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Verdict which completely omits an essential element of a statutory aggravating circumstance does not suffice as a finding of that statutory aggravating circumstance. Black v. State, 261 Ga. 791, 410 S.E.2d 740 (1991), cert. denied, 506 U.S. 839, 113 S. Ct. 118, 121 L. Ed. 2d 74 (1992).

Defendant's death sentence could not stand since the jury's verdict omitted an essential element of the O.C.G.A. § 17-10-30(b)(7) aggravating circumstance. However, since the evidence was sufficient to support a proper § 17-10-30(b)(7) finding, the state could seek anew the death penalty. Black v. State, 261 Ga. 791, 410 S.E.2d 740 (1991),

cert. denied, 506 U.S. 839, 113 S. Ct. 118, 121 L. Ed. 2d 74 (1992).

Failure to submit aggravating circumstances which are raised by evidence is not an implied directed verdict of acquittal on these aggravating circumstances. Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), cert. denied, 456 U.S. 919, 102 S. Ct. 1778, 72 L. Ed. 2d 180 (1982).

Renotification on aggravating circumstance code language. — Trial court did not err by refusing a defendant's request to dismiss the statutory aggravating circumstance of committing murder for the purpose of receiving money since the facts supported a possibility that the accomplice was the person who committed the murder for that purpose; however, the remedy was to merely have the state re-notify the defendant regarding the statutory aggravating circumstance using the language of the code, not dismissal of the statutory aggravating circumstance. Wagner v. State, 282 Ga. 149, 646 S.E.2d 676 (2007).

Poll of the jury may clarify the jury's written finding of aggravating circumstances. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

In double murder case in which two death sentences were imposed on the defendant, the fact that each murder was a statutory circumstance supporting the death penalty for the other did not require reversal since several additional aggravating circumstances sounding in torture were present. Blanks v. State, 254 Ga. 420, 330 S.E.2d 575 (1985), cert. denied, 475 U.S. 1090, 106 S. Ct. 1479, 89 L. Ed. 2d 733 (1986).

Erroneous sentencing charge on aggravated battery. — When the trial court instructed the jury that the offense of aggravated battery is committed when the defendant causes the specified injuries "maliciously, that is to say, with intent . . . ," this instruction was erroneous. A person acts "maliciously" when the person acts intentionally and without justification or serious provocation. What the court should have said was: "Maliciously, that is to say, intentionally and without justification or serious provocation. . . .". The instruction given, by its incompleteness, removed from the prosecution the burden of proving every element of the crime of aggravated battery beyond a reasonable doubt. Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992).

Failure to find aggravating circumstance. — Superior court improperly denied the defendant's motion to vacate the void sentences of life without the possibility of parole because the plea court did not specify an aggravating circumstance at the time of sentencing. Cordova v. State, 297 Ga. 26, 771 S.E.2d 884 (2015).

Resentencing. — On resentencing after the defendant's death penalty was overturned on technical grounds, the state may offer proof of statutory aggravating circumstances submitted to the first jury but not listed by that jury in support of the death sentence. Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398 (1983).

Federal district court's initial judgment holding that there was insufficient evidence to support a death sentence, i.e., insufficient evidence to prove the alleged statutory aggravating factors beyond a reasonable doubt, as required by O.C.G.A. § 17-10-30(c), which decision was left undisturbed by the federal appellate court, which reversed the district court's denial of the writ of habeas corpus with respect to the guilt phase of the trial, barred the state under the double jeopardy clause from attempting to impose the death penalty on the defendant in the defendant's retrial. Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

2. Prior Convictions

Evidence of prior record or other criminal acts. — During the presentence hearing, the state, subject to notice limitations, is allowed to place the defendant's character in issue through the defendant's prior record or other criminal acts. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert.

Aggravating Circumstances (Cont'd)
2. Prior Convictions (Cont'd)

denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Evidence supported a jury's determination that there were statutory aggravating circumstances to support the death penalty for a defendant's murder of a fellow inmate in that the murder was committed by a person in a place of lawful confinement and the murder was committed by a person with a prior record of conviction for a capital felony as: (1) the defendant and the deceased inmate were confined in a county detention center; (2) the defendant had been convicted of an armed robbery and two other murders; (3) the defendant had struck a defense attorney repeatedly during a jailhouse interview; (4) the defendant had slashed a prison guard's face and throat with a razor blade; and (5) in one day, the defendant had murdered one prison inmate, repeatedly stabbed another with an improvised weapon, and planned to kill a third inmate. Williams v. State, 281 Ga. 87, 635 S.E.2d 146 (2006), cert. denied, 553 U.S. 1004, 128 S. Ct. 2046, 170 L. Ed. 2d 793 (2008).

Aggravating circumstance may be established by proof of out-of-state convictions that clearly are comparable to Georgia capital felony offenses. Moon v. State, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991), rev'd on other grounds sub nom. Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994).

Eleven-year-old murder conviction properly considered. — 1976 murder conviction was not too old to use in aggravation at a trial in 1987. The age of a conviction is a matter which the defense may argue in mitigation, but the age of the conviction is no ground for the exclusion of the evidence. Kinsman v. State, 259 Ga. 89, 376 S.E.2d 845, cert. denied, 493 U.S. 874, 110 S. Ct. 210, 107 L. Ed. 2d 163 (1989).

Prior capital felony not charged at guilt-innocence phase. — When a defendant in a capital case is not charged during the guilt-innocence phase with the capital felony designated as an aggravating circumstance, the trial court would be required to charge the definition of that capital felony as part of the court's instruction to the jury during the sentencing phase of the trial, unless such charge has been waived. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 446 U.S. 988, 100 S. Ct. 2975, 64 L. Ed. 2d 847 (1980).

Even if statutory aggravating circumstance is found, death penalty need not be imposed. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).

History of serious assaultive convictions is unconstitutional as an aggravating circumstance. — Portion of paragraph (b)(1) of this section which allowed for the death penalty if a murder was committed by a person who had a substantial history of serious assaultive criminal convictions (deleted in 1981 codification) was unconstitutional and, thereby, unenforceable. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976); Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976).

Prior noncapital felonies are admissible but not as statutory aggravating circumstances to authorize the imposition of the death penalty. Hughes v. State, 239 Ga. 393, 236 S.E.2d 829 (1977); Davis v. State, 241 Ga. 376, 247 S.E.2d 45, cert. denied, 439 U.S. 947, 99 S. Ct. 341, 58 L. Ed. 2d 338 (1978).

Jury should consider record as of time of sentencing, not moment of crime. — In deciding if a defendant has a prior record of conviction for a capital felony, the jury should consider the defendant's record as of the time of sentencing rather than at the moment of the crime. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

Supreme Court of Georgia has interpreted O.C.G.A. § 17-10-30(b)(1) as referring to the defendant's record at the time of sentencing. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

At issue for sentencing purposes is the status of the defendant at the time of sentencing, not the defendant's status at the moment the defendant committed the crimes for which the defendant was tried.

State v. Terry, 257 Ga. 473, 360 S.E.2d 588 (1987).

Proving prior crime without conviction. — Prior crime may be proven in aggravation despite the lack of a conviction so long as there has not been a previous acquittal. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

One murder as aggravating factor for other murder in joint trial. — When the defendant has been tried for two murders jointly, it is not improper to use the conviction for the murder of one victim as the sole statutory aggravating circumstance supporting the sentence for the murder of the other. Childs v. State, 257 Ga. 243, 357 S.E.2d 48 (1987), cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1988).

Non-statutory aggravating evidence. — Conviction introduced as non-statutory aggravating evidence does not differ from a conviction introduced to form the basis of a statutory aggravating circumstance on the basis that a statutory aggravating circumstance must be found before the jury can impose a death sentence. Evidence introduced by the state in the penalty phase, whether it is offered to prove a statutory aggravating circumstance or whether it is non-statutory aggravating evidence, is intended to influence the trier of fact to impose a death sentence. Tharpe v. Head, 272 Ga. 596, 533 S.E.2d 368 (2000).

3. Crime Committed While Engaged in Commission of Other Crimes

This section did not require conviction of crime forming basis of aggravating circumstance in order to allow a jury to find such an aggravating circumstance for sentencing purposes. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

It is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

No requirement that crime be completed or that offender be charged with it. — The "while … engaged in the commission of" requirement of paragraph (b)(2) of this section did not require that the subject felony shall have been completed or that the offender shall have been charged with or convicted of the felony. Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718, cert. denied, 444 U.S. 974, 100 S. Ct. 469, 62 L. Ed. 2d 389 (1979); Roberts v. State, 252 Ga. 227, 314 S.E.2d 83, cert. denied, 469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984).

Defendant's argument that the death penalty was not appropriate punishment in the defendant's case because the defendant did not complete the armed robbery was rejected. The fact that the robbery was not completed does not diminish the defendant's culpability in the murder and the appropriateness of the death sentence in the defendant's case. Brockman v. State, 292 Ga. 707, 739 S.E.2d 332 (2013).

Use of crimes as aggravating circumstances for one another not permitted. — If armed robberies are held to be aggravating circumstances authorizing death penalties as to murders, the murders cannot then be used in aggravation of the armed robberies. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Although under the test provided for comparison by Ga. L. 1973, p. 159, § 4 (see O.C.G.A. § 17-10-35), two sentences of death for murder and rape are not excessive or disproportionate to the penalties imposed in similar cases, the actual imposition of the two death sentences on the basis of mutually aggravating circumstances cannot be upheld since if the rape offense serves as the aggravating circumstances authorizing the death penalties as to the murder, the murder cannot then be used in aggravation of the rape. Gibson v. State, 236 Ga. 874, 226 S.E.2d 63, cert. denied, 429 U.S. 986, 97 S. Ct. 507, 50 L. Ed. 2d 598 (1976).

Aggravating Circumstances (Cont'd)
3. Crime Committed While Engaged in Commission of Other Crimes (Cont'd)

If one crime, such as robbery, is used as the statutory aggravating circumstances to support imposition of the death penalty for another crime, such as murder, then the murder cannot then be used as the statutory aggravating circumstances to support imposition of the death penalty for the armed robbery. Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978).

When the murders of three children occurred while the defendant was engaged in the commission of another capital felony, the murder of an adult, the imposition of the death penalty for each of the murders of the three children could be supported by the aggravating circumstance that each was committed during the murder of the adult; but the doctrine of "mutually supporting aggravating circumstances" precluded reciprocal use of the murders of the three children as aggravating circumstances to support the imposition of the death penalty for the murder of the adult. Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1982), cert. denied, 460 U.S. 1103, 103 S. Ct. 1803, 76 L. Ed. 2d 367 (1983).

Doctrine of "mutually supporting aggravating circumstances" precludes simultaneous use of the murder of one victim to support the death penalty for murder of a second victim and use of the murder of the latter victim to support the death penalty for the murder of the first victim. Wilson v. State, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983).

Death sentence upheld when each is supported by other circumstances. — Imposition of two death sentences on the basis of mutually aggravating circumstances cannot be upheld. However, if the death sentences are legally and factually supported by additional aggravating circumstances, no violation is present. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610 (1986), 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Doctrine of "mutually supporting aggravating circumstances" precludes imposition of two death sentences if the sole statutory aggravating circumstance is that the defendant has committed a double murder. Nonetheless, if each murder conviction is supported by an independent statutory aggravating circumstance (e.g., armed robbery), the jury may impose the death penalty for each murder. In such cases, the fact that the jury has designated each murder as a statutory aggravating circumstance supporting the death penalty for the other does not require the reversal of either death sentence. Putman v. State, 251 Ga. 605, 308 S.E.2d 145 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984).

Doctrine of "mutually supporting aggravating circumstances" precludes imposition of two death sentences when the sole statutory aggravating circumstance is that the defendant has committed a double murder. However, the jury may impose a death sentence for each murder in a multiple-murder case if each murder is supported by an independent statutory aggravating circumstance. Isaacs v. State, 259 Ga. 717, 386 S.E.2d 316 (1989), cert. denied, 497 U.S. 1031, 110 S. Ct. 3297, 111 L. Ed. 2d 805 (1990).

Defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor because two statutory aggravating circumstances were found; namely, the murder was committed while engaged in the capital felony of kidnapping with bodily injury and while engaged in the offense of burglary, and an insufficiency of the evidence to support one or more statutory aggravating circumstances found by the jury did not require reversal if supported by at least one. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

If death to victim does not result, death penalty must be set aside. Thomas v. State, 145 Ga. App. 69, 243 S.E.2d 250 (1978).

O.C.G.A. § 17-10-30(b)(2) is applicable to multiple murders. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Murder of one victim could be used as the aggravating circumstance supporting imposition of the death penalty for murder of another victim in the same crime. Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987); overruled on other grounds, Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007).

Even though the doctrine of "mutually supporting circumstances" precludes simultaneous use of the murder of one victim to support the death penalty for murder of the second victim and use of the murder of the second to support the death penalty for murder of the first, it is appropriate to select one of the two as the basis for affirming a death sentence. McMichen v. State, 265 Ga. 598, 458 S.E.2d 833 (1995).

O.C.G.A. § 17-10-30(b)(2) does not require that the underlying felony be one other than murder. Godfrey v. Francis, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd sub nom. 836 F.2d 1557 (11th Cir. 1988), cert. dismissed sub nom. Zant v. Godfrey, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

O.C.G.A. § 17-10-30(b)(2) does not require simultaneity of action with regard to multiple offenses if there is one continuous course of criminal conduct in a relatively short period of time. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

O.C.G.A. § 17-10-30(b)(2) aggravating circumstance does not require simultaneity of action between the murder and the other capital felony or aggravated battery; § 17-10-30(b)(2) does not require that the murder victim and the kidnapping with bodily injury victim be the same person. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Intent to commit other crime may arise before or after murder. — Jury may find the defendant guilty of armed robbery and find that the armed robbery is a statutory aggravating circumstance supporting the death penalty for the victim's murder regardless of whether the defendant's intent to take the victim's property arose before or after the murder. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Evidence was sufficient for application of the aggravating circumstance that murders were committed while the defendant was engaged in the commission of kidnapping, even if the kidnapping was an afterthought to the shootings. Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997), cert. denied, 523 U.S. 1127, 118 S. Ct. 1815, 140 L. Ed. 2d 953 (1998).

Noncontemporaneous offenses. — If there was no indication in the jury's verdict that the offense of armed robbery was committed contemporaneously with the murder, as the statute requires, and if the jury was not polled as to the aggravating circumstances, the jury's O.C.G.A. § 17-10-30(b)(2) finding was insufficient. Jarrell v. State, 261 Ga. 880, 413 S.E.2d 710 (1992).

Use of capital felony as both aggravating circumstance and basis for felony murder conviction. — When the defendant argued that it was unconstitutional to allow the defendant's armed robbery to serve both as a basis for a conviction of felony murder and as a statutory aggravating circumstance, for in these circumstances the finding of a statutory aggravating circumstance failed to serve the narrowing function described in Zant v. Stephen, 462 U.S. 862, 103 S. Ct. 2733, 77 L.Ed.2d 235 (1983); the fact that the prerequisites of a possible death sentence could be satisfied by proof offered at the guilt-innocence phase of the trial was no bar to the imposition of a death sentence, nor an indication that a statutorily-defined aggravating circumstance was not helping to distinguish cases in which the death penalty was imposed from the many cases in which the death penalty was not. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Supporting capital felony not specified by jury. — If the jury did not specify the supporting capital felony, but the only one charged was armed robbery, absent any objection to the form of the verdict, the jury's finding was sufficiently clear to

Aggravating Circumstances (Cont'd)
3. Crime Committed While Engaged in Commission of Other Crimes (Cont'd)

allow the appellate court to rationally review the verdict. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Murder committed by wife during rape by husband. — Jury was properly instructed that the jury could find the O.C.G.A. § 17-10-30(b)(2) circumstance with the underlying predicate crime of aiding and abetting rape as the jury could properly find that the defendant, a female, committed murder during the commission of a rape by her husband. Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

Murder committed during burglary. — Since the appellant was discovered while still at the scene of the burglary and since the appellant fired at two people in the appellant's attempt to get away, killing one, the court concluded that the murder occurred during the commission of the burglary and that the evidence supported the jury's finding of a statutory aggravating circumstance under O.C.G.A. § 17-10-30(b)(2). Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Imposition of the death penalty for a murder occurring during the commission of a burglary is not rendered constitutionally infirm by reason of the fact that the murder is the burglary conviction's predicate offense. Cash v. State, 258 Ga. 460, 368 S.E.2d 756 (1988).

Jury was authorized to conclude that the defendant burst through the door of the defendant's mother-in-law's home "without authority" and with the intent to commit the felony of murder, and thus that the defendant committed the offense of burglary, which could properly count in aggravation for imposition of the death penalty. Brantley v. State, 262 Ga. 786, 427 S.E.2d 758 (1993).

Evidence was sufficient to prove that defendant lacked authority to enter the victims' house and that the defendant intended to commit the specified felonies once inside under O.C.G.A. § 16-7-1(a), and the defendant's argument that the defendant had authority to enter due to the defendant's marriage to one of the victims was not supported by the law; the trial court did not err by refusing to grant the defendant's motion to dismiss the statutory aggravating circumstance based on the defendant's commission of a burglary under O.C.G.A. § 17-10-30(b)(2). Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Considering the two murders committed by the defendant, the Supreme Court of Georgia determined that the sentences of death were not excessive or disproportionate to the penalty imposed in similar cases as the defendant murdered a parent and a young child for the purpose of robbing a home; the defendant made the child turn the power back on so that the defendant could see the parent since the parent was still indicating signs of life and the defendant wanted to see to complete the murder; the defendant boasted of raping the child before cutting the child's throat; and, knowing that the child was still alive, the defendant set the house on fire, leaving the pair to burn. O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008).

Evidence sufficient to show murder committed along with other crimes. — Evidence supported the jury's O.C.G.A. § 17-10-30(b)(2) findings that the murder of the defendant's spouse was committed while the defendant was engaged in the commission of the offenses of rape, kidnapping with bodily injury, and burglary. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Evidence was sufficient to prove that a murder was committed while the defendant was engaged in the kidnapping and bodily injury of the victim, an aggravating circumstance under O.C.G.A. § 17-10-30(b)(2); the evidence established that the victim was taken from the victim's home and held at gunpoint by the defendant, that the defendant refused to allow the victim to leave, and that instead the defendant drove the victim to a home

where the defendant shot the victim. Dalton v. State, 282 Ga. 300, 647 S.E.2d 580 (2007).

There were sufficient aggravating circumstances to support the defendant's sentencing to life imprisonment without the possibility of parole based on the evidence establishing that the defendant and a codefendant shot and killed a convenience store clerk while the pair were robbing the store. McDougal v. State, 284 Ga. 427, 667 S.E.2d 592 (2008).

Evidence sufficient to find aggravating circumstance of paragraph (b)(4). — Evidence that the defendant sold the victim's ring, stripped the victim's car and attempted to sell various parts of the car, and took the victim's pistol after murdering the victim was sufficient to support a finding of the aggravating circumstance in O.C.G.A. § 17-10-30(b)(4). Baxter v. State, 254 Ga. 538, 331 S.E.2d 561, cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275 (1985).

Presence of circumstances of paragraphs (b)(2) and (b)(7). — State is not precluded from urging the presence of both O.C.G.A. § 17-10-30(b)(2) and (b)(7) simply because rape is a fact supporting both circumstances. Parks v. State, 254 Ga. 403, 330 S.E.2d 686 (1985).

When an aggravated battery is alleged to have been committed upon the person who is also the murder victim, the same limitations should apply to O.C.G.A. § 17-10-30(b)(2) circumstance as to O.C.G.A. § 17-10-30(b)(7) circumstance. That is, insofar as aggravated battery is concerned, only facts occurring prior to death may be considered; i.e., only facts showing aggravated battery, which are separate from the act causing instantaneous death, will support a finding of aggravated battery. Davis v. State, 255 Ga. 588, 340 S.E.2d 862, cert. denied, 479 U.S. 871, 107 S. Ct. 243, 93 L. Ed. 2d 168 (1986).

Evidence supported a defendant's conviction for aggravated battery as there was evidence supporting an inference that the victim's first wound was non-fatal as the victim managed to flee a short distance into a neighbor's yard before succumbing to the gunfire; the trial court was not required to grant the defendant's motion for a directed verdict on the aggravated battery charge and the trial court did not err by allowing the jury to consider the crime of aggravated battery as an aggravating circumstance of the murder. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Death penalty for kidnapping with bodily injury is not unconstitutional if the victim is killed. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610 (1986), 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Although the state obtained an order of nolle prosequi regarding a kidnapping with bodily injury charge before trial, the offense was sufficiently part of the same criminal transaction to permit the jury to find the statutory aggravating circumstance that the murder was committed while the defendant was engaged in the commission of kidnapping with bodily injury. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Kidnapping with bodily injury is a capital felony for purposes of aggravating circumstances. — If the victim of the kidnapping is killed, kidnapping with bodily injury is a capital felony for purposes of the statutory aggravating circumstances. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Death penalty for rape is not unconstitutional if the victim is killed. Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978), overruled on other grounds, Sabel v. State, 248 Ga. 10, 282 S.E.2d 61 (1981).

Marital murderers. — This section did not forbid imposition of the death penalty upon marital murderers. It merely requires that statutory aggravating circumstances exist. Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980).

Death penalty for armed robbery alone is excessive. — Under the test provided by former Code 1933, § 27-2537 (see O.C.G.A. § 17-10-35), a death sen-

Aggravating Circumstances (Cont'd)
3. Crime Committed While Engaged in Commission of Other Crimes (Cont'd)

tence imposed for armed robbery must be considered to be excessive or disproportionate to the penalties imposed in similar cases. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Death sentence for armed robbery must be considered to be excessive or disproportionate to the penalties imposed in similar cases. Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

Death has rarely been imposed for armed robbery offense. — Even if there is no indication that the death sentence was imposed for an armed robbery offense under the influence of passion, prejudice, or any other arbitrary factor, since it has rarely been imposed for that offense, it must be considered to be excessive or disproportionate to the penalties imposed in similar cases. Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977).

Armed robbery is viable aggravating circumstance. — "Capital felony" was used in this section in a generic sense to include those felonies which were capital crimes in this state at the time this section was enacted. Thus, armed robbery remains a viable aggravating circumstance. Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533 (1978).

Armed robbery is still a capital felony for purposes of aggravating circumstances under this section, even though the death penalty cannot be imposed for armed robbery. Davis v. State, 241 Ga. 376, 247 S.E.2d 45, cert. denied, 439 U.S. 947, 99 S. Ct. 341, 58 L. Ed. 2d 338 (1978); Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Even though the death penalty may no longer be imposed for armed robbery alone, armed robbery is still a capital felony under the aggravating circumstance provisions of this section. Jones v. State, 243 Ga. 820, 256 S.E.2d 907, cert. denied, 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979).

Armed robbery was still considered a capital offense under paragraph (b)(2) of this section. Simmons v. State, 149 Ga. App. 830, 256 S.E.2d 79 (1979).

Charge on statutory aggravating circumstances was proper, when even if the defendant decided to take the victim's money only after having twice shot the victim in the head, the jury was authorized to find that the offense of murder was committed while the defendant was engaged in the commission of the offense of armed robbery. Davis v. State, 255 Ga. 588, 340 S.E.2d 862, cert. denied, 479 U.S. 871, 107 S. Ct. 243, 93 L. Ed. 2d 168 (1986).

Defendant's death sentence was not disproportionate since the defendant's two victims were deliberately killed during the commission of an armed robbery and were shot in the back of the head. Arevalo v. State, 275 Ga. 392, 567 S.E.2d 303 (2002), cert. denied, 538 U.S. 962, 123 S. Ct. 1749, 155 L. Ed. 2d 515 (2003).

Kidnapping with bodily injury is viable aggravating circumstance. — Crime, such as kidnapping with bodily injury, on which the death penalty cannot be imposed is nevertheless another capital felony for purposes of aggravating circumstances under this section. Cook v. State, 242 Ga. 657, 251 S.E.2d 230 (1978).

Although the death penalty may not be imposed for the offense of kidnapping with bodily injury unless the victim is killed, kidnapping with bodily injury is a capital felony that may be considered by the jury as a O.C.G.A. § 17-10-30(b)(2) statutory aggravating circumstance supporting a death sentence for the offense of murder. Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 292 (1992).

Even though the trial court directed a verdict of acquittal of kidnapping with

bodily injury because the kidnapping occurred in a different county, the jury was authorized to find the statutory aggravating circumstance that the murder was committed while the defendant was engaged in the commission of kidnapping with bodily injury; the offense of kidnapping with bodily injury was sufficiently part of the same criminal transaction to be considered as and found to be a O.C.G.A. § 17-10-30(b)(2) aggravating circumstance of the murder. Lee v. State, 270 Ga. 798, 514 S.E.2d 1, cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Trial court properly denied the defendant's motion to dismiss the two statutory aggravating circumstances under O.C.G.A. § 17-10-30(b)(2) that involved the defendant's commission of the murder while engaged in the commission of the kidnappings with bodily injury of two victims even though the defendant alleged that the kidnappings with bodily injury occurred after the murder, and that the "bodily injury" elements, the rapes, occurred several hours after the murder. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Trial court did not err in sentencing the defendant to death for murder because the evidence was sufficient to support the trial court's finding of the existence of a statutory aggravating circumstance based on kidnapping with bodily injury beyond a reasonable doubt under O.C.G.A. § 17-10-30(b)(2) since the stab wound to the victim's thigh and the victim's strangulation constituted bodily injuries sufficient to complete this statutory aggravating circumstance; the defendant pled guilty to the offense of kidnapping with bodily injury, and the evidence presented at the sentencing trial correlated with the definition of kidnapping. Loyd v. State, 288 Ga. 481, 705 S.E.2d 616, cert. dismissed, 565 U.S. 971, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Death resulting from kidnapping. — Evidence was sufficient for conviction for murder committed during kidnapping, O.C.G.A. § 17-10-30(b)(2), as the evidence showed that the defendant had stalked children, possessed a gun and child pornography, had taken two children and taped their mouths shut, and led police to a body, even though the second kidnapping victim in the same incident was not killed. Presnell v. State, 274 Ga. 246, 551 S.E.2d 723 (2001), cert. denied, 535 U.S. 1059, 122 S. Ct. 1921, 152 L. Ed. 2d 829 (2002).

Kidnapping alone is not a statutory aggravating circumstance. Crawford v. State, 256 Ga. 57, 344 S.E.2d 215, cert. denied, 479 U.S. 989, 107 S. Ct. 583, 93 L. Ed. 2d 585 (1986).

"Simple" kidnapping not a statutory aggravating circumstance. — Since kidnapping when no bodily injury occurs was not a capital crime at the time O.C.G.A. § 17-10-30 was enacted, such an offense cannot serve as a statutory aggravating circumstance. Crawford v. State, 254 Ga. 435, 330 S.E.2d 567 (1985), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

Evidence was sufficient to support finding that murder occurred while defendant was committing rape when the victim was found with her sweater open, her slip pulled up and her pantyhose and panties pulled down, evidence established that there could have been manipulation of the victim's sexual organs, bruises were present on her thigh and there was a tear in the vaginal wall and hemorrhaging around the urethra. Spraggins v. State, 255 Ga. 195, 336 S.E.2d 227 (1985), cert. denied, 476 U.S. 1120, 106 S. Ct. 1982, 90 L. Ed. 2d 664 (1986).

Evidence sufficient to establish aggravated battery. — When the state contended at trial that the offense of murder was committed while the offender was engaged in the commission of the offense of aggravated battery, the evidence showed that the victim was struck twice in the head with a heavy stick and then strangled to death with a ligature, one blow to the head left a severe bruise on the victim's left cheek and ear, and the other blow lacerated the victim's scalp and fractured the victim's skull, the evidence was sufficient to establish the commission of an aggravated battery, and to establish that the aggravated battery preceded the killing and was a separate and distinct act

Aggravating Circumstances (Cont'd)
3. Crime Committed While Engaged in Commission of Other Crimes (Cont'd)

from the act causing death. Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992); Wade v. State, 261 Ga. 105, 401 S.E.2d 701 (1991).

Evidence was sufficient to support a finding of aggravated battery as the defendant invited the victim to the defendant's apartment, attacked the victim without provocation, chased the victim through the apartment, and continued inflicting wounds until the victim died. Perkins v. State, 269 Ga. 791, 505 S.E.2d 16 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Testimony of a state psychiatrist who examined the defendant is not irrelevant to the statutory aggravating circumstance of murder committed while the offender was engaged in the commission of another capital felony because the psychiatrist testifies in rebuttal to a defense witness who has previously testified as to the defendant's mental condition. Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Evidence supported death penalty for defendant found guilty of being the actual perpetrator of the murder of two unarmed, elderly men during the armed robbery of a convenience store. Wilson v. State, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983).

Murder committed during armed robbery. — Evidence supported findings that murder was committed while the defendant was engaged in commission of armed robbery and burglary. Beck v. State, 255 Ga. 483, 340 S.E.2d 9, cert. denied, 479 U.S. 871, 107 S. Ct. 242, 93 L. Ed. 2d 167 (1986), 495 U.S. 940, 110 S. Ct. 2194, 109 L. Ed. 2d 521 (1990).

Petitioner, a death row inmate, in a federal habeas petition argued the death sentence was unconstitutionally imposed because there was insufficient evidence to establish that the murder occurred during the commission of an armed robbery under O.C.G.A. § 16-8-41 for purposes of O.C.G.A. § 17-10-30(b)(2), but this argument was rejected because while the victim's wallet was never found, the wallet was missing, the petitioner had not yet cashed the petitioner's paycheck but nevertheless was in possession of a large sum of cash the night the murder occurred, the petitioner was in possession of an ATM card later determined to belong to the victim, and the petitioner attempted to use the ATM card to withdraw money while wearing a straw hat and sunglasses. Jefferson v. Terry, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Sufficient aggravating circumstances. — Evidence was sufficient under O.C.G.A. § 17-10-35(c)(2) to find the statutory aggravating circumstances in order to impose the death sentence on the defendant after finding that the defendant committed, inter alia, malice murder and the jury found that the offense was committed by a person with a prior record of conviction for a capital felony and that the murder was committed while the defendant was engaged in the commission of another capital felony, pursuant to O.C.G.A. § 17-10-30(b)(1), (3), because the defendant stole a car, robbed a bank at gunpoint, shot a driver while trying to escape, and eventually surrendered. Nance v. State, 280 Ga. 125, 623 S.E.2d 470 (2005).

4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances

Paragraph (b)(7) constitutional. — Structure of the Georgia death penalty is constitutional including the statutory aggravating circumstance established by O.C.G.A. § 17-10-30(b)(7). Mathis v. Zant, 744 F. Supp. 272 (N.D. Ga. 1990), vacated in part on other grounds, 975 F.2d 1493 (11th Cir. 1992).

Defendant abandoned the defendant's claim raised solely in an enumeration of error that the phrases "outrageously or wantonly vile, horrible or inhuman" and "depravity of mind" in O.C.G.A. § 17-10-30(b)(7) were facially unconstitu-

tional because the defendant completely failed to support that claim with any argument or citation of authority in the defendant's brief; further, the claim was without merit as the United States Supreme Court and the Georgia Supreme Court rejected a facial challenge to the constitutionality of the statutory aggravating circumstance set forth in § 17-10-30(b)(7). Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Aggravating circumstance described in O.C.G.A. § 17-10-30(b)(7) is not per se unconstitutional. Morgan v. Zant, 582 F. Supp. 1026 (S.D. Ga.), aff'd in part, rev'd in part on other grounds, 743 F.2d 775 (11th Cir. 1984), overruled on other grounds, 784 F.2d 1479 (11th Cir.), cert. denied, 478 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986), 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

Paragraph (b)(7) of this section was not unconstitutionally vague. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977); Crowe v. State, 265 Ga. 582, 458 S.E.2d 799 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996).

Paragraph (b)(7) of O.C.G.A. § 17-10-30 was not inherently overbroad or vague and the court acted properly in reading this provision to the jury and instructing the jury that the jury "may consider that one aggravated factor if it is supported by the evidence." Cape v. Francis, 741 F.2d 1287 (11th Cir. 1984), cert. denied, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 245 (1985).

O.C.G.A. § 17-10-30(b)(7) circumstance was not unconstitutionally vague or overbroad as applied to a defendant who viciously attacked the defendant's spouse with a knife, cutting the spouse five times in the spouse's face, once on the spouse's hand, another six times in the spouse's chest and back, and slashing the spouse's throat at least seven times so deeply as to nearly decapitate the spouse. Taylor v. State, 261 Ga. 287, 404 S.E.2d 255, cert. denied, 502 U.S. 947, 112 S. Ct. 393, 116 L. Ed. 2d 343 (1991).

O.C.G.A. § 17-10-30(b)(7) has two parts. First, the murder must be "outrageously or wantonly vile, horrible or inhuman." Second, the offense of murder must involve either torture, depravity of mind, or an aggravated battery to the victim (or a combination of these three elements). Black v. State, 261 Ga. 791, 410 S.E.2d 740 (1991), cert. denied, 506 U.S. 839, 113 S. Ct. 118, 121 L. Ed. 2d 74 (1992).

Failure to find that murder was outrageously or wantonly vile, horrible, or inhuman. — Because the jury did not make a finding that the murder committed by the defendant was outrageously or wantonly vile, horrible, or inhuman, in compliance with the first component of the aggravating circumstance set forth in O.C.G.A. § 17-10-30(b)(7), the statutory aggravating circumstance imposed required vacating that factor; however, the defendant's death sentence was unaffected because the death sentence was supported by the jury's finding of three other statutory aggravating circumstances. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

Defining "outrageously or wantonly vile, horrible or inhuman." — Words "outrageous or wantonly vile, horrible or inhuman" are subject to common understanding and need no clarification. Conklin v. State, 254 Ga. 558, 331 S.E.2d 532, cert. denied, 474 U.S. 1038, 106 S. Ct. 606, 88 L. Ed. 2d 584 (1985).

All terms in O.C.G.A. § 17-10-30(b)(7) are words of ordinary significance which require no explication with the exception of "aggravated battery" which is a crime defined by statute. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Defining "aggravated battery." — Trial judge need not define any O.C.G.A. § 17-10-30(b)(7) term other than the phrase "aggravated battery." Morgan v. Zant, 582 F. Supp. 1026 (S.D. Ga.), aff'd in part, rev'd in part on other grounds, 743 F.2d 775 (11th Cir. 1984), overruled on other grounds, 784 F.2d 1479 (11th Cir.), cert. denied, 478 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986), 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

Defining "depravity of mind." — Absent a request, depravity of mind need not

Aggravating Circumstances (Cont'd)
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances (Cont'd)

be defined in the court's charge to the jury; however, if the court undertakes to do so the court should do so correctly. West v. State, 252 Ga. 156, 313 S.E.2d 67 (1984).

"Depravity of mind" is not catchall for cases when no other statutory aggravating circumstance is raised by the evidence. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977); Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978).

"Depravity of mind" will not be permitted to become a catchall. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

Beating of victim before or after death would support depravity of mind. — In defendant's capital murder trial, counsel was not ineffective for failing to call a forensic pathologist to counter the state's pathologist's testimony that the victim was alive from a gunshot wound when the victim was severely beaten, which supported two aggravating circumstances for the death penalty under O.C.G.A. § 17-10-30(b)(2), and (b)(7), because even if the victim was dead when beaten, that evidence would have supported a finding of depravity of mind. Terrell v. GDCP Warden, 744 F.3d 1255 (11th Cir. 2014).

Death penalty is restricted to those cases that lie at the core of statutory aggravating circumstances. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).

Upon sentence review, affirmance will be restricted to those cases which lie at the very core of this section. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

Test for presence of this aggravating circumstance. — Aggravating circumstance of paragraph (b)(7) of this section involved both the effect on the victim, viz., torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts were outrageously or wantonly vile, horrible, or inhuman. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).

It is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980).

Disjunctive phrases means only one element needs to exist. — In determining whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance, the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one subpart of the second component. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980); Ledford v. State, 264 Ga. 60, 439 S.E.2d 917 (1994), cert. denied, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 641 (1995).

Finding that a murder involved torture, depravity of mind, an aggravated battery, or some combination of those three involved only one aggravating circumstance. Carruthers v. State, 272 Ga. 306, 528 S.E.2d 217, cert. denied, 531 U.S. 934, 121 S. Ct. 321, 148 L. Ed. 2d 258 (2000), overruled on other grounds, Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Trial court erred by merely reading the language of O.C.G.A. § 17-10-30(b)(7) to the jury without explaining the meaning of "aggravated battery", when a reasonable juror, if properly instructed, could very well have concluded that there was no aggravated battery in the case. Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

Improper instructions were harmless error. — Improper instruction telling the jury that the jury could find the O.C.G.A. § 17-10-30(b)(7) circumstance merely on a finding of "deficiency in moral

sense and rectitude" rather than a finding of "utterly corrupt, perverted or immoral" did not require reversal, when the instructions on the other aggravating circumstances were proper, and the defendant did not show that the evidence was insufficient to find those circumstances. Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

Trial court's failure to instruct jury on element of armed robbery permitted the jury to exercise an impermissible "open-ended discretion", as a reasonable juror could have believed that although the defendant intended to take property from a store, the defendant did not intend to take property from the person of the murder victim. Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

Verdict lacking paragraph (b)(7) findings was insufficient. — Since a jury's O.C.G.A. § 17-10-30(b)(7) verdict cannot be sustained if the verdict completely omits an essential element of the statutory aggravating circumstance, a jury's verdict, failing to find that the murder was "outrageously or wantonly vile, horrible, or inhuman," was insufficient, even though the jury did find depravity of mind and torture. Jarrell v. State, 261 Ga. 880, 413 S.E.2d 710 (1992).

Specific finding as to facts not required. — There is no requirement that the jury make a specific finding as to how the facts support O.C.G.A. § 17-10-30(b)(7). Rather, it is only required that the form of the verdict set forth the applicable statutory language. Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

Execution-style murder of unarmed and already wounded innocent man provided an adequate factual basis for a jury's finding an aggravating circumstance under O.C.G.A. § 17-10-30(b)(7). Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

Execution-style murder of security guard, an off-duty police officer investigating a disturbance, was an outrageously or wantonly vile, horrible, and inhuman murder. Davis v. State, 263 Ga. 5, 426 S.E.2d 844, cert. denied, 510 U.S. 950, 114 S. Ct. 396, 126 L. Ed. 2d 344 (1993).

Lack of standards. — Imposition of the death penalty pursuant to this section does not constitute cruel and unusual punishment even though neither the court nor the jury is given standards to determine whether the offense for which the death penalty is being given is outrageously or wantonly vile, horrible, or inhuman in that the offense involved torture, depravity of mind, or an aggravated battery to the victim. Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978).

In determining whether the evidence shows depravity of mind, the age, and the physical characteristics of the victim may be considered. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980); Rivers v. State, 250 Ga. 303, 298 S.E.2d 1 (1982).

Depravity of mind may be shown by facts occurring only prior to death. — When only facts occurring prior to death are relied upon to support a finding of torture or aggravated battery, the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant. That is, a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

Depravity of mind may be shown by acts committed on body after death. — Defendant who mutilates or seriously disfigures the victim's body after death, or who commits a sex act upon the victim's body after death may be found to have a depraved mind, and such acts would be sufficient to show depravity of mind of the defendant within the meaning of this section. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

Provision satisfied even if relative timing of death and aggravating acts indeterminate. — If it cannot be determined whether the victim was subjected to an aggravated battery or torture before death, or to mutilation or disfigurement after death, because the exact time of death or the precise act causing death

Aggravating Circumstances (Cont'd)
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances (Cont'd)

cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery, serious physical abuse before death, or depravity of mind demonstrated after death. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

Even though the testimony was inconclusive as to whether the victim, who was shot, was alive when the victim's throat was cut, there was sufficient evidence to support a finding of aggravating circumstances under O.C.G.A. § 17-10-30(b)(2) and (b)(7). Drane v. State, 265 Ga. 255, 455 S.E.2d 27 (1995).

In order to constitute aggravated battery, bodily harm must occur before death. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980).

What constitutes torture. — Torture occurs when the victim is subjected to serious physical abuse before death. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980); Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 990, 66 L. Ed. 2d 829 (1981); Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981), cert. denied, 456 U.S. 938, 102 S. Ct. 1995, 72 L. Ed. 2d 457 (1982); Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982); Mathis v. State, 249 Ga. 454, 291 S.E.2d 489 (1982); Jones v. State, 249 Ga. 605, 293 S.E.2d 708 (1982).

Torture also occurs when the victim is subjected to an aggravated battery. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980); Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981), cert. denied, 455 U.S. 1038, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982).

Torture occurs when the victim is subjected to serious physical abuse before death as when the victim dies from a slow but steady loss of blood a full two hours after being shot in the neck and abandoned by the defendant. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied, 451 U.S. 921, 101 S. Ct. 2000, 68 L. Ed. 2d 312 (1981).

Because the victim, whose hands had been bound with wire, was raped and then shot at point blank range, the evidence supported the finding of depravity of mind on the part of the defendant and that the murder involved torture to the victim and was outrageously and wantonly vile. Johnson v. Zant, 249 Ga. 812, 295 S.E.2d 63 (1982), cert. denied, 459 U.S. 1228, 103 S. Ct. 1236, 75 L. Ed. 2d 469 (1983).

Defendant who tortures a victim before killing the victim can be found to have a depraved mind. Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied 449 U.S. 1103, 101 S. Ct. 900, 66 L. Ed. 2d 829 (1981); Jones v. State, 249 Ga. 605, 293 S.E.2d 708 (1982), cert. denied, 502 U.S. 832, 112 S. Ct. 107, 116 L. Ed. 2d 77 (1991).

Evidence for O.C.G.A. § 17-10-30(b)(7) depraved mind murder was sufficient as the defendant was shown to have stalked elementary school children; planned the defendant's crimes; abducted the eight-year-old victim as the victim was walking home from school; taped the victim's mouth shut; threatened to kill the victim; took the victim to a remote area; made the victim strip naked; forced the victim to watch as the defendant raped and forced other sex acts on the victim's friend; chased the victim as the victim tried to escape; and held the victim's head underwater where the victim struggled for several minutes before dying. Presnell v. State, 274 Ga. 246, 551 S.E.2d 723 (2001), cert. denied, 535 U.S. 1059, 122 S. Ct. 1921, 152 L. Ed. 2d 829 (2002).

Death penalty was properly imposed under O.C.G.A. § 17-10-30(b)(2), (7) after the defendant: (1) used the defendant's parent's relationship with a sick, elderly victim to gain access to the victim's house and belongings, steal the victim's checkbook, and forge the victim's checks; (2) plotted the victim's murder when the victim threatened to report the crime; (3) ambushed the victim in the victim's driveway, shot and wounded the victim, chased

the victim, knocked the victim down, and shot the victim three more times while standing over the victim; (4) dragged the victim into the bushes, beat, and robbed the victim; and (5) had been convicted of prior crimes involving a calculated, planned murder and an armed robbery, an aggravated battery to the victim before death, or depravity of mind. Terrell v. State, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Although the defendant could not be convicted of both malice murder and three counts of aggravated battery when the same actions by the defendant served as the basis for both the murder and the battery offenses, the jury was nevertheless authorized to find the statutory aggravating circumstances set forth in O.C.G.A. § 17-10-30(b)(2) and the aggravated battery portion of the (b)(7) circumstance because the victim's death was not instantaneous; likewise, the jury's finding of torture was supported by the evidence that the victim's death was not instantaneous but was preceded by serious sexual abuse, as well as the serious physical abuse that constituted the aggravated batteries. Furthermore, the shocking and vicious nature of the victim's murder by stomping and kicking authorized the jury to find that the murder was outrageously or wantonly vile, horrible, or inhuman; thus, the evidence was sufficient to support the jury's findings beyond a reasonable doubt of both the paragraph (b)(2) and (b)(7) statutory aggravating circumstances. Ledford v. State, 289 Ga. 70, 709 S.E.2d 239, cert. denied, 565 U.S. 1017, 132 S. Ct. 556, 181 L. Ed. 2d 401 (2011), overruled on other grounds by Willis v. State, 394 Ga. 686, 820 S.E.2d 640 (2018).

Physical abuse includes psychological abuse resulting in mental anguish to the victim in anticipation of physical harm. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied, 451 U.S. 921, 101 S. Ct. 2000, 68 L. Ed. 2d 312 (1981); Brown v. Francis, 254 Ga. 83, 326 S.E.2d 735, cert. denied, 474 U.S. 865, 106 S. Ct. 186, 88 L. Ed. 2d 155 (1985).

Evidence of psychological abuse by the defendant to the victim before death if it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse, that is, torture of the victim, and also will support a finding of depravity of mind of the defendant. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980); Rivers v. State, 250 Ga. 303, 298 S.E.2d 1 (1982).

Even when death instantaneous. — While the death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery, evidence of psychological abuse by the defendant to the victim prior to death, if it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to serious physical abuse, that is, torture of the victim, and will support a finding of depravity of mind of the defendant. Dampier v. State, 245 Ga. 882, 268 S.E.2d 349, cert. denied, 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161 (1980).

Infliction of mental distress on someone other than victim. — Evidence that the defendant, having shot and killed his estranged wife and her boyfriend, walked his five-year-old child through her mother's blood and left her screaming in a truck overlooking the murder scene while he drank beer at a neighbor's house, was sufficient to support the finding of depravity of mind. McMichen v. State, 265 Ga. 598, 458 S.E.2d 833 (1995).

Physical abuse includes sexual abuse for purposes of proving torture under this section. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied, 451 U.S. 921, 101 S. Ct. 2000, 68 L. Ed. 2d 312 (1981).

Serious sexual abuse may be found to constitute serious physical abuse. Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 611 (1980); Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 900, 66 L. Ed. 2d 829 (1981), 449 U.S. 1103, 101 S. Ct. 990, 66 L. Ed. 2d 829 (1981); Rivers v. State, 250 Ga. 303, 298 S.E.2d 1 (1982).

Depravity of mind. — When only facts occurring prior to death are relied upon, the fact that the victim was tortured will support a finding of depravity of

Aggravating Circumstances (Cont'd)
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances (Cont'd)

mind. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied, 451 U.S. 921, 101 S. Ct. 2000, 68 L. Ed. 2d 312 (1981).

Evidence amply supported the statutory aggravating circumstance of torture and depravity of mind as the victim, an elderly woman weighing less than 100 pounds, was raped so forcefully that she received potentially fatal injuries to her vaginal tract, was brutally beaten on the head so hard that she suffered a potentially fatal brain hemorrhage, and kicked in the chest hard enough to break her sternum and several ribs and to cause potentially fatal internal bleeding, and was then strangled to death. Allen v. State, 253 Ga. 390, 321 S.E.2d 710 (1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1774, 84 L. Ed. 2d 834 (1985).

Defendant convicted of two capital felonies can receive death penalty for both under this section. Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978).

After raping, robbing, and binding victim, defendant put a bullet through victim's head, the sentence of death imposed is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Execution-style murder of unarmed and wounded armed robbery victim was an outrageously or wantonly vile, horrible, and inhuman murder. Jones v. State, 249 Ga. 605, 293 S.E.2d 708 (1982), cert. denied, 502 U.S. 832, 112 S. Ct. 107, 116 L. Ed. 2d 77 (1991).

Finding of strangulation alone is not enough. — Finding of strangulation alone does not, as a matter of law, establish torture of the victim or depravity of mind on the part of the defendant so as to constitute an aggravating circumstance under O.C.G.A. § 17-10-30(b)(7). Baxter v. State, 254 Ga. 538, 331 S.E.2d 561, cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275 (1985), reh'g. denied, 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991).

Post-mortem mutilation of the victim's body may show depravity of mind sufficient to support a finding that the "offense of murder" was "outrageously or wantonly vile, horrible or inhuman." Conklin v. State, 254 Ga. 558, 331 S.E.2d 532, cert. denied, 474 U.S. 1038, 106 S. Ct. 606, 88 L. Ed. 2d 584 (1985).

Verdict of "torture, depravity of mind, or aggravated battery" was not insufficiently definitive as, under the circumstances, each of the three components of the finding described essentially the same conduct. Alderman v. State, 254 Ga. 206, 327 S.E.2d 168, cert. denied, 474 U.S. 911, 106 S. Ct. 282, 88 L. Ed. 2d 245 (1985), rehrg. denied, 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991).

Death sentence not unconstitutional if defendant murdered rape victim. — O.C.G.A. § 17-10-30(b)(7) was not applied to the defendant, who raped his victim before murdering her, in violation of his Eighth Amendment rights. Johnson v. Kemp, 759 F.2d 1503 (11th Cir. 1985).

Aggravating circumstance found beyond a reasonable doubt. — See Conklin v. State, 254 Ga. 558, 331 S.E.2d 532, cert. denied, 474 U.S. 1038, 106 S. Ct. 606, 88 L. Ed. 2d 584 (1985); Perkins v. State, 269 Ga. 791, 505 S.E.2d 16 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Evidence showed that the defendant severely beat the victim in the face with a heavy stick, and then killed the victim by crushing the victim's skull with a log after the victim had fallen to the ground, thus, the evidence supported the jury's finding that the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Evidence supported the jury's O.C.G.A. § 17-10-30(b)(7) finding. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Application of O.C.G.A. § 17-10-30(b)(7) aggravating circumstance held not unconstitutional in view of Georgia Supreme Court's analysis in review of death sentence. Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

There was sufficient evidence to support a finding of the statutory aggravating circumstances in O.C.G.A. § 17-10-30(b)(7), namely that the offense was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim. Alderman v. Zant, 22 F.3d 1541 (11th Cir.), cert. denied, 513 U.S. 1061, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994).

Defendant committed an aggravated battery against the victim by inflicting a non-fatal gunshot wound to the victim's arm and shoulder, leading the victim into a back bedroom as the victim's sister approached the house, holding the victim alive as the victim's sister asked where the victim was and then murdered the victim, fatally shooting the victim four more times, and finally obtaining another weapon from the codefendant's automobile and shooting the victim again; those facts authorized the jury's finding of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance regarding the victim's murder and the imposition of the death penalty under Georgia law and under the Constitution of the United States. Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001), cert. denied, 537 U.S. 840, 123 S. Ct. 163, 154 L. Ed. 2d 62 (2002).

Defendant's life without parole sentences for two murders were supported by the existence of the aggravating circumstance set out in O.C.G.A. § 17-10-30(b)(7) because: (1) the defendant murdered one victim for the specific purpose of causing emotional distress to the defendant's former wife; (2) the defendant shot a stranger, shot into the home of two other strangers, and murdered another stranger; and (3) the defendant left notes at all the scenes for the purpose of establishing the illusion of an unknown killer working in the area so that when the defendant achieved the ultimate goal of shooting the former wife, suspicion would be diverted from the defendant. Lewis v. State, 279 Ga. 464, 614 S.E.2d 779 (2005).

Evidence supported the jury's finding of an aggravated battery for purposes of the death penalty under O.C.G.A. § 17-10-30(b)(7) after finding petitioner inmate guilty of felony murder because the evidence showed that the petitioner severely beat the victim in the face with a heavy stick, and then finished the victim off by crushing the victim's skull with a log after the victim fell to the ground. Jefferson v. Terry, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Kidnapping of a murder victim's ten-year-old child along with the victim, the fact that the child witnessed the victim plead for the victim's life, and the fact that the child witnessed the murder, was sufficient to enable the jury to find beyond a reasonable doubt that the murder was outrageously or wantonly vile, horrible, or inhuman. Dalton v. State, 282 Ga. 300, 647 S.E.2d 580 (2007).

Evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of statutory aggravating circumstances because the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt; the murder was committed while the defendant was engaged in the commission of the capital felony of armed robbery, and the murder was outrageously or wantonly vile, horrible, or inhuman in that the murder involved depravity of mind: (1) the defendant initially attacked the victim, who was disabled, in the confined area of a bathroom, where the defendant struck the victim multiple times shortly after the victim emerged from the shower; (2) the defendant continued the attack on the victim even as the victim fell to the floor; (3) the evidence showed that the defendant struck the victim in the head with a hammer and a metal stool at least 12 to 14 times; and (4) the defendant acted for the purpose of obtaining money the victim had just received from cashing the victim's disability check. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Aggravating Circumstances (Cont'd)
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances (Cont'd)

Trial court did not err in sentencing the defendant to death for murder because the evidence supported the trial court's finding beyond a reasonable doubt that the murder was outrageously or wantonly vile, horrible, or inhuman in that the murder involved torture to the victim and the depravity of mind of the defendant; the defendant pled guilty to the offenses of cruelty to children, aggravated sodomy, and enticing a child for indecent purposes, and the state presented evidence that the defendant took the three-year-old victim from the defendant's home to an abandoned trailer late at night for the purpose of having sex with the defendant. Loyd v. State, 288 Ga. 481, 705 S.E.2d 616, cert. dismissed, 565 U.S. 971, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Death sentence proportional to other cases involving aggravating factor. — Death sentence imposed on the defendant was not the result of passion, prejudice, or any other arbitrary factor in violation of O.C.G.A. § 17-10-35(c)(1), nor was the death sentence excessive or disproportionate under § 17-10-35(c)(3); considering the evidence that the defendant choked and stabbed four female victims to death, that the defendant attempted to kill four other female victims, and that the murder in the instant case involved the O.C.G.A. § 17-10-30(b)(7) aggravating factor relating to the fact that the murder was vile and involved a kidnapping, the sentence was proportional to similar cases and was not the result of any arbitrary factor. Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Instruction proper. — Because the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance was not used as an unlawful "catchall" justification for the death penalty, the trial court properly gave an instruction regarding that statutory aggravating circumstance recommended by the supreme court. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

5. Murder of Peace Officer, Corrections Employee, or Fireman for Purpose of Avoiding, Arrest or Custody =cd.

Knowledge that victim was peace officer or other official. — O.C.G.A. § 17-10-30(b)(8) statutory aggravating circumstance does not require knowledge on the part of the defendant that the victim was a peace officer or other designated official engaged in the performance of official duties. Fair v. State, 284 Ga. 165, 664 S.E.2d 227 (2008).

Murders to prevent arrest and against peace officer in performing duties not necessarily identical. — Murder committed for the purpose of preventing a lawful arrest and murder committed against a peace officer while engaged in the performance of the officer's official duties were not necessarily identical, and therefore did not fall within the inclusion provisions of former Code 1933, §§ 26-505 and 26-506 (see O.C.G.A. §§ 16-1-6 and 16-1-7), as these sections did not apply to aggravating circumstances but to crimes. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); City of Atlanta v. First Nat'l Bank, 246 Ga. 424, 271 S.E.2d 821 (1980).

Death penalty warranted for murder of peace officer by person in custody. — Death penalty was warranted after the jury found the following statutory aggravating circumstances to exist beyond a reasonable doubt: (1) the offense of murder was committed against a peace officer while engaged in the performance of the officer's official duties; and (2) the offense of murder was committed by a person in the lawful custody of a peace officer. Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981), cert. denied, 455 U.S. 927, 102 S. Ct. 1291, 71 L. Ed. 2d 471 (1982).

Murder of off-duty police officer. — Death penalty was warranted under O.C.G.A. § 17-10-30 since the defendant

shot execution-style an off-duty police officer in the official performance of the officer's duties as a security guard. Davis v. State, 263 Ga. 5, 426 S.E.2d 844, cert. denied, 510 U.S. 950, 114 S. Ct. 396, 126 L. Ed. 2d 344 (1993).

Evidence sufficient. — Imposition of the death sentence and the jury's finding of the aggravators that the offense was committed against a police officer in the performance of the officer's official duties and that the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest were supported by evidence that the defendant shot and killed a police officer during an investigatory stop to prevent the officer from discovering that the defendant was a convicted felon in possession of a weapon, as well as by the defendant's admissions that the defendant shot the officer in the face and again in the back of the head when the defendant heard the officer moan. Henry v. State, 269 Ga. 851, 507 S.E.2d 419 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Defendant's death sentence was upheld since the committed crimes of malice murder and aggravated battery on a peace officer were committed while the defendant was engaged in the commission of an aggravated battery and the murder was committed against a peace officer while the officer was engaged in the performance of official duties. Lawler v. State, 276 Ga. 229, 576 S.E.2d 841, cert. denied, 540 U.S. 934, 124 S. Ct. 356, 157 L. Ed. 2d 243 (2003).

6. Causing or Directing Another to Commit Murder or Committing Murder as Agent or Employee

O.C.G.A. § 17-10-30(b)(6) is not unconstitutionally vague. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Agency relationship required. — If the defendant was not hired by another person, i.e., was not that person's agent, the death penalty cannot be upheld based on O.C.G.A. § 17-10-30(b)(6). Whittington v. State, 252 Ga. 168, 313 S.E.2d 73 (1984).

Terms "agent" and "employee," as used in O.C.G.A. § 17-10-30(b)(6), should be given their common, everyday meanings; an "employee" is one who is hired by another and an "agent" is one who acts for another. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Murder for hire. — Legislature intended that O.C.G.A. § 17-10-30(b)(6) be applicable to murders for hire and that the statute be applicable to both the hirer and the one hired. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Defendant who caused or directed a follower or lackey to commit murder was subject to the application of O.C.G.A. § 17-10-30(b)(6), even if the murder was not for hire. Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999).

7. Great Risk of Death to More than One Person

Defining terms for jury instruction. — Defining the terms "knowingly" and "great risk" in an instruction on the O.C.G.A. § 17-10-30(b)(3) circumstance was not required. Philpot v. State, 268 Ga. 168, 486 S.E.2d 158 (1997), cert. denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L. Ed. 2d 648 (1998).

Circumstance held inapplicable. — O.C.G.A. § 17-10-30(b)(3) aggravating circumstance was not meant to apply to a case where the defendant used a shotgun to shoot the victim, who was lying face down on the ground, in the head. Harrison v. State, 257 Ga. 528, 361 S.E.2d 149 (1987), cert. denied, 485 U.S. 982, 108 S. Ct. 1281, 99 L. Ed. 2d 492 (1988).

Sufficient evidence. — Evidence that the defendant fired several shots into a crowded night club was sufficient to show that the defendant knowingly created a great risk of death to more than one person in a public place. Philpot v. State, 268 Ga. 168, 486 S.E.2d 158 (1997), cert. denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L. Ed. 2d 648 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, §§ 856 et seq., 864 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2324 et seq.

ALR. — Constitutionality of statute which makes specified punishment or penalty mandatory and permits no exercise of discretion on part of court or jury, 83 A.L.R. 1362.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 A.L.R. 899.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case, 91 A.L.R.3d 382.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like — post-Gregg cases, 63 A.L.R.4th 478.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like — post-Gregg cases, 64 A.L.R.4th 755.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like — post-Gregg cases, 64 A.L.R.4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like — post-Gregg cases, 65 A.L.R.4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like — post-Gregg cases, 66 A.L.R.4th 417.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like — post-Gregg cases, 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like — post-Gregg cases, 67 A.L.R.4th 942.

Application of death penalty to nonhomicide cases, 62 A.L.R.5th 121.

Application of fair warning requirement of due process clause to state death penalty proceedings premised upon retroactive application of case law, 93 A.L.R.6th 391.

Validity, construction, and operation of Federal Death Penalty Act, 18 U.S.C.A. § 3591 et seq., 195 A.L.R. Fed. 1.

17-10-30.1. Imprisonment for life without parole; finding of statutory aggravating circumstance required; duties of judge and jury.

Repealed by Ga. L. 2009, p. 223, § 4/SB 13, effective April 29, 2009.

Editor's notes. — This Code section was based on Code 1981, § 17-10-30.1, enacted by Ga. L. 1993, p. 1654, § 4.

Ga. L. 2009, p. 223, § 8/SB 13, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an

accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand." This Act became effective April 29, 2009.

Ga. L. 2009, p. 223, § 9/SB 13, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10/SB 13, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3)/HB 142 codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a)/SB 13, not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b)/SB 13, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

17-10-31. Requirement of jury finding of aggravating circumstance and recommendation of death penalty prior to imposition; arguments of counsel during sentencing phase; jury instructions; actions of judge in event of failure to reach unanimous verdict.

(a) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the accused to death. Where a statutory aggravating circumstance is not found or where a statutory circumstance is found but a recommendation of death is not made, the jury shall decide whether to recommend a sentence of life imprisonment without parole or life imprisonment with the possibility of parole. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the accused to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

(b) During the sentencing phase before a jury, counsel for the state and the accused may present argument and the trial judge may instruct the jury:

(1) That "life without parole" means that the accused shall be incarcerated for the remainder of his or her natural life and shall not be eligible for parole unless such person is subsequently adjudicated to be not guilty of the offense for which he or she was sentenced; and

(2) That "life imprisonment" means that the accused will be incarcerated for the remainder of his or her natural life but will be eligible for parole during the term of such sentence.

(c) If the jury is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole.

History. — Code 1933, § 26-3102, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 809, § 1; Ga. L. 1973, p. 159, § 7; Ga. L. 2009, p. 223, § 5/SB 13.

Cross references. — Provisions regarding recommendations for imposition of death sentence, § 17-9-3.

Editor's notes. — Ga. L. 2009, p. 223, § 8/SB 13, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand." This Act became effective April 29, 2009.

Ga. L. 2009, p. 223, § 9/SB 13, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10/SB 13, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a)/SB 13, not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendments by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b)/SB 13, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Law reviews. — For article, "Jury Sentencing in Georgia — Time for a Change?," see 5 Ga. St. B.J. 421 (1969). For survey of 1986 Eleventh Circuit cases on constitutional criminal procedure, see 38 Mercer L. Rev. 1141 (1987). For article, "Death Penalty," see 66 Mercer L. Rev. 51 (2014).

For note raising chilling effect on defendant's constitutional rights posed by this section prior to its 1973 amendment, in light of United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), see 20 Mercer L. Rev. 309 (1969).

For note, "Evaluating the Constitutionality of Proposals to Allow Non-Unanimous Juries to Impose the Death Penalty in Georgia," see 29 Ga. St. U.L. Rev. 1003 (2010). For note, "A Promise Unfulfilled: Challenges to Georgia's Death Penalty Statute Post Furman," see 33 Ga. St. U.L. Rev. 839 (2017).

JUDICIAL DECISIONS

Constitutionality generally. — Complex statistical study that indicated a risk that racial considerations enter into capital sentencing determinations did not prove that a particular defendant's capital sentence was unconstitutional under the Eighth Amendment or the equal protection clause of the Fourteenth Amendment. McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Section applies to sentencing hearing only. — Both former Code 1933, §§ 26-3102 and 27-2-503 (see O.C.G.A. §§ 17-10-2 and 17-10-31) applied only to the sentencing phase of a capital case after conviction. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Indictment need not recite statutory aggravating circumstances. — Death penalty was not unfairly assessed against the defendant because no aggravating circumstances charged to or considered by the jury were alleged in the indictment as there is no requirement that statutory aggravating circumstances be alleged in an indictment against the accused. Dix v. Newsome, 584 F. Supp. 1052 (N.D. Ga. 1984).

Discretion to consider mitigating circumstances. — Sentencing authority can assign what the sentencing authority deems the appropriate weight to particular mitigating circumstances. Moreover, with unbridled consideration of mitigating circumstances, the sentencing authority may consider something to be mitigating that others might consider aggravating. Moore v. Balkcom, 716 F.2d 1511 (11th Cir.), supplemented by 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 733 (1984).

No need to balance aggravating, mitigating circumstances. — Georgia's post-Furman capital punishment statute does not provide for the balancing of aggravating and mitigating circumstances. Once a single aggravating circumstance is shown, all aggravating and mitigating circumstances are relevant and considered by the jury, but those circumstances are not weighed against each other. Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995).

Life sentence when aggravating circumstances exist. — Whether sentencing be by judge or jury, life imprisonment may be imposed even though statutory aggravating circumstances are found to exist. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Jury need not find any mitigating circumstance in order to make recommendation of mercy that is binding on the trial court. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Jury must find statutory aggravating circumstance before recommending sentence of death. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

In jury cases, trial judge is bound by jury's recommended sentence. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Under Georgia law, the jury's sentencing recommendation is binding on the trial court which actually sentences the defendant. Burden v. Zant, 975 F.2d 771 (11th Cir. 1992), rev'd on other grounds, 510 U.S. 132, 114 S. Ct. 654, 126 L. Ed. 2d 611 (1994).

Although a habeas corpus petitioner contended that the prosecution misled the jury into believing that the jury's role with regard to the death penalty was merely advisory, no due process violation was shown. The prosecution accurately characterized the jury's death penalty finding as a recommendation in accordance with O.C.G.A. § 17-10-2(c), and the jury was properly advised that the recommendation was binding on the sentencing court in accordance with O.C.G.A. § 17-10-31.

Carr v. Schofield, 364 F.3d 1246 (11th Cir. 2004).

Life sentence absent jury recommendation of death. — If a sentence of death was not recommended by the jury, O.C.G.A. § 17-10-31 required the court to sentence the defendant to life imprisonment. Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983).

Judge must impose lesser punishment when jury cannot agree. — Jury that convicted must also impose the sentence. Because only two sentences can be imposed, life imprisonment or death, if the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976); Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983).

Although the jury did return a finding of a statutory aggravating circumstance, but the jury deadlocked on the question of whether the defendant should be given the death penalty, under Georgia's statutory death-penalty provisions, pretermitting any constitutional question of double jeopardy, the trial judge must impose the lesser sentence of life imprisonment. Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983).

Instruction as to requirements of section not impermissible expression of opinion. — There is no impermissible expression of opinion if the trial court instructs the jury that the defendant cannot be sentenced to death unless the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt and recommends that the death penalty be imposed. Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2017, 60 L. Ed. 2d 388 (1979).

Evidence of parole eligibility. — Trial court did not err by refusing to allow the defendant to present evidence and arguments about the likely date of parole eligibility if the defendant was sentenced to life with the possibility of parole for the murders because such evidence and argument was generally not permitted prior to the addition of life without parole as a sentencing option. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Retrial as to sentencing where sentence reversed for error. — A new trial on the sentence can be held before a new jury if the jury that convicted the accused also sentenced the accused to death and the sentence was reversed on appeal because of some error that infected the sentence. In such a situation, there can be a remand for a new trial as to the sentence only. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976); Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983).

Death sentence prohibited on retrial if first jury sentenced defendant to life imprisonment. — If the convicting jury sentences the defendant to life imprisonment, this constitutes an acquittal of the charge that the evidence supports a finding of a statutory aggravating circumstance, and in any retrial the double-jeopardy clause prohibits the defendant's being given the death sentence. Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983).

Life sentence not required if first jury did not reach penalty phase. — Trial court was not required to impose life imprisonment under O.C.G.A. § 17-10-31 since the first jury did not reach the penalty phase and thus was not called on to decide the defendant's sentence under the death penalty statute. Terrell v. State, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Trial court did not err in giving an Allen charge to a jury considering the death penalty, overruling Legare v. State, 250 Ga. 875 (1983), because the statement that a unanimous verdict was required was technically correct, although it would be better practice to omit that phrase when giving an Allen charge in the penalty phase of a capital case. Humphreys v. State, 287 Ga. 63, 694 S.E.2d 316, cert. denied, 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010), overruled in part by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Refusal to allow defense comment on death sentence not error. — It is difficult to imagine how a court might commit reversible error by refusing to allow defense counsel to comment on a

death sentence that, once the jury has rendered the jury's verdict, is mandatory. Putman v. State, 251 Ga. 605, 308 S.E.2d 145 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984).

Death sentence upheld when each aggravating factor supported by other circumstances. — Defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor because two statutory aggravating circumstances were found; namely, the murder was committed while engaged in the capital felony of kidnapping with bodily injury and while engaged in the offense of burglary, and an insufficiency of the evidence to support one or more statutory aggravating circumstances found by the jury did not require reversal if supported by at least one. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Cited in Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); House v. Stynchcombe, 239 Ga. 222, 236 S.E.2d 353 (1977); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977); Mendenhall v. Hopper, 453 F. Supp. 977 (S.D. Ga. 1978); Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984); Green v. Zant, 738 F.2d 1529 (11th Cir. 1984); Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985); Rogers v. State, 256 Ga. 139, 344 S.E.2d 644 (1986); Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012).

RESEARCH REFERENCES

ALR. — Racial discrimination in punishment for crime, 40 A.L.R.3d 227.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 A.L.R.4th 1028.

Validity, construction, and application of pattern and nonpattern jury instructions in state death penalty proceedings, 83 A.L.R.6th 255.

Validity, construction, and application of aggravating and mitigating provisions of death penalty statutes — Supreme Court cases, 21 A.L.R. Fed. 2d 1.

17-10-31.1. Requirement of jury finding of aggravating circumstance and recommendation of sentence of death or life without parole; duties of judge; jury instruction on meaning of "life without parole" and "life imprisonment."

Repealed by Ga. L. 2009, p. 223, § 6/SB 13, effective April 29, 2009.

Editor's notes. — This Code section was based on Code 1981, § 17-10-31.1, enacted by Ga. L. 1993, p. 1654, § 5.

Ga. L. 2009, p. 223, § 8/SB 13, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand." This Act became effective April 29, 2009.

Ga. L. 2009, p. 223, § 9/SB 13, not

codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10/SB 13, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3) codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a)/SB 13, not codified by the General Assembly, provides, in part, that the law as set forth in Section 4 of this Act as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009.

Ga. L. 2009, p. 223, § 11(b)/SB 13, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

RESEARCH REFERENCES

ALR. — Validity, construction, and application of pattern and nonpattern jury instructions in state death penalty proceedings, 83 A.L.R.6th 255.

17-10-32. Sentencing of person indicted for capital offense to life imprisonment or other punishment upon plea of guilty.

Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, sentence the person to life imprisonment or to any other punishment authorized by law for the offense named in the indictment; provided, however, that the judge must find one of the statutory aggravating circumstances provided in Code Section 17-10-30 before imposing the death penalty, except in cases of treason or aircraft hijacking.

History. — Ga. L. 1956, p. 737, § 1; Ga. L. 1973, p. 159, § 8.

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006).

JUDICIAL DECISIONS

Duty to inform as to who will impose sentence prior to entry of guilty plea. — Trial court has discretion, after accepting a guilty plea in a death penalty case, to impose sentence or to have a jury do so; however, the defendant should be informed of the trial court's decision regarding who will impose sentence before the defendant enters a guilty plea. Browner v. State, 357 Ga. 321, 357 S.E.2d 559 (1987).

Second sentence of former Code 1933, § 27-704 (see O.C.G.A. § 17-7-70) relates to guilty pleas upon accusations as well as after indictment. Garmon v. Johnson, 243 Ga. 855, 257 S.E.2d 276 (1979).

Judge not required to impose life sentence or less upon plea of guilty. — This section cannot be construed to mean that, upon entry of plea of guilty, the trial judge must sentence the defendant to life

imprisonment or a lesser punishment. The trial judge is merely authorized, in the exercise of judicial discretion, but is not required by the provision of that section to impose such sentence. Massey v. State, 220 Ga. 883, 142 S.E.2d 832 (1965), cert. denied, 385 U.S. 36, 87 S. Ct. 241, 17 L. Ed. 2d 36 (1966).

Assertion on habeas corpus of refusal to accept guilty plea. — Defendant sentenced to death in jury trial may not assert on habeas corpus that the trial judge refused to accept the defendant's guilty plea and required the defendant to plead not guilty and stand trial by jury as the defendant's denial of a motion for new trial had been affirmed by the Supreme Court. Golden v. Balkcom, 214 Ga. 15, 102 S.E.2d 578 (1958).

Cited in Golden v. State, 213 Ga. 481, 99 S.E.2d 882 (1957); Smith v. State, 214 Ga. 314, 104 S.E.2d 444 (1958); McCrary v. State, 215 Ga. 887, 114 S.E.2d 133 (1960); Johnson v. Caldwell, 228 Ga. 776, 187 S.E.2d 844 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981); Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 622 et seq., 718 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2183 et seq.

ALR. — Effect of abolition of capital punishment on procedural rules governing crimes punishable by death — post-Furman decisions, 71 A.L.R.3d 453.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

17-10-32.1. Sentencing of person subject to death penalty or life without parole upon plea of guilty; duties of judge.

Repealed by Ga. L. 2009, p. 223, § 7/SB 13, effective April 29, 2009.

Editor's notes. — This Code section was based on Code 1981, § 17-10-32.1, enacted by Ga. L. 1993, p. 1654, § 6.

Ga. L. 2009, p. 223, § 8/SB 13, not codified by the General Assembly, provides that: "Except as provided in this section, the provisions of this Act shall apply only to those offenses committed after the effective date of this Act. With express written consent of the state, an accused whose offense was committed prior to the effective date of this Act may elect in writing to be sentenced under the provisions of this Act, provided that: (1) jeopardy for the offense charged has not attached or (2) the accused has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking prosecution after the remand." This Act became effective April 29, 2009.

Ga. L. 2009, p. 223, § 9/SB 13, not codified by the General Assembly, provides that: "Except as provided in Section 8 of this Act, the amendment or repeal of a Code section by this Act shall not affect any sentence imposed by any court of this state prior to the effective date of this Act."

Ga. L. 2009, p. 223, § 10/SB 13, not codified by the General Assembly, provides that: "A person may be sentenced to life without parole without the prosecutor seeking the death penalty under the laws of this state." Ga. L. 2011, p. 752, § 17(3)/HB 142 codified these provisions at Code Section 17-10-16.1.

Ga. L. 2009, p. 223, § 11(a)/SB 13, not codified by the General Assembly, provides that the law as set forth in this Code section as it existed prior to April 29, 2009, shall apply to all offenses committed on and before April 29, 2009, and the amendment by this Act shall apply to all crimes committed on and after April 29, 2009.

Ga. L. 2009, p. 223, § 11(b)/SB 13, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the

Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

17-10-33. Imposition of sentence of death upon judgment of death; to whom copies of sentence sent; conveying defendant to state correctional institution; expenses of transporting defendant.

Upon a judgment of death made by a judge, it shall be the duty of the judge to sentence the defendant to death and to indicate the sentence in writing, which writing shall be filed with the papers in the case against the defendant. A certified copy of the sentence shall be sent by the clerk of the court in which the sentence is pronounced to the defendant's attorney of record, to the Attorney General, and to the superintendent of the state correctional institution where the execution is to take place, not less than ten days prior to the time fixed in the sentence of the court for the execution of the defendant. In all cases it shall be the duty of the sheriff of the county in which the defendant is sentenced, together with one deputy or more if in the sheriff's judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge or, if the trial judge is not available, by the judge of the probate court of the county in which the defendant is sentenced, to convey the defendant to the appropriate state correctional institution, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of the defendant, unless otherwise directed by the Governor or unless a stay of execution has been caused by an appeal, granting of a new trial, or other order of a court of competent jurisdiction. The expense for transporting the defendant to the state correctional institution for the purpose of execution of the death sentence shall be paid by the county governing authority of the county in which the defendant was convicted, out of any funds on hand in the treasury of the county.

History. — Ga. L. 1924, p. 195, § 3; Code 1933, § 27-2514; Ga. L. 1973, p. 159, § 9; Ga. L. 1983, p. 665, § 1; Ga. L. 2000, p. 947, § 2.

Editor's notes. — Ga. L. 2000, p. 947, § 1, not codified by the General Assembly, provides that: "It is the intention of the General Assembly to provide for execution by lethal injection for persons sentenced to death after conviction of capital crimes committed on or after May 1, 2000. It is the further intention of the General Assembly that persons sentenced to death for crimes committed prior to the effective date of this Act be executed by lethal injection if the Supreme Court of the United States declares that electrocution violates the Constitution of the United States or if the Supreme Court of Georgia declares that electrocution violates the Constitution of the United States or the Constitution of Georgia."

JUDICIAL DECISIONS

This section did not violate U.S. Const., amends. 8 or 14. Mason v. State, 236 Ga. 46, 222 S.E.2d 339, cert. denied, 428 U.S. 910, 96 S. Ct. 3225, 49 L. Ed. 2d 1219 (1976).

Variance between title and subject matter of legislation. — Ga. L. 1924, p. 195 did not contain matter not expressed in its caption, in violation of Ga. Const. 1877, Art. III, Sec. VII, Para. VIII (see Ga. Const. 1983, Art. III, Sec. V, Para. III). Howell v. State, 164 Ga. 204, 138 S.E. 206, appeal dismissed, 275 U.S. 576, 48 S. Ct. 114, 72 L. Ed. 435 (1927).

Manner in which capital sentences executed is for legislative enactment. — There being no provision in the Constitution conferring upon sheriffs of counties the power to execute sentences of the courts in capital cases, the manner of execution of such sentences is for legislative enactment. Dunaway v. Gore, 164 Ga. 219, 138 S.E. 213 (1927).

In jury cases, trial judge is bound by jury's recommended sentence. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Cited in Meyers v. Whittle, 171 Ga. 509, 156 S.E. 120 (1930); Williams v. State, 187 Ga. 415, 1 S.E.2d 27 (1939).

OPINIONS OF THE ATTORNEY GENERAL

Custody when execution stayed but no new date set. — Department of Corrections (now Department of Offender Rehabilitation) has authority to accept a prisoner for whom no new execution date has been set. Op. Att'y Gen. No. 71-188.

O.C.G.A. §§ 42-5-50(a) and 42-5-51(b), inapplicable in death cases. — Supervening events described by former Code 1933, § 27-2514 (see O.C.G.A. § 17-10-33) did not include the filing of a motion for new trial, so that such nonfinality of conviction which, by the terms of Ga. L. 1968, p. 1399, § 1 (see O.C.G.A. § 42-5-50(a)) precluded state penitentiary acceptance of custody of prisoners sentenced to serve time does not in the case of prisoners sentenced to be executed, preclude acceptance of custody. That is to say, the procedure of retention of convicted prisoners in the county jails until their convictions have become final, as provided in Ga. L. 1968, p. 1399, § 1, does not apply to persons sentenced to death, because they are not "sentenced to serve time," as stated in Ga. L. 1968, p. 1399, § 1 (see O.C.G.A. § 42-5-51(b)), and therefore do not have "a sentence," in the words of Ga. L. 1968, p. 1399, § 1, and because former Code 1933, § 27-2514 (see O.C.G.A. § 17-10-33) specifically requires the sheriff to convey them to the penitentiary unless the Governor directs otherwise, a stay has been caused by appeal, a new trial has been granted, or a court orders otherwise. 1971 Op. Att'y Gen. No. 71-188.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq. 21A Am. Jur. 2d, Criminal Law, § 855 et seq. 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 61.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2324 et seq.

ALR. — Liability under policy of life insurance where insured is executed for crime, 36 A.L.R. 1255.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 A.L.R.4th 1028.

17-10-34. Sentence to specify time period for and place of execution; appointing time period for execution of pregnant female.

When a person is sentenced to the punishment of death, the court shall specify the time period for the execution in the sentence. The time period for the execution fixed by the court shall be seven days in duration and shall commence at noon on a specified date and shall end at noon on a specified date. The time period shall commence not less than 20 days nor more than 60 days from the date of sentencing. However, if the person is a female who is pregnant at the time of sentencing, the court shall appoint a time period for execution after the female is no longer pregnant.

History. — Laws 1833, Cobb's 1851 Digest, p. 840; Code 1863, § 4555; Code 1868, § 4575; Code 1873, § 4669; Code 1882, § 4669; Penal Code 1895, § 1044; Penal Code 1910, § 1070; Code 1933, § 27-2519; Ga. L. 1985, p. 1463, § 1.

JUDICIAL DECISIONS

Fixing new date for unexecuted sentence. — When the day fixed by the trial court for the execution of a capital sentence has passed, and the sentence for any reason whatever has not been executed, it is the duty of the judge of the superior court in which the sentence of death was imposed, either in term or in vacation by an order as prescribed by law, to name and fix a new date for the execution of the capital sentence. Gore v. Humphries, 163 Ga. 106, 135 S.E. 481 (1926).

Cited in Meyers v. Whittle, 171 Ga. 509, 156 S.E. 120 (1930).

OPINIONS OF THE ATTORNEY GENERAL

Authority of court. — Courts may only exercise those powers which are expressly delegated to the courts in setting time or place for execution. 1980 Op. Att'y Gen. No. 80-86.

Fixing new date for execution when original date passed. — If the date for the execution of a convict in a capital case has passed for any reason, the judge has the power to set a new date for the execution of the original sentence, but the Department of Offender Rehabilitation (now Department of Corrections) is not bound by further, more specific time limitations which such court might impose and the department may exercise broad discretion in establishing the specific hour of execution on the date specified. 1980 Op. Att'y Gen. No. 80-86.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2420 et seq.

ALR. — Effect of permitting day fixed for execution to pass without carrying out sentence, 34 A.L.R. 314.

17-10-35. Review of death sentences by Supreme Court; forwarding of record and transcript; scope of review; written briefs and oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.

(a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court.

(b) The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision and the extracts prepared as provided for in subsection (a) of

Code Section 17-10-37 shall be provided to the resentencing judge for his consideration.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

History. — Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4.

Cross references. — Service of notice of appeal, enumeration of errors, briefs, and motions where capital crime involved, Rules of the Supreme Court of the State of Georgia, Rule 44. Unified appeal, review proceedings, Uniform Superior Court Rules, Rule 34.5.

Law reviews. — For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985). For article, "Death Penalty Law," see 53 Mercer L. Rev. 233 (2001). For survey article on death penalty decisions from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 175 (2003). For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005). For annual survey of death penalty law, see 58 Mercer L. Rev. 111 (2006). For annual survey on death penalty, see 65 Mercer L. Rev. 93 (2013).

For note, "Reviewing the Georgia Supreme Court's Efforts at Proportionality Review," see 39 Ga. L. Rev. 631 (2005). For note, "A Promise Unfulfilled: Challenges to Georgia's Death Penalty Statute Post Furman," see 33 Ga. St. U.L. Rev. 839 (2017).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment criticizing inadequate standards and nebulous measurements for review under Georgia death penalty statute, in light of Colby v. State, 231 Ga. 829, 204 S.E.2d 612 (1974), see 26 Mercer L. Rev. 331 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Factors Reviewed by Court
1. Passion, Prejudice, or Other Arbitrary Factor
2. Aggravating Circumstances
3. Excessive or Disproportionate Sentences

General Consideration

Constitutionality. — This section was not unconstitutional. Young v. State, 237 Ga. 852, 230 S.E.2d 287 (1976), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

This section is not subject to constitutional attack under U.S. Const., amends. 8 and 14. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

As to constitutionality, see House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3221, 49 L. Ed. 2d 1217 (1976); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977); Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S. Ct. 508, 50 L. Ed. 2d 599 (1976); McMichen v. State, 265 Ga. 598, 458 S.E.2d 833 (1995).

Structure of the Georgia death penalty statute is constitutional. Zant v. Stephens,

462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Habeas corpus petitioner failed to assert in the original petition, the amended petition, or the post-hearing brief a constitutional or statutory challenge to the Supreme Court of Georgia's method of proportionality review as provided in O.C.G.A. § 17-10-35(c); therefore, the petitioner's challenge was waived. Hall v. Lee, 286 Ga. 79, 684 S.E.2d 868 (2009).

Need for review by Supreme Court. — Although the defendant wrote to the trial court asking that the defendant's appeal "be stopped," the Supreme Court must review a death penalty case under O.C.G.A. § 17-10-35. Patillo v. State, 258 Ga. 255, 368 S.E.2d 493, cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988).

New approach in considering sufficiency sua sponte in non-death penalty cases. — Georgia Supreme Court's new approach of not automatically considering sufficiency sua sponte in non-death penalty cases was held to begin with cases docketed to the term of court that begins in December 2020, and the Court's new approach did not preclude the Court from exercising the Court's discretion to consider sufficiency sua sponte when specific circumstances warrant such review. Davenport v. State, No. S20A0035, 2020 Ga. LEXIS 479 (July 2, 2020).

Section deals with sentence review regardless of form of plea. — This section did not relate to the alternatives available to a defendant when a defendant is called upon to enter a plea but instead concerns the standard to be used by the Supreme Court in reviewing the death sentence, regardless of whether the sentence was imposed after a guilty or not guilty plea. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1217 (1976).

Review of improper argument contentions. — Supreme Court's statutory duty to ensure that the sentence of death has not been imposed due to passion, prejudice, or other arbitrary factor, a duty applicable only in the review of cases in which the death sentence has been imposed, is the basis for the court's decision to expressly limit to death penalty cases the exception to the appellate practice of declining to review improper argument contentions which were not brought to the attention of the trial court. Metts v. State, 270 Ga. 481, 511 S.E.2d 508 (1999).

Under the review required by O.C.G.A. § 17-10-35(c)(1) in death penalty cases, even if improper arguments have not been timely objected to at trial, reversal is required if there was a reasonable probability that the improper arguments changed the jury's exercise of discretion in choosing between life imprisonment or death. Ford v. Tate, 307 Ga. 383, 835 S.E.2d 198 (2019).

Court may examine other convictions of defendant. — Nothing in this section foreclosed the Supreme Court during the course of its independent review from examining nonappealed cases and cases in which the defendant pled guilty to a lesser offense. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1217 (1976).

Questionnaire to be completed by trial judge. — Questionnaire supplied by Supreme Court to superior court judges under this section, which called for subjective evaluation of the defendant's mental and physical state, and of the evidence was required to be completed by the trial court judge, not by the defense attorney. Greene v. State, 240 Ga. 804, 242 S.E.2d 587 (1978).

Counsel's duty to client not relieved by review under section. — Duty of the Supreme Court to review the record to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor in no way relieves counsel of diligence on behalf of a client. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), modified on other grounds, 243 Ga. 244, 253 S.E.2d 707 (1979).

Duty of state to provide indigents access to appellate process. — Duty of the state is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse the defendant's conviction, but

General Consideration (Cont'd)

only to assure the indigent defendant an adequate opportunity to present the defendant's claims fairly in the context of the state's appellate process. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1217 (1976).

For rationale behind reporting of voir dire in capital cases, see State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980).

Failure to transcribe closing arguments not error. — Trial court's failure to transcribe the closing arguments at a sentencing hearing does not prevent reviewing courts from examining the imposition of a death sentence with full disclosure of the basis for the sentence when the record containing the transcript of the imposition of sentence does not refer to any undisclosed aspect of the proceeding on which the judge relied in imposing sentence. Moore v. Balkcom, 716 F.2d 1511 (11th Cir.), supplemented by 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 733 (1984).

Review of state court's proportionality review by federal habeas court. — Federal habeas court should not undertake a review of the state Supreme Court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in similar cases. Its review remains confined to whether the state sentencing procedure both on its face and as applied violates the Eighth and Fourteenth Amendments. Moore v. Balkcom, 716 F.2d 1511 (11th Cir.), supplemented by 722 F.2d 629 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 733 (1984).

Five aggravators supported death sentence for malice murder. — Death sentence based on O.C.G.A. § 17-10-30(b)(2), (b)(4), (b)(7), and O.C.G.A. § 17-10-35(c)(1), (c)(3) aggravators for malice murder was supported by sufficient evidence, was not the result of ineffective counsel or an improperly selected jury, and was not disproportionate to other depraved, wantonly vile, and tortuous murders. Defendant's counsel's withholding of alleged mitigating evidence (by presenting the evidence to the trial court under seal) so that the state could not use that evidence against the defendant in the event of a new trial could not be used to assess whether counsel was ineffective for withholding the evidence. Franks v. State, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Evidence was sufficient to support death penalty. — See Jones v. State, 249 Ga. 605, 293 S.E.2d 708 (1982); Perkins v. State, 269 Ga. 791, 505 S.E.2d 16 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999); Johnson v. State, 271 Ga. 375, 519 S.E.2d 221 (1999), cert. denied, 528 U.S. 1172, 120 S. Ct. 1199, 145 L. Ed. 2d 1102 (2000); Gulley v. State, 271 Ga. 337, 519 S.E.2d 655 (1999), cert. denied, 528 U.S. 1172, 120 S. Ct. 1199, 145 L. Ed. 2d 1102 (2000); Drane v. State, 271 Ga. 849, 523 S.E.2d 301 (1999), cert. denied, 531 U.S. 853, 121 S. Ct. 131, 148 L. Ed. 2d 84 (2000); Pace v. State, 271 Ga. 829, 524 S.E.2d 490 (1999), cert. denied, 531 U.S. 890, 121 S. Ct. 101, 148 L. Ed. 2d 60 (2000); Holsey v. State, 271 Ga. 856, 524 S.E.2d 473 (1999), cert. denied, 530 U.S. 1246, 120 S. Ct. 2695, 147 L. Ed. 2d 966 (2000); Nance v. State, 272 Ga. 217, 526 S.E.2d 560, cert. denied, 531 U.S. 950, 121 S. Ct. 353, 148 L. Ed. 2d 284 (2000); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002); Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000), cert denied, 533 U.S. 935, 121 S. Ct. 2564, 150 L. Ed. 2d 728 (2001).

Trial court did not err in sentencing the defendant to death for murder because death was not excessive or disproportionate punishment within the meaning of Georgia law and was not unconstitutional; the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the evidence presented at the defendant's sentencing trial was clearly sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of each of the statutory aggravating circumstances found in the defendant's case, the defen-

dant's crimes could be called "premeditated" because the defendant already knew what the defendant was going to do when the defendant took the victim away from home. Loyd v. State, 288 Ga. 481, 705 S.E.2d 616, cert. dismissed, 565 U.S. 971, 132 S. Ct. 474, 181 L. Ed. 2d 309 (U.S. 2011).

Death sentence was supported by the jury's finding beyond a reasonable doubt that the murders were committed during a burglary and were outrageously or wantonly vile, horrible, or inhuman in that they involved torture, depravity of mind, and an aggravated battery against the victims. Rice v. State, 292 Ga. 191, 733 S.E.2d 755 (2012), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor because two statutory aggravating circumstances were found; namely, the murder was committed while engaged in the capital felony of kidnapping with bodily injury and while engaged in the offense of burglary, and an insufficiency of the evidence to support one or more statutory aggravating circumstances found by the jury did not require reversal if supported by at least one. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Presumption of correctness denied state court comment. — State trial court's comment appearing in a standard post-conviction report that the defendant's nephew, represented by the same counsel as the defendant, testified against the defendant under a grant of immunity was not entitled to a presumption of correctness because this material fact was not adequately developed before the trial court. Burden v. Zant, 975 F.2d 771 (11th Cir. 1992), rev'd on other grounds, 510 U.S. 132, 114 S. Ct. 654, 126 L. Ed. 2d 611 (1994).

Waiver of appeal. — Criminal defendant may waive the defendant's statutory right to appeal a conviction in return for the state's waiver of the right to seek the death penalty. Thomas v. State, 260 Ga. 262, 392 S.E.2d 520 (1990).

Absence of a notice of appeal was not fatal to the defendant's appeal in a case involving imposition of the death penalty. Lance v. State, 275 Ga. 11, 560 S.E.2d 663, cert. denied, 537 U.S. 1050, 123 S. Ct. 620, 154 L. Ed. 2d 525 (2002), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Verdict should have been returned in conjunctive but sentence appropriate. — Because the jury's recommendation of death for the defendant's murder conviction was sufficiently based on other valid statutory aggravating factors, the fact that the jury returned a disjunctive finding of torture, depravity of mind, or an aggravated battery to the victim, whereas this finding should have been returned in the conjunctive to ensure unanimity concerning the necessary elements of the circumstances under O.C.G.A. § 17-10-30(b)(7), no reversal was required. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007).

Cited in Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975); Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975); Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975); Tamplin v. State, 235 Ga. 774, 221 S.E.2d 455 (1975); Mason v. State, 236 Ga. 46, 222 S.E.2d 339 (1976); Goodwin v. State, 236 Ga. 339, 223 S.E.2d 703 (1976); Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976); Pulliam v. State, 236 Ga. 460, 224 S.E.2d 8 (1976); Birt v. State, 236 Ga. 815, 225 S.E.2d 248 (1976); Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976); Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976); Dungee v. State, 237 Ga. 218, 227 S.E.2d 746 (1976); Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976); Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977); Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977); Young v. State, 239 Ga. 53, 236

General Consideration (Cont'd)

S.E.2d 1 (1977); Meeks v. State, 142 Ga. App. 452, 236 S.E.2d 119 (1977); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Gaddis v. State, 239 Ga. 238, 236 S.E.2d 594 (1977); Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977); Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Campbell v. State, 240 Ga. 352, 240 S.E.2d 828 (1977); Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977); Gibson v. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977); Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978); Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978); Dungee v. Hopper, 241 Ga. 236, 244 S.E.2d 849 (1978); Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978); Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978); Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978); Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978); Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979); Ruffin v. State, 242 Ga. 95, 252 S.E.2d 472 (1979); Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979); Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979); Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979); Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979); Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979); Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979); Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979); Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979); Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979); Tucker v. State, 344 Ga. 721, 261 S.E.2d 635 (1979); Tucker v. State, 245 Ga. 68, 263 S.E.2d 109 (1980); Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980); Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980); Patrick v. State, 245 Ga. 417, 265 S.E.2d 553 (1980); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980); Stevens v. State, 245 Ga. 583, 266 S.E.2d 194 (1980); Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980); Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980); Hance v. State, 245 Ga. 856, 268 S.E.2d 339; Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980); Lewis v. State, 246 Ga. 101, 268 S.E.2d 915 (1980); State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980); Alderman v. Austin, 498 F. Supp. 1134 (S.D. Ga. 1980); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981); Dean v. State, 247 Ga. 724, 279 S.E.2d 217 (1981); Waters v. State, 248 Ga. 355, 283 S.E.2d 238 (1981); Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981); Krier v. State, 249 Ga. 80, 287 S.E.2d 531 (1982); Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982); Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982); Mathis v. State, 249 Ga. 454, 291 S.E.2d 489 (1982); Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685 (1982); Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982); Hill v. State, 250 Ga. 277, 295 S.E.2d 518 (1982); Sprouse v. State, 250 Ga. 174, 296 S.E.2d 584 (1982); Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983); Wilson v. State, 250 Ga. 630, 300 S.E.2d 640 (1983); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983); Cape v. Francis, 558 F. Supp. 1207 (M.D. Ga. 1983); Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984); Allen v. State, 253 Ga. 390, 321 S.E.2d 710 (1984); Devier v. State, 253 Ga. 604, 323 S.E.2d 150 (1984); Ross v. State, 254 Ga. 22, 326 S.E.2d 194 (1985); Alderman v. State, 254 Ga. 206, 327 S.E.2d 168 (1985); Walker v. State, 254 Ga. 149, 327 S.E.2d 475 (1985); Blanks v. State, 254 Ga. 420, 330 S.E.2d 575 (1985); Conklin v. State, 254 Ga. 558, 331 S.E.2d 532 (1985); Baxter v. State, 254 Ga. 538, 331 S.E.2d 561; Cook v. State, 255 Ga. 565, 340 S.E.2d 843 (1986);

Davis v. State, 255 Ga. 588, 340 S.E.2d 862 (1986); Davis v. State, 255 Ga. 598, 340 S.E.2d 869 (1986); Rogers v. State, 256 Ga. 139, 344 S.E.2d 644 (1986); Romine v. State, 256 Ga. 521, 350 S.E.2d 446 (1986); Fugitt v. State, 256 Ga. 292, 348 S.E.2d 451 (1986); Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986); Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); Harrison v. State, 257 Ga. 528, 361 S.E.2d 149 (1987); Crawford v. State, 257 Ga. 681, 362 S.E.2d 201 (1987); Blankenship v. State, 258 Ga. 43, 365 S.E.2d 265 (1988); Lee v. State, 258 Ga. 82, 365 S.E.2d 99 (1988); Newland v. State, 258 Ga. 172, 366 S.E.2d 689 (1988); Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988); Morrison v. State, 258 Ga. 683, 373 S.E.2d 506 (1988); Lee v. State, 258 Ga. 762, 374 S.E.2d 199 (1988); Jarrells v. State, 258 Ga. 833, 375 S.E.2d 842 (1989); Potts v. State, 259 Ga. 96, 376 S.E.2d 851 (1989); Miller v. State, 259 Ga. 296, 380 S.E.2d 690 (1989); Hall v. State, 259 Ga. 412, 383 S.E.2d 128 (1989); Gary v. State, 260 Ga. 38, 389 S.E.2d 218 (1990); Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990); Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991); Stripling v. State, 261 Ga. 1, 401 S.E.2d 500 (1991); Wade v. State, 261 Ga. 105, 401 S.E.2d 701 (1991); Ferrell v. State, 261 Ga. 115, 401 S.E.2d 741 (1991); Christenson v. State, 261 Ga. 80, 402 S.E.2d 41 (1991); Burden v. Zant, 498 U.S. 433, 111 S. Ct. 862, 112 L. Ed. 2d 962 (1991); Taylor v. State, 261 Ga. 287, 404 S.E.2d 255; Gibson v. State, 261 Ga. 313, 404 S.E.2d 781 (1991); Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991); Todd v. State, 261 Ga. 766, 410 S.E.2d 725 (1991); Hall v. State, 261 Ga. 778, 415 S.E.2d 158 (1991); Meders v. State, 261 Ga. 806, 411 S.E.2d 491 (1992); Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78 (1992); Hill v. State, 263 Ga. 37, 427 S.E.2d 770 (1993); Osborne v. State, 263 Ga. 214, 430 S.E.2d 576 (1993); Burgess v. State, 264 Ga. 777, 450 S.E.2d 680 (1994); Wellons v. State, 266 Ga. 77, 463 S.E.2d 868 (1995); Waldrip v. State, 267 Ga. 739, 482 S.E.2d 299 (1997); Bishop v. State, 268 Ga. 286, 486 S.E.2d 887 (1997); Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997); Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (1998); Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998); Palmer v. State, 271 Ga. 234, 517 S.E.2d 502 (1999); Morrow v. State, 272 Ga. 691, 532 S.E.2d 78 (2000); Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000); Colwell v. State, 273 Ga. 634, 544 S.E.2d 120 (2001); Butts v. State, 273 Ga. 760, 546 S.E.2d 472 (2001); Fults v. State, 274 Ga. 82, 548 S.E.2d 315 (2001); McPherson v. State, 274 Ga. 444, 553 S.E.2d 569 (2001); Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); Sharp v. State, 286 Ga. 799, 692 S.E.2d 325 (2010); Barrett v. State, 292 Ga. 160, 733 S.E.2d 304 (2012).

Factors Reviewed by Court

1. Passion, Prejudice, or Other Arbitrary Factor

Evidence of plea bargain not admissible. — Testimony of a former district attorney in rebuttal to the defendant's evidence presented in mitigation at the sentencing phase of the defendant's trial, i.e., that the defendant offered to plead guilty to all charges in exchange for the state's agreement not to seek the death penalty, was not inflammatory or highly prejudicial requiring reversal of the sentence; however, in the future, offers by the defendants to plead guilty and testimony of prosecutors regarding such offers are no longer admissible. Mobley v. State, 265 Ga. 292, 455 S.E.2d 61 (1995).

Argument of state for death penalty if plausible reasons offered. — Arguments of the prosecutor during the sentencing phase of a murder trial does not influence the jury to impose the death sentence through passion and prejudice, as those terms were used in this section, if the prosecutor argues for the death penalty and offers plausible reasons for the prosecutor's position. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Effect of improper argument if evidence overwhelming. — If the evidence in a murder and rape trial shows that the defendant raped a 13-year-old girl in a

Factors Reviewed by Court (Cont'd)
1. Passion, Prejudice, or Other Arbitrary Factor (Cont'd)

vacant house and then murdered her by inflicting multiple stab wounds to her face, chest, and abdomen, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, even though the prosecuting attorney, in closing argument, paraphrased to the jury sentiments on imposition of the death penalty and attributed these sentiments to a noted justice as the evidence against the defendant is so overwhelming. Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979).

Reading by state of dicta from other cases. — Prosecutor may read dicta from other cases when used not for the purpose of persuading the jury to impose the death penalty, but when addressing the court, though it is preferable that such arguments are conducted outside of the jury's presence. Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Implication by state that Georgia Supreme Court would uphold death penalty. — Practice of influencing a jury to impose the death penalty by implying that justices of the Georgia Supreme Court would approve such a sentence is error, though sometimes harmless, under the due process clause of U.S. Const., amend. 14. Zant v. Campbell, 245 Ga. 368, 265 S.E.2d 22, cert. denied, 449 U.S. 891, 101 S. Ct. 252, 66 L. Ed. 2d 118 (1980).

Remark by prosecution that sentence reviewable and may be set aside. — It is reversible error for the prosecutor to mention to the jury in the prosecutor's arguments during the death penalty phase that any sentence of death will be reviewed by the trial judge and the Supreme Court, and that the sentence can be set aside. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977).

Prosecutor comments that jury can pass on sentencing responsibility. — Jury is given the heavy burden of making the decision of whether the defendant will live or die. Comments about appellate safeguards on the death penalty suggest to the jury that the jury can pass the responsibility for the death sentence on to the Supreme Court. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

Possibility of jury imposing more severe punishment. — If one of the jury's functions is to impose punishment for crime, a reference by the prosecutor to the defendant's right to appeal is more likely to be considered reversible error if a death penalty is subsequently imposed, for the reason that in the weighing of imponderables it cannot be concluded that the jury was not influenced by such statements to impose more severe punishment than their unbiased judgment would have given. Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975).

Jury exposed to remarks about appellate review. — If the jury is exposed to comments about appellate review of the death penalty, the trial court should explain to the jury that it is the responsibility of each juror to decide whether the defendant will be executed, and that the jury cannot pass that responsibility on to anyone else. The jury should be told to decide on the penalty as if there was no possibility of any review of the sentence. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

Court must consider unfavorable publicity even if defendant did not raise it. — Even if a defendant did not make any motion for a continuance or change of venue at the trial because of unfavorable publicity, this matter still must be considered pursuant to the court's duty in a death case to consider the punishment as well as any errors enumerated by way of appeal. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), modified on other grounds, 243 Ga. 244, 253 S.E.2d 707 (1979).

Video tape of confession. — Since the part of the video taped confession in which the defendant was seen handcuffed was only a brief part of the tape, and the tape was only a brief part of the trial, and the jury had the opportunity to observe the defendant at trial, the video tape record-

ing did not create passion, prejudice, or other arbitrary factor such as would influence the jury to impose the penalty of death. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Handcuffing of defendant in view of jury. — If a suspect was being transported away from the jail where the suspect was being held, it was natural for the police to have the suspect handcuffed for security reasons and the jury would not have been shocked to see it, and it was not error to deny a motion for mistrial. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Issue of mental retardation. — Procedure requiring the defendant to prove the defendant's mental retardation by a preponderance of the evidence in a jury trial was not unconstitutional merely because it was accomplished by appellate judges rather than a jury. Morrison v. State, 276 Ga. 829, 583 S.E.2d 873 (2003), cert. denied, 541 U.S. 940, 124 S. Ct. 1662, 158 L. Ed. 2d 363 (2004), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Showing jury "no-billed" and inapplicable counts. — When the state's exhibit included a copy of a prior six-count indictment, the first five counts charging four defendants, including the present defendant, with three counts of armed robbery, one count of receiving stolen property, a .45 pistol, and one count of possession of LSD, and the last count charging one of the present defendant's codefendants with being a repeat offender, and the exhibit showed on its face that the grand jury no-billed the possession of LSD count (Count 5), Counts 5 and 6 should have been deleted, but absent a proper objection, there was no reversible error. Showing the jury one count plainly marked "no-billed" and another count not even charging the present defendant with a crime did not result in a death sentence imposed as the result of passion, prejudice, or other arbitrary factor. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Charge that jury not to base verdict on sympathy for defendant. — It was reversible error for the trial court to charge the jury that the jury was not to base the jury's verdict on sympathy for the defendant. Legare v. State, 250 Ga. 875, 302 S.E.2d 351 (1983), overruled in part, Humphreys v. State, No. 2010 Ga. LEXIS 227, 2010 Ga. LEXIS 227 (Ga. 2010).

Prosecutorial argument not improper. — Prosecutor's closing argument at the sentencing phase that if the jury returned a verdict recommending death, the jury would not be responsible for the defendant's execution did not introduce "passion, prejudice or any other arbitrary factor," nor did the argument tend to diminish the jury's sense of responsibility or deny the defendant fundamental fairness. Hance v. State, 254 Ga. 575, 332 S.E.2d 287, cert. denied, 474 U.S. 1038, 106 S. Ct. 606, 88 L. Ed. 2d 584 (1985).

When the prosecutor in closing argument in the guilt/innocence phase referred to a Bible verse that "the wicked flee when no man pursueth," asked the jurors not to decide to "let the Lord handle it," and stated that the jury might be "the Lord's fisherman to handle" the defendant's accountability, these arguments did not result in the imposition of the death penalty through the influence of passion, prejudice, or any other arbitrary factor; the arguments simply urged the jury to accept the jury's legal duty to pass judgment rather than abdicating that role. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

No reasonable probability prosecutor's remarks affected jury's discretion in determining sentence. — Prosecutor's remark that the defendant's conviction "would say enough to this dual killer," in conjunction with the state's demonstrative aid indicating that the defendant was a "mass killer," did not constitute an improper future dangerousness argument at the guilt/innocence phase of the trial because the remark was not an argument that the defendant posed a threat of future dangerousness if not

Factors Reviewed by Court (Cont'd)
1. Passion, Prejudice, or Other Arbitrary Factor (Cont'd)

found guilty but was a reasonable inference from the evidence; even assuming that the prosecutor's comment was improper, there is no reasonable probability that it affected the jury's exercise of discretion in determining the defendant's death sentence. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Testimony that the defendant spoke of leaving no witnesses, following a prior armed robbery, if the defendant ever committed another such robbery, added nothing inflammatory to a record that included testimony from a codefendant that, on the night of the armed robbery in question, the defendant stated that the defendant did not intend to leave any witnesses. Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

Victim impact evidence not improper. — Testimony of the spouse of a murder victim, who sobbed while testifying, was not improper because the passion shown was not the product of any arbitrary factor but was the direct result of the defendant's own actions. Jones v. State, 267 Ga. 592, 481 S.E.2d 821, cert. denied, 522 U.S. 953, 118 S. Ct. 376, 139 L. Ed. 2d 293 (1997).

Crying by jurors during sentencing does not indicate that the death penalty was imposed under the influence of passion or prejudice. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Closing arguments. — Review by the Supreme Court under O.C.G.A. § 17-10-35 includes review of closing arguments. Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987), overruled on other grounds, Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007).

Death penalty need not be reversed simply because some portion of the closing argument might have been subject to some objection never made. Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987), overruled on other grounds, Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007).

References to religion. — Defendant's right to due process as secured by O.C.G.A. § 17-10-35, the Georgia Constitution, and the Constitution of the United States was abridged when the trial court allowed the inappropriate arguments from the Bible over objection. Carruthers v. State, 272 Ga. 306, 528 S.E.2d 217, cert. denied, 531 U.S. 934, 121 S. Ct. 321, 148 L. Ed. 2d 258 (2000), overruled on other grounds, Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor under O.C.G.A. § 17-10-35(c)(1) and was not excessive or disproportionate to the penalty imposed in other similar cases, considering both the crimes and the defendant under § 17-10-35(c)(3) since the defendant: (1) planned the crimes and was armed with a gun and handcuffs; (2) broke into the defendant's in-laws' house after severing their phone line; (3) shot and killed the defendant's father-in-law and wounded the defendant's mother-in-law while they lay in bed; (4) handcuffed the defendant's bleeding mother-in-law to her nine-year-old son and left them tethered to a bed rail in a room with her dead husband and the defendant's two-year-old son; and (5) abducted the defendant's estranged wife and her 17-year-old sister to a mobile home where the defendant made them take showers while the defendant watched, and then raped them both. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Death sentence upheld. — Defendant's death sentence for malice murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor and the evidence was clearly sufficient to authorize the jury to find the statutory aggravating circumstances beyond a reasonable doubt. Walker v. State,

281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Death sentence for the killing of a police officer in the performance of the officer's duties was not disproportionate since the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the evidence was sufficient to authorize the jury to find beyond a reasonable doubt three statutory aggravating circumstances that supported the death sentence for the murder. Brannan v. State, 275 Ga. 70, 561 S.E.2d 414, cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002).

2. Aggravating Circumstances

Failure of one aggravating circumstance does not invalidate others. — If two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance, or more, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 446 U.S. 988, 100 S. Ct. 2975, 64 L. Ed. 2d 847 (1980).

The O.C.G.A. § 17-10-30(b)(10) statutory aggravating circumstance found as to each of two murder victims was not supported by the evidence based on the state's argument that killing a witness to a crime was a means of avoiding, interfering with, or preventing lawful arrest, and that once a defendant obtained the victims' ATM cards and PINs, the defendant murdered the victims because the defendant knew that the defendant would be apprehended if the victims were left alive. However, the invalidation of this statutory aggravating circumstance did not affect the death sentences imposed. Humphreys v. State, 287 Ga. 63, 694 S.E.2d 316, cert. denied, 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010), overruled in part by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Improper to use crimes as evidence in aggravation of each other. — If armed robberies are held to be aggravating circumstances authorizing death penalties as to murders, the murders cannot then be used in aggravation of the armed robberies. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Although under the test provided for comparison by subsection (c)(3) of this section, two sentences of death for murder and rape are not excessive or disproportionate to the penalties imposed in similar cases, the actual imposition of the two death sentences on the basis of mutually aggravating circumstances cannot be upheld. If the rape offense serves as the aggravating circumstance authorizing the death penalties as to the murder, the murder cannot then be used in aggravation of the rape. Gibson v. State, 236 Ga. 874, 226 S.E.2d 63, cert. denied, 429 U.S. 986, 97 S. Ct. 507, 50 L. Ed. 2d 598 (1976).

Death can be imposed if sentences each supported by other circumstances. — Imposition of two death sentences on the basis of mutually aggravating circumstances cannot be upheld. However, if the death sentences are legally and factually supported by additional aggravating circumstances, no violation is present. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610 (1986), 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Death penalty for kidnapping. — Death penalty for kidnapping with bodily injury is not unconstitutional if the victim is killed. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610 (1986), 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Death sentence held not disproportionate or excessive. — Considering both defendant and the clearly egregious facts of the torture and double murder case, the defendant's death sentences were not excessive or disproportionate punishment as compared to the penalty imposed in similar cases. Sealey v. State, 277 Ga. 617, 593 S.E.2d 335 (2004), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Failure to adequately charge on mitigating circumstances. — If the court errs in failing to adequately charge on mitigating circumstances and in failing to make clear to the jury that the jury

Factors Reviewed by Court (Cont'd)
2. Aggravating Circumstances (Cont'd)

could recommend a life sentence even though the jury found a statutory aggravating circumstance, the sentences of death for murder must be set aside, and a new trial allowed on the issue of punishment. Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

Consideration of defendant's prior record. — Defendant's prior record is a factor properly taken into consideration by juries. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Statutory aggravating circumstances found by jury supported by evidence beyond a reasonable doubt. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Because the defendant admitted that, while the children were sleeping and to scare a girlfriend, the defendant used a cigarette lighter to set fire to the bedding on the corner of the defendant's son's bed, causing a fire in a trailer that killed the son and two daughters, the evidence was sufficient to enable a rational trier of fact to find that the defendant was, beyond a reasonable doubt, guilty of three counts of malice murder, three counts of felony murder, and two counts of arson in the first degree; thus, the evidence was sufficient to authorize the jury to find beyond a reasonable doubt the existence of statutory aggravating circumstances that support death sentences for the malice murders under O.C.G.A. § 17-10-35(c)(2). Riley v. State, 278 Ga. 677, 604 S.E.2d 488 (2004).

Because the evidence showed that the defendant was the gunman and apparent leader in the carjacking, kidnapping, and execution-style murder of one victim and the attempted execution-style murder of a second victim, the evidence was sufficient to enable the jury to find proof beyond a reasonable doubt of the defendant's guilt of malice murder, felony murder, aggravated battery, aggravated assault, false imprisonment, theft by taking, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon and to authorize the jury to find three statutory aggravating circumstances beyond a reasonable doubt. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005).

Evidence was sufficient under O.C.G.A. § 17-10-35(c)(2) to find the statutory aggravating circumstances in order to impose the death sentence on the defendant after finding that the defendant committed, inter alia, malice murder, and the jury found that the offense was committed by a person with a prior record of conviction for a capital felony and that the murder was committed while the defendant was engaged in the commission of another capital felony, pursuant to O.C.G.A. § 17-10-30(b)(1), (3), because the defendant stole a car, robbed a bank at gunpoint, shot a driver while trying to escape, and eventually surrendered. Nance v. State, 280 Ga. 125, 623 S.E.2d 470 (2005).

Evidence, including testimony by a co-defendant and eyewitness testimony by the victim's spouse, was sufficient to support a finding of the aggravating circumstances that the murder was committed while the defendant was engaged in an armed robbery, that the murder was committed for the purpose of receiving money or a thing of monetary value, and that the murder was outrageously or wantonly vile, horrible, or inhuman in that the murder involved depravity of mind. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of statutory aggravating circumstances because the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt; the murder was committed while the defendant was engaged in the commission of the capital felony of armed robbery, and the murder was outrageously or wantonly vile, horrible, or inhuman in that the murder involved depravity of mind: (1) the

defendant initially attacked the victim, who was disabled, in the confined area of a bathroom, where the defendant struck the victim multiple times shortly after the victim emerged from the shower; (2) the defendant continued the attack on the victim even as the victim fell to the floor; (3) the evidence showed that the defendant struck the victim in the head with a hammer and a metal stool at least 12 to 14 times; and (4) the defendant acted for the purpose of obtaining money the victim had just received from cashing the victim's disability check. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Death penalty warranted for murder of peace officer by person in custody. — Death penalty was warranted after the jury found the following statutory aggravating circumstances to exist beyond a reasonable doubt: (1) the offense of murder was committed against a peace officer while engaged in the performance of the officer's official duties; and (2) the offense of murder was committed by a person in the lawful custody of a peace officer. Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981), cert. denied, 455 U.S. 927, 102 S. Ct. 1291, 71 L. Ed. 2d 471 (1982).

Evidence supported Supreme Court's conclusions concerning aggravating circumstance. See Morgan v. Zant, 582 F. Supp. 1026 (S.D. Ga.), aff'd in part, rev'd in part on other grounds, 743 F.2d 775 (11th Cir. 1984), overruled on other grounds, Peek v. Kemp, 784 F.2d 1479 (11th Cir.), cert. denied, 478 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986), 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

Evidence supported findings of aggravated circumstances. — See Patillo v. State, 258 Ga. 255, 368 S.E.2d 493, cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988); Holiday v. State, 258 Ga. 393, 369 S.E.2d 241 (1988); Pruitt v. State, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990); Lynd v. State, 262 Ga. 58, 414 S.E.2d 5 (1992); Terrell v. State, 271 Ga. 783, 523 S.E.2d 294 (1999), recons. denied, overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Evidence was sufficient to enable the jury to find the existence of the following statutory aggravating circumstances beyond a reasonable doubt under O.C.G.A. § 17-10-35(c)(2): (1) the offense of murder was committed while the defendant was engaged in the commission of a burglary; and (2) the offense of murder was committed while the defendant was engaged in the commission of the kidnappings with bodily injury of the murder victim's two daughters. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Defendant was properly sentenced to death for murder and arson in the first degree because the evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of the statutory aggravating circumstances found in the case; the death sentences were not disproportionate punishment within the meaning of Georgia law. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

3. Excessive or Disproportionate Sentences

Whether sentence is excessive or disproportionate not a jury question. — Decision whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases is not one to be made as such by the jury. Blake v. State, 239 Ga. 292, 236 S.E.2d 637, cert. denied, 434 U.S. 960, 98 S. Ct. 492, 54 L. Ed. 2d 320 (1977).

Whether sentence is one of cruel and unusual punishment is for court to decide. Blake v. State, 239 Ga. 292, 236 S.E.2d 637, cert. denied, 434 U.S. 960, 98 S. Ct. 492, 54 L. Ed. 2d 320 (1977).

Due process does not require jury determination of the excessive or disproportionate penalty question. Blake v. State, 239 Ga. 292, 236 S.E.2d 637, cert. denied, 434 U.S. 960, 98 S. Ct. 492, 54 L. Ed. 2d 320 (1977).

If past juries have imposed life sentence, death sentence should be set aside. — If prior cases indicate that the

Factors Reviewed by Court (Cont'd)
3. Excessive or Disproportionate Sentences (Cont'd)

past practice among juries faced with similar factual situations to that being reviewed and like aggravating circumstances has been to impose only the sentence of life imprisonment for an offense, rather than death, the Supreme Court has no alternative, under the language of this section, except to set aside the sentence of death. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

Sentence "substantially out of line." — Under O.C.G.A. § 17-10-35(c)(3), the appellate court will set aside a sentence of death that is "substantially out of line" with sentences imposed for similar crimes, focusing on how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed; because the jury in the defendant's first trial never considered what sentence should be imposed, the jury's actions in the first trial were not considered in determining whether the defendant's current death sentence was disproportionate to sentences for other similar crimes involving a similar defendant. Terrell v. State, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Court need not consider decisions if life sentences imposed. — Proportionality review conducted by the Georgia Supreme Court was not constitutionally defective because it allegedly did not consider those appellate decisions in which life sentences were imposed. Cape v. Francis, 741 F.2d 1287 (11th Cir. 1984), cert. denied, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 245 (1985).

When reaction is substantially out of line with reactions of prior sentences, then the Supreme Court must set aside the death penalty as excessive. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1217 (1976).

Different sentences for codefendants. — As to propriety of death sentence if not imposed upon all participants in same transaction, see Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978).

There is no simplistic rule that a codefendant may not be sentenced to death when another defendant receives a lesser sentence. McClesky v. State, 245 Ga. 108, 263 S.E.2d 146 (1980), cert. denied, 449 U.S. 891, 101 S. Ct. 253, 66 L. Ed. 2d 119 (1980).

In view of the extent of the defendant's participation in a homicide, and the defendant's culpability, the defendant's death sentence was not disproportionate to the life sentence that a codefendant received only because the state didn't have as strong a case against the codefendant as the state did against the defendant. Beck v. State, 255 Ga. 483, 340 S.E.2d 9, cert. denied, 479 U.S. 871, 107 S. Ct. 242, 93 L. Ed. 2d 167 (1986), 495 U.S. 940, 110 S. Ct. 2194, 109 L. Ed. 2d 521 (1990).

Given the defendant's degree of participation in the crimes and the defendant's apparent lack of remorse, a death sentence was not disproportionate to the life sentence of the codefendant. Carr v. State, 267 Ga. 547, 480 S.E.2d 583, cert. denied, 522 U.S. 921, 118 S. Ct. 313, 139 L. Ed. 2d 242 (1997).

Defendant's death sentence was not impermissibly disproportionate to the sentence of a coindictee as the coindictee obeyed the defendant out of fear of what the defendant would do to the coindictee and did not participate in finding out where the victim lived, in forcing the victim into the car, in removing the victim from the car, or in shooting the victim, nor was the coindictee present when the victim was shot; the defendant was the prime mover in the planning and execution of the victim's murder and then sought to conceal the defendant's part in the crime, and the fact that an accomplice had not been tried and might not be sentenced to death did not make the defendant's death sentence disproportionate. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Life sentence changed to death sentence upon retrial. — If the same defendant was tried previously on the same charges and the jury imposed a life sentence, the death sentence in the case under review was obviously disproportionate to the life sentence previously imposed

against the same defendant in the same case. Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977).

In a capital case, if a defendant is sentenced to life on the first trial and later retried, a death sentence cannot be imposed at the conclusion of the second trial. Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Death penalty for armed robbery is excessive or disproportionate. — Under the test provided by paragraph (c)(3) of this section, a death sentence imposed for armed robbery must be considered to be excessive or disproportionate to the penalties imposed in similar cases. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976).

If the Supreme Court has previously reviewed a death sentence on direct appeal in order to determine whether the sentence was excessive or disproportionate to the sentences imposed in similar cases, it will decline to take it up again in a habeas corpus appeal. Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Role of federal courts. — It is not the role of the federal courts to dictate to the state courts the method of conducting a proportionality review in a death penalty case so long as the state supreme court's review and result do not rise to the level of unconstitutional action. Collins v. Francis, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Failure to challenge sentencing report. — Since proportionality reviews are not required by the constitution in death penalty cases, it is difficult to see actual and substantial prejudice caused by counsel's failure to review and correct mistakes in the trial judge's post-trial sentencing report, even if such failure would constitute ineffective assistance of counsel. McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

Death sentences upheld. — Sentences of death imposed for the murder of three people unknown to the defendant, including two children, one of whom was sexually assaulted, were neither excessive nor disproportionate. Rivers v. State, 250 Ga. 303, 298 S.E.2d 1 (1982).

Sentence of death imposed in a murder for hire case was not excessive or disproportionate to sentences imposed in similar cases, considering both the crime and the defendant, since, although the defendants who were hired to commit murder have been given life sentences, other cases show that juries find the death penalty to be appropriate punishment in contract murder cases. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Sentence of death for a murder committed during an armed robbery was not excessive or disproportionate to sentences imposed in similar cases when the defendant stated before the robbery began that the defendant intended to leave no witnesses and the defendant thereafter shot unresisting, unarmed victims and, in addition, the defendant had been convicted previously of armed robbery. Mincey v. State, 251 Ga. 255, 304 S.E.2d 882, cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

Review of cases shows that juries find the death penalty to be appropriate when an adult defendant commits murder during the commission of an armed robbery. Roberts v. State, 252 Ga. 227, 314 S.E.2d 83, cert. denied, 469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984).

Death penalty was held appropriate punishment since the defendant committed murder during the armed robbery. Ingram v. State, 253 Ga. 622, 323 S.E.2d 801 (1984), cert. denied, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985).

Defendant's sentence of death was not disproportionate to the life sentence given a codefendant as the defendant admitted striking the victim with a baseball bat, taking a gun offered by a codefendant and shooting the victim in the head, assisting

Factors Reviewed by Court (Cont'd)
3. Excessive or Disproportionate Sentences (Cont'd)

in dismembering and burying the body, and concealing the crime. Hittson v. State, 264 Ga. 682, 449 S.E.2d 586 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2005, 131 L. Ed. 2d 1005 (1995).

Death sentence was not imposed as the result of impermissible passion, prejudice, or any other arbitrary factor, and it was not disproportionate, where the defendant shot and killed a police officer during the performance of the officer's official duties and in order to avoid arrest. Henry v. State, 269 Ga. 851, 507 S.E.2d 419 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Upon examination of the entire trial record, the Georgia Supreme Court concluded that the absence of the prosecuting attorney's violation of the Golden Rule, which was a marginal one whose impropriety was not obvious from prior case law, would not in reasonable probability have changed the jury's sentencing verdict. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Death sentences imposed were not disproportionate punishment within the meaning of Georgia law. Hulett v. State, 296 Ga. 49, 766 S.E.2d 1 (2014), cert. denied, 135 S. Ct. 2358, 192 L. Ed. 2d 153 (U.S. 2015).

Death sentence proper. — See Pye v. State, 269 Ga. 779, 505 S.E.2d 4 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999); Perkins v. State, 269 Ga. 791, 505 S.E.2d 16 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Death sentence imposed on the defendant was not the result of passion, prejudice, or any other arbitrary factor in violation of O.C.G.A. § 17-10-35(c)(1), nor was the death sentence excessive or disproportionate under § 17-10-35(c)(3); considering the evidence that the defendant choked and stabbed four female victims to death, that the defendant attempted to kill four other female victims, and that the murder in the instant case involved the O.C.G.A. § 17-10-30(b)(7) aggravating factor relating to the fact that the murder was vile and involved a kidnapping, the sentence was proportional to similar cases and was not the result of any arbitrary factor. Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

In a capital murder case, because the evidence showed that the defendant carefully planned the crime of robbing an armored truck and killed a guard without mercy and for monetary gain, the death sentence imposed against the defendant for the murder in the case was neither excessive nor disproportionate to the penalties imposed in similar cases in the State of Georgia and was upheld. Tollette v. State, 280 Ga. 100, 621 S.E.2d 742 (2005).

Defendant's death sentence for the killing of a driver while the defendant was trying to escape after robbing a bank was not excessive or disproportionate to the penalty imposed in similar cases based on the Georgia Supreme Court's proportionality review under O.C.G.A. § 17-10-35(c)(1); the defendant had previously robbed two banks and had threatened to kill bank employees, had other convictions, and similar cases supported imposition of the death penalty in the defendant's murder conviction. Nance v. State, 280 Ga. 125, 623 S.E.2d 470 (2005).

Attack on the death sentence citing numerous other murder cases where the defendant did not receive a death sentence was unsuccessful because the state supreme court, as required by O.C.G.A. § 17-10-35(c)(3), had already determined that the inmate's death sentence was not excessive or disproportionate to penalties imposed in similar cases, and the federal habeas court deferred to that factual determination because the inmate had not put forth clear and convincing evidence to show the state court was incorrect. Crowe v. Terry, 426 F. Supp. 2d 1310 (N.D. Ga. 2005).

Defendant's death sentence for malice murder was affirmed as the sentence was neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia as the defendant murdered at

least four persons and attempted or planned to murder several other people; the defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Williams v. State, 281 Ga. 87, 635 S.E.2d 146 (2006), cert. denied, 553 U.S. 1004, 128 S. Ct. 2046, 170 L. Ed. 2d 793 (2008).

Death sentence for malice murder was not disproportionate or excessive where although a codefendant had been sentenced only to life, the evidence showed that the defendant was the more culpable party, and the codefendant was mentally retarded; furthermore, other cases cited by the court involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Considering the two murders committed by the defendant, the Supreme Court of Georgia determined that the sentences of death were not excessive or disproportionate to the penalty imposed in similar cases as the defendant murdered a parent and a young child for the purpose of robbing a home; the defendant made the child turn the power back on so that the defendant could see the parent since the parent was still indicating signs of life and the defendant wanted to see to complete the murder; the defendant boasted of raping the child before cutting the child's throat; and, knowing that the child was still alive, the defendant set the house on fire, leaving the pair to burn. O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008).

Following the defendant's convictions of malice murder, aggravated sodomy, kidnapping with bodily injury, and aggravated assault after the defendant grabbed a woman who was riding a bike, dragged her to a concealed area, and sexually assaulted, beat, stomped, and killed her, the jury's imposition of a death sentence was not disproportionate punishment in light of the shocking details of the murder and in light of the defendant's long history of criminal acts against numerous women, including rape, several attempted rapes, and sexually-deviant behavior directed toward women including a 14-year-old female relative. Ledford v. State, 289 Ga. 70, 709 S.E.2d 239, cert. denied, 565 U.S. 1017, 132 S. Ct. 556, 181 L. Ed. 2d 401 (2011), overruled on other grounds by Willis v. State, 394 Ga. 686, 820 S.E.2d 640 (2018).

Death penalty is appropriate punishment after a defendant is found to have been the actual perpetrator of, or active participant in, double murders committed upon victims who are unrelated to the defendant, such as the robbery and murder of vacationing couples asleep in their cars. Putman v. State, 251 Ga. 605, 308 S.E.2d 145 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984).

Death sentence was not disproportionate under O.C.G.A. § 17-10-35(c)(3) since the defendant: (1) used the mother's relationship with a sick, elderly individual to gain access to the individual's house and belongings, steal the individual's checkbook, and forge the individual's checks; (2) plotted the victim's murder when the victim threatened to report the crime; (3) ambushed the victim in the victim's driveway, shot and wounded the victim, chased the victim, knocked the victim down, and shot the victim three more times while standing over the victim; (4) dragged the victim into the bushes, beat, and robbed the victim; and (5) had been convicted of prior crimes involving a calculated, planned murder and armed robbery, an aggravated battery to the victim before death, or depravity of mind. Terrell v. State, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Seriousness of prior record and of instant offense. — Sentence of death was not excessive or disproportionate to sentences imposed in similar cases since the defendant had an extensive, serious prior record and committed an armed robbery during the course of which the defendant killed one person, seriously wounded another, shot another, and kidnapped still another. Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984), cert. denied, 469 U.S. 1132, 105 S. Ct. 816, 83 L. Ed. 2d 809 (1985).

Factors Reviewed by Court (Cont'd)
3. Excessive or Disproportionate Sentences (Cont'd)

Due process afforded habeas corpus petitioner on proportionality claim. — See Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 952 (1985).

Excessiveness not shown. — Sentence of death was not excessive or disproportionate punishment for a vicious and brutal murder committed by a defendant with a prior conviction of a capital felony. Hicks v. State, 256 Ga. 715, 352 S.E.2d 762, cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987).

Death sentence upon conviction on three counts of murder was neither excessive nor disproportionate to sentences imposed in similar cases as the jury found that each offense was outrageously and wantonly vile, horrible and inhuman in that the offense involved torture and an aggravated battery to the victim. Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 808 (1989).

In a malice murder trial, a sentence of death was held to be neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Patillo v. State, 258 Ga. 255, 368 S.E.2d 493, cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 485 et seq., 846 et seq. 21A Am. Jur. 2d, Criminal Law, §§ 718 et seq., 831 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and the Rights of the Accused, § 2521 et seq.

ALR. — Claims of ineffective assistance of counsel in death penalty proceedings — United States Supreme Court cases, 31 A.L.R. Fed. 2d 1.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense — federal cases, 42 A.L.R. Fed. 2d 145.

17-10-35.1. Review of pretrial proceedings when death penalty is sought; reports investigating reversible error; transmittal of reports to Supreme Court; orders regarding review; Attorney General assistance; res judicata; applicability; waiver of rights.

(a) In cases in which the death penalty is sought, there may be a review of all pretrial proceedings by the Supreme Court upon a determination by the trial judge under Code Section 17-10-35.2 that such review is appropriate. The review shall be initiated by the trial judge's filing in the office of the clerk of superior court and delivering to the parties a report certifying that all pretrial proceedings in the case have been completed and that the case stands ready for trial. Within ten days after the filing of the report or the receipt of transcripts of the proceedings, whichever is later, the prosecutor and the defendant may each file with the clerk of superior court and serve upon the opposing party a report identifying all areas of the pretrial proceedings with respect to which reversible error may arguably have occurred. Either party may consolidate with such report an application for appeal with respect to any order, decision, or judgment entered in the case. Any such

application for appeal shall be in the form otherwise appropriate under subsection (b) of Code Section 5-6-34, but:

(1) Any such application for appeal shall be filed with the clerk of superior court rather than the clerk of the Supreme Court;

(2) The opposing party shall not be required or permitted to respond to such an application for appeal; and

(3) No certificate of immediate review shall be required for the filing of such application for appeal.

(b) The reports of the trial judge, prosecutor, and defendant under subsection (a) of this Code section shall be in the form of standard questionnaires prepared and supplied by the Supreme Court. Such questionnaires shall be designed to determine whether there is arguably any existence of reversible error with respect to any of the following matters:

(1) Any proceedings with respect to change of venue;

(2) Any proceedings with respect to recusal of the trial judge;

(3) Any challenge to the jury array;

(4) Any motion to suppress evidence;

(5) Any motion for psychiatric or other medical evaluation; and

(6) Any other matter deemed appropriate by the Supreme Court.

(c) Upon the filing of the reports of the parties, the clerk of superior court shall transmit to the Supreme Court the report of the trial judge, the transcripts of proceedings, and the reports of the parties together with any application for appeal consolidated therewith. A copy of all of the foregoing shall also be delivered by the clerk of superior court to the Attorney General.

(d) The Supreme Court shall issue an order granting review of the pretrial proceedings, or portions thereof, or denying review within 45 days of the date on which the case was received. The order of the Supreme Court shall identify the matters which shall be subject to review, and such matters may include, but need not be limited to, any matters called to the court's attention in any of the reports or in any application for appeal. No notice of appeal shall be required to be filed if review of the pretrial proceedings is granted. An order granting review of pretrial proceedings shall specify the period of time within which each party shall file briefs and reply briefs with respect to the matters identified in the Supreme Court's order granting review. The Supreme Court may order oral argument or may render a decision on the record and the briefs.

(e) If requested by the district attorney, the Attorney General shall assist in the review and appeal provided for in this Code section.

(f) Review of any matter under this Code section shall, as to any question passed on in such review, be res judicata as to such question and shall be deemed to be the law of the case.

(g) The procedure under this Code section shall not apply to any ruling or order made, invoked, or sought subsequent to the filing of the report of the trial judge.

(h) The failure of either party to assert the rights given in this Code section, or the failure of the Supreme Court to grant review, shall not waive the right to posttrial review of any question review of which could be sought under this Code section and shall not constitute an adjudication as to such question.

History. — Code 1981, § 17-10-35.1, enacted by Ga. L. 1988, p. 1437, § 4; Ga. L. 2010, p. 420, § 1/HB 323.

Cross references. — Issues for review, Ga. Sup. Ct. R. 37.

Editor's notes. — Ga. L. 2010, p. 420, § 3/HB 323, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to any case docketed on or after July 1, 2010.

Law reviews. — For article, "A Study of the Unified Appeal Procedure in Georgia," see 23 Ga. L. Rev. 185 (1988). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988). For annual survey on the death penalty, see 64 Mercer L. Rev. 109 (2012).

JUDICIAL DECISIONS

Victim-impact evidence warranted death sentence reversal. — Prosecutor's use of victim-impact evidence concerning the personal characteristics of the victim and the psychological, emotional, and physical impact of the crime on the victim's family attempted to introduce evidence of a kind never before approved by the court without pretrial, interim appellate review warranting reversal of the death sentence in accordance with *Sermons v. State*, 262 Ga. 286 (1992). Moore v. State, 263 Ga. 11, 427 S.E.2d 766 (1993).

Cited in Caldwell v. State, 260 Ga. 278, 393 S.E.2d 436 (1990); Mobley v. State, 262 Ga. 808, 426 S.E.2d 150 (1993); Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994); Southeastern Newspapers Corp. v. State, 265 Ga. 223, 454 S.E.2d 452 (1995); Ramirez v. State, 276 Ga. 158, 575 S.E.2d 462 (2003); Harper v. State, 283 Ga. 102, 657 S.E.2d 213 (2008); Walker v. State, 290 Ga. 696, 723 S.E.2d 894 (2012); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012); State v. Cash, 302 Ga. 587, 807 S.E.2d 405 (2017).

17-10-35.2. Hearing to determine appropriateness of interim appellate review of pretrial rulings.

Prior to the filing of a report by the trial judge under Code Section 17-10-35.1 certifying that pretrial proceedings are complete, the court shall conduct a hearing to determine if an interim appellate review of pretrial rulings is appropriate. The court shall hear from the state and the defense as to whether the delay to be caused by interim appellate review outweighs the need for such review. The court shall order such

review and initiate the procedure contained in Code Section 17-10-35.1 unless the court concludes and enters an order to the effect that interim appellate review would not serve the ends of justice in the case. An order obviating interim appellate review shall not be appealable.

History. — Code 1981, § 17-10-35.2, enacted by Ga. L. 1988, p. 1437, § 4.

Cross references. — Issues for review, Ga. Sup. Ct. R. 37.

JUDICIAL DECISIONS

Cited in Caldwell v. State, 260 Ga. 278, 393 S.E.2d 436 (1990); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012).

17-10-36. Establishment of unified review procedure by Supreme Court; effect on habeas corpus.

(a) The Supreme Court of Georgia shall establish, by rules, a new unified review procedure to provide for the presentation to the sentencing court and to the Supreme Court of all possible challenges to the trial, conviction, sentence, and detention of defendants upon whom the sentence of death has been or may be imposed, which challenges before July 1, 1988, have been presented for review by the former unified review procedure under this subsection. Such new unified review procedure shall govern both pretrial and posttrial appellate review of death penalty cases.

(b) The Supreme Court shall establish, by rules, a series of check lists to be utilized by the trial court, the prosecuting attorney, and defense counsel prior to, during, and after the trial of cases in which the death penalty is sought to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements, so that, for purposes of any pretrial review and the trial and posttrial review, the record and transcript of proceedings will be complete for a review by the sentencing court and the Supreme Court of all possible challenges to the trial, conviction, sentence, and detention of the defendant.

(c) Nothing in this Code section or in the rules of the Supreme Court shall limit or restrict the grounds of review or suspend the rights or remedies available through the procedures governing the writ of habeas corpus.

(d) The procedures governing the writ of habeas corpus may be employed to assert rights or seek remedies if the procedures established in the rules of the Supreme Court as applied to the petitioner are inadequate or ineffective in any constitutional sense.

History. — Code 1933, § 27-2538, enacted by Ga. L. 1980, p. 390, § 1; Ga. L. 1988, p. 1437, § 5.

Cross references. — Habeas corpus generally, T. 9, C. 14.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, a comma was inserted following "July 1, 1988" in subsection (a) and a comma was deleted following "death penalty is sought" near the beginning of subsection (b).

Law reviews. — For article, "A Study of the Unified Appeal Procedure in Georgia," see 23 Ga. L. Rev. 185 (1988). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration
To What Proceedings Section Applicable

General Consideration

Constitutionality. — Unified appeal procedure under O.C.G.A. § 17-10-36 does not violate the due process clause of U.S. Const., amend. 14 in that the procedure fails to provide a defendant with reciprocal rights of discovery, nor does the procedure violate the equal protection clause of the same amendment. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982); Putman v. Turpin, 53 F. Supp. 2d 1285 (M.D. Ga. 1999).

Defendant's conviction for malice murder, aggravated battery, and possession of a firearm during the commission of a felony were affirmed as the Unified Appeal Procedure under O.C.G.A. § 17-10-36 was not unconstitutional; it was designed for the benefit, not the detriment of a defendant, and it did not interfere with the attorney-client relationship. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Purpose of procedure is to prevent and correct error. — Purpose of the unified appeal procedure under O.C.G.A. § 17-10-36 is not to force a waiver of any rights. Rather, the procedure is designed to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Making all available rights known to defendant. — Unified appeal procedure benefits criminal defendant against whom death penalty is sought by ensuring that all state and federal rights available to the defendant are made known to the defendant. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Defendant offered numerous opportunities to state dissatisfaction with attorney. — Defendant has not suffered the denial of a constitutional right under O.C.G.A. § 17-10-36 when a defendant is offered the opportunity, prior to and during trial, to state that the defendant is dissatisfied with the defendant's attorney's assistance. By affording a defendant numerous opportunities to raise questions or objections concerning the defendant's counsel's assistance, the unified appeal procedure recognizes that prior to or during trial the problem of ineffective assistance of counsel may be more suitably remedied than after conviction and the imposition of the death sentence. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Cited in Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989); Williams v. Turpin, 87 F.3d 1204 (11th Cir. 1996); Mincey v. Head, 206 F.3d 1106 (11th Cir. 2000); Worthy v. State, 307 Ga. App. 297, 704 S.E.2d 808 (2010); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012).

To What Proceedings Section Applicable

Procedure designed to protect defendant during each phase of judicial process. — Unified appeal procedure is

designed to protect the criminal defendant in this potentially precarious situation during each phase of the judicial process which may ultimately result in a conviction and sentence of death. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Applicability to death penalty cases. — Proceedings under unified appeal procedure are applicable only in cases in which death penalty is sought, and commence at earliest possible opportunity after indictment. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Habeas corpus. — Georgia's Unified Appeal Procedure, O.C.G.A. § 17-10-36, setting forth rules promulgated by the Georgia Supreme Court that prescribed procedures to be utilized in death penalty cases by the trial court, defense counsel, and the prosecutor prior to, during, and after trial, did not violate a state death row inmate's right to silence by requiring the inmate to answer the court's questions about the inmate's satisfaction with defense counsel and the manner in which the defense was being conducted. Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007), aff'd, 546 F.3d 1326 (11th Cir. Ga. 2008).

Unified motion for review procedure. — Unified appeal procedure establishes unified motion for review procedure; this "motion" encompasses pretrial, trial, and certain review proceedings. Sliger v. State, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Challenges to indictment. — Because O.C.G.A. § 17-10-36 did not grant the Supreme Court of Georgia with the power to abrogate or interfere with an otherwise-valid statutory enactment, such as the statutory procedure by which prosecutors procured indictments and conducted criminal prosecutions through them, the trial court did not err in refusing to quash the indictment filed against the defendant, despite the fact that a 6.04 percentage point under-representation of white persons on the grand jury list from which the defendant's grand jury was selected violated the standard outlined in Ga. Unif. R. Super. Ct. 34, Unif. App. P. II(E). Edwards v. State, 281 Ga. 108, 636 S.E.2d 508 (2006).

17-10-37. Appointment of assistant to Supreme Court to review death sentences; employment of staff to compile data.

(a) There shall be an assistant to the Supreme Court who shall be an attorney appointed by the Chief Justice and who shall serve at the pleasure of the court. The assistant shall assist the Supreme Court in the review of all death sentences.

(b) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence reviewed in accordance with Code Section 17-10-35.

History. — Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4; Ga. L. 2010, p. 420, § 2/HB 323.

Editor's notes. — Ga. L. 2010, p. 420, § 3/HB 323, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to any case docketed on or after July 1, 2010.

Law reviews. — For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979).

For note, "Reviewing the Georgia Supreme Court's Efforts at Proportionality Review," see 39 Ga. L. Rev. 631 (2005).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment criticizing inadequate standards and nebulous measurements for review under Georgia death penalty statute, in light of Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974), see 26 Mercer L. Rev. 331 (1974).

JUDICIAL DECISIONS

Constitutionality. — This section was not subject to constitutional attack under U.S. Const., amends. 8 and 14. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

As to constitutionality of this section, see House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3221, 49 L. Ed. 2d 1217 (1976); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977); Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S. Ct. 508, 50 L. Ed. 2d 599 (1976).

This section was not unconstitutional. Young v. State, 237 Ga. 852, 230 S.E.2d 287 (1976).

Examination of defendant's other convictions. — Nothing in this section foreclosed the Supreme Court during the course of its independent review from examining nonappealed cases and cases in which the defendant pled guilty to a lesser offense. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1217 (1976).

Duty of state to provide indigents access to appellate process. — Duty of the state is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse the defendant's conviction, but only to assure the indigent defendant an adequate opportunity to present the defendant's claims fairly in the context of the state's appellate process. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1217 (1976).

Cited in Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975); Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975); Tamplin v. State, 235 Ga. 774, 221 S.E.2d 455 (1975); Goodwin v. State, 236 Ga. 339, 223 S.E.2d 703 (1976); Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976); Pulliam v. State, 236 Ga. 460, 224 S.E.2d 8 (1976); Birt v. State, 236 Ga. 815, 225 S.E.2d 248 (1976); Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976); Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976); Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977); Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977); Campbell v. State, 240 Ga. 352, 240 S.E.2d 828 (1977); Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978); Dungee v. Hopper, 241 Ga. 236, 244 S.E.2d 849 (1978); Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978); Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979); Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979); Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979); Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979); Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980); Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980); Patrick v. State, 245 Ga. 417, 265 S.E.2d 553 (1980); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980); Stevens v. State, 245 Ga. 583, 266 S.E.2d 194 (1980); Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980); Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980); Hance v. State, 245 Ga. 856, 268 S.E.2d 339; Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980); Lewis v. State, 246 Ga. 101, 268 S.E.2d 915 (1980); State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980); Alderman v. Austin, 498 F. Supp. 1134 (S.D. Ga. 1980); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq. 21A Am. Jur. 2d, Criminal Law, § 831 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and the Rights of the Accused, § 2521 et seq.

17-10-38. Death sentences generally.

(a) All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection. Lethal injection is the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person is dead.

(b) In all cases in which the defendant is sentenced to death, it shall be the duty of the trial judge in passing sentence to direct that the defendant be delivered to the Department of Corrections for execution of the death sentence at a state correctional institution designated by the department.

(c) Notwithstanding any other provision of law, prescription, preparation, compounding, dispensing, or administration of a lethal injection authorized by a sentence of death by a court of competent jurisdiction shall not constitute the practice of medicine or any other profession relating to health care which is subject by law to regulation, licensure, or certification.

(d) No state agency, department, or official may, through regulation or otherwise, require or compel a physician to participate in the execution of a death sentence. "To participate in the execution of a death sentence" means any of the following actions: selecting injection sites; starting an intravenous line or lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; or consulting with or supervising lethal injection personnel.

History. — Ga. L. 1924, p. 195, § 1; Code 1933, § 27-2512; Ga. L. 1937-38, Ex. Sess., p. 330, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 2000, p. 947, § 3.

Editor's notes. — Ga. L. 2000, p. 947, § 1, not codified by the General Assembly, provides that: "It is the intention of the General Assembly to provide for execution by lethal injection for persons sentenced to death after conviction of capital crimes committed on or after May 1, 2000. It is the further intention of the General Assembly that persons sentenced to death for crimes committed prior to the effective date of this Act be executed by lethal injection if the Supreme Court of the United States declares that electrocution violates the Constitution of the United States or if the Supreme Court of Georgia declares that electrocution violates the Constitution of the United States or the Constitution of Georgia."

Ga. L. 2000, p. 947, § 6, not codified by the General Assembly, provides that: "Section 3 of this Act shall apply to persons sentenced to death for crimes committed on or after May 1, 2000. Code Section 17-10-38 as it existed prior to its amend-

ment by Section 3 of this Act shall continue to apply with respect to crimes committed prior to May 1, 2000, except that Section 3 of this Act shall apply to all persons sentenced to death for crimes committed prior to May 1, 2000, if the Supreme Court of the United States declares that electrocution violates the Constitution of the United States or if the Supreme Court of Georgia declares that electrocution violates the Constitution of the United States or the Constitution of Georgia."

Law reviews. — For article, "The Constitutional Right not to Kill," see 62 Emory L.J. 121 (2012).

JUDICIAL DECISIONS

For challenge of Ga. L. 1937-38, Ex. Sess., p. 330, § 1 on ex post facto grounds, see Benton v. State, 187 Ga. 149, 199 S.E. 749 (1939).

Allegation that section violates separation of powers provision. — Allegation that this section was unconstitutional, null, and void because the statute supposedly violated Ga. Const. 1877, Art. I, Sec. I, Para. XXIII (see Ga. Const. 1983, Art. I, Sec. II, Para. III), presented no question for judicial determination since the statute failed to point out wherein the Act was repugnant to and in conflict with that constitutional provision. Williams v. State, 187 Ga. 415, 1 S.E.2d 27 (1939).

Ga. L. 1937-38, Ex. Sess., p. 330, § 1 not unconstitutional. — This section was not unconstitutional as violative of Ga. Const. 1877, Art. III, Sec. I, Para. I (see Ga. Const. 1983, Art. III, Sec. V, Para. IV) to the effect that no law shall be amended or repealed by mere reference to its title or section number. Williams v. State, 187 Ga. 415, 1 S.E.2d 27 (1939).

Variance between title and subject matter of legislation. — Ga. L. 1924, p. 195 did not contain matter not expressed in its caption, in violation of Ga. Const. 1877, Art. III, Sec. VII, Para. VIII (see Ga. Const. 1983, Art. III, Sec. V, Para. III). Howell v. State, 164 Ga. 204, 138 S.E. 206, appeal dismissed, 275 U.S. 576, 48 S. Ct. 114, 72 L. Ed. 435 (1927).

Manner in which capital sentences executed is for legislative enactment. — There being no provision in the Constitution conferring upon sheriffs of counties the power to execute sentences of the courts in capital cases, the manner of execution of such sentences is for legislative enactment. Dunaway v. Gore, 154 Ga. 219, 138 S.E. 213 (1927).

Constitutionality of electrocution. — As electrocution inflicts purposeless violence and needless mutilation, in violation of the proscription of cruel and unusual punishments of Ga. Const. 1983, Art. I, Sec. I, Para. XV., future executions of death sentences are to be carried out by lethal injection only. Dawson v. State, 274 Ga. 327, 554 S.E.2d 137 (2001).

Relationship to O.C.G.A. § 9-3-33. — In a 42 U.S.C. § 1983 case in which a death row inmate challenged Georgia's three-drug lethal injection method, the complaint was untimely; the complaint was governed by the two-year statute of limitations found in O.C.G.A. § 9-3-33, and the inmate's claim accrued in 2001 when the General Assembly adopted lethal injection as Georgia's method of execution of death sentences as found in O.C.G.A. § 17-10-38. Alderman v. Donald, No. 08-12550, 2008 U.S. App. LEXIS 19072 (11th Cir. Sept. 3, 2008) (Unpublished).

Changes made in 2013 to O.C.G.A. § 42-5-36 were not substantial changes to Georgia's execution protocol and the defendant's method-of-execution claim accrued in October 2001 and must have been filed by October 2003 to be timely; the defendant's federal complaint challenging lethal injection, filed on May 12, 2017, was over ten years too late. Ledford v. Comm'r, Ga. Dep't of Corr., 856 F.3d 1312 (11th Cir. 2017).

Cited in Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000); Hill v. Owens, 292 Ga. 380, 738 S.E.2d 56 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Designation by Commissioner of place of execution. — Commissioner of offender rehabilitation (now commissioner of corrections) is authorized to designate any state correctional institution as the place for carrying out an execution. 1980 Op. Att'y Gen. No. 80-121.

State correctional institution defined. — State correctional institution is any facility used to punish criminal offenders. 1980 Op. Att'y Gen. No. 80-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2324 et seq.

ALR. — Substantive challenges to propriety of execution by lethal injection in state capital proceedings, 21 A.L.R.6th 1.

17-10-39. Procedure for determination if female sentenced to death is pregnant; suspension of execution of sentence; issuance of new order for execution of sentence; entry of order upon minutes of court.

After a sentence of death has been imposed, if a female defendant so sentenced is believed to be pregnant, the sheriff of the county in which the defendant is imprisoned, with the concurrence and assistance of the judge of the probate court, shall select one or more physicians who shall conduct an examination. If the female is found to be pregnant, the sheriff shall suspend the execution of the sentence and make a report of the examination and suspension of execution to the presiding judge of the circuit, who shall cause the report and suspension to be entered on the minutes of the superior court of the county where the sentence was imposed. When the defendant is no longer pregnant, the judge shall issue a new order as provided in Code Section 17-10-40 directing the sheriff to execute the sentence at such date and place as the judge may appoint and direct in the order, which the sheriff shall be bound to do accordingly. The judge shall cause the new order and other proceedings in the case to be entered on the minutes of the court in which the sentence was imposed.

History. — Laws 1833, Cobb's 1851 Digest, p. 839; Code 1863, § 4553; Code 1868, § 4573; Code 1873, § 4667; Ga. L. 1874, p. 30; Code 1882, § 4667; Penal Code 1895, § 1045; Penal Code 1910, § 1071; Code 1933, § 27-2520.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq.

17-10-40. Change of time period for execution when time period set for execution has passed; recordation on court minutes; length of and time limitation for new time period for execution; setting day and time for execution.

(a) Where the time period for the execution of any convicted person in a capital case has passed by reason of a supersedeas incident to appellate review, a stay of execution by the State Board of Pardons and Paroles, or for any other reason, a judge of the superior court of the county where the case was tried shall have the power and authority to pass an order fixing a new time period for the execution of the original sentence without requiring the convicted person to be brought before him by a writ of habeas corpus. The order shall be recorded on the minutes of the court and a certified copy of the order shall be sent immediately to the convicted person's attorney of record, to the Attorney General, and to the superintendent of the state correctional institution at the place of execution.

(b) The new time period for the execution shall be seven days in duration and shall commence at noon on a specified date and shall end at noon on a specified date. The new time period for the execution fixed by the judge shall commence not less than ten nor more than 20 days from the date of the order.

(c) The Department of Corrections shall set the day and time for execution within the time period designated by the judge of the superior court. If the execution is not carried out on the day and at the time originally set by the Department of Corrections, the Department of Corrections is authorized to set new dates and times for execution within the period designated by the judge of the superior court.

History. — Ga. L. 1924, p. 195, § 7; Code 1933, § 27-2518; Ga. L. 1983, p. 665, § 2; Ga. L. 1985, p. 1463, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, "Offender Rehabilitation" was changed to "Corrections" in subsection (c).

JUDICIAL DECISIONS

Disclosure of identifying information of persons and entitites involved in executions. — Georgia Supreme Court held that it is was not unconstitutional for the State of Georgia to maintain the confidentiality of the names and other identifying information of the persons and entities involved in executions, pursuant to O.C.G.A. § 42-5-36(d), including those who manufacture the drug or drugs to be used. Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

Trial judge can exercise the jurisdiction vested in the judge under this section in vacation. Mallory v. Chapman, 158 Ga. 228, 122 S.E. 884, 34 A.L.R. 310 (1924).

Effect of involuntary absence of defendant. — Order of a trial judge fixing a new date for execution of sentence, after

the original date has passed, is not void because the defendant is involuntarily absent and has not waived or authorized anyone else to waive the defendant's right to be present at the time and place of resentencing, and the passage of such order is not violative of the defendant's rights under the several provisions of the state and federal Constitutions. McBurnett v. Balkcom, 207 Ga. 452, 62 S.E.2d 180 (1950).

Absence of defendant when new date set does not violate due process. — Although it was necessary for the defendant to have been present in court when the original sentence of execution was pronounced, as well as during other proceedings throughout the trial, in the absence of waiver, no violation of the due process clause of U.S. Const., amend. 14 appears, when the attack is not on the original sentence, but merely on an order fixing a new date of execution, entered in the defendant's absence, which order became necessary after the date fixed in the original sentence had passed because supersedeas pending the determination of a writ of error, since setting a new date of execution is not a new sentence of the defendant, as to which the judge has no discretion, but merely setting the time. Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Setting of new date when sheriff has allowed date for execution to elapse. — Prisoner who has been convicted and sentenced to be executed will not be discharged on habeas corpus because the sheriff permitted the date assigned for the execution to elapse; instead a new date will be assigned. Mallory v. Chapman, 158 Ga. 228, 122 S.E. 884, 34 A.L.R. 310 (1924).

Cited in Williams v. State, 187 Ga. 415, 1 S.E.2d 27 (1939); Smith v. Henderson, 190 Ga. 886, 10 S.E.2d 921 (1940); Parks v. State, 206 Ga. 675, 58 S.E.2d 142 (1950); McLendon v. Balkcom, 207 Ga. 100, 60 S.E.2d 753 (1950).

OPINIONS OF THE ATTORNEY GENERAL

Authority to transport defendant for physical examination. — Person in the custody of the sheriff, who has not actually been transported to the penitentiary and delivered to the director, remains with the superior court, and the Board of Pardons and Paroles or the State Board of Corrections (now Board of Offender Rehabilitation) would have no jurisdiction, authority, or power to pass any order directing such a person to be transported to another place for physical examination. 1945-47 Op. Att'y Gen. p. 434.

Custody of Department of Offender Rehabilitation. — Once the Department of Offender Rehabilitation has obtained custody of a prisoner whose execution date has been stayed and no new execution date has been set, it remains until execution and so long as the sentence is valid. 1971 Op. Att'y Gen. No. 71-188.

Requirements for order establishing new execution date. — To constitute a facially valid order establishing a new execution date for a condemned person where the original execution date has passed, the order must establish a new execution date within limits set forth in O.C.G.A. § 17-10-40. 1981 Op. Att'y Gen. No. 81-105.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq.

ALR. — Effect of permitting day fixed for execution to pass without carrying out sentence, 34 A.L.R. 314.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

17-10-41. Persons required to be present at executions.

There shall be present at the execution of a convicted person the superintendent of the state correctional institution or a deputy superintendent thereof, at least three executioners, two physicians to determine when death supervenes, and other correctional officers, assistants, technicians, and witnesses as determined by the commissioner of corrections. In addition, the convicted person may request the presence of his or her counsel, a member of the clergy, and a reasonable number of relatives and friends, provided that the total number of witnesses appearing at the request of the convicted person shall be determined by the commissioner of corrections.

History. — Ga. L. 1924, p. 195, § 4; Code 1933, § 27-2515; Ga. L. 1956, p. 161, § 32; Ga. L. 1988, p. 252, § 1; Ga. L. 2000, p. 947, § 4.

Editor's notes. — Ga. L. 2000, p. 947, § 1, not codified by the General Assembly, provides that: "It is the intention of the General Assembly to provide for execution by lethal injection for persons sentenced to death after conviction of capital crimes committed on or after May 1, 2000. It is the further intention of the General Assembly that persons sentenced to death for crimes committed prior to the effective date of this Act be executed by lethal injection if the Supreme Court of the United States declares that electrocution violates the Constitution of the United States or if the Supreme Court of Georgia declares that electrocution violates the Constitution of the United States or the Constitution of Georgia."

JUDICIAL DECISIONS

Cited in Irwin v. Lawrence, 196 Ga. App. 202, 26 S.E.2d 251 (1943).

OPINIONS OF THE ATTORNEY GENERAL

Other persons admitted only with defendant's consent. — Since this section explicitly enumerated who may be witnesses at an execution, it was conclusive that the General Assembly intended to exclude any other witnesses except the condemned person's counsel, relatives, and such clergy and friends as the condemned may desire. This exception for designated persons requires a determination by the condemned person, which must be conveyed to the Department of Corrections (now Department of Offender Rehabilitation) within a reasonable time before the execution. If the condemned person should express a desire to have some member of the press present the department would be legally authorized to admit the press. Otherwise, the department was required by this section to restrict those present to the ones named in this section, and others requested by the condemned. 1963-65 Op. Att'y Gen. p. 346.

Discretion as to who may be present. — The only person with any discretion in deciding who shall be present at an execution is the condemned person personally. Further, the condemned person has no discretion as to individual members of the general public who are not the condemned's counsel, relatives, and such clergy and friends as the condemned may desire. 1960-61 Op. Att'y Gen. p. 354.

Residence of electrician immaterial. — No reference was made by this section to the residence of the electrician. The indefinite article "an" was used and therefore the place of residence of the electrician used in electrocutions was immaterial under the law. 1948-49 Op. Att'y Gen. p. 281.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq.
C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2429 et seq.
ALR. — Validity of rules and regulations concerning viewing of execution of death penalty, 107 A.L.R.5th 291.

17-10-42. Preparation and filing of certification of execution.

The executioner and attending physicians shall certify the fact of the execution to the clerk of the superior court of the county in which the sentence was imposed, which certificate shall be filed by the clerk with the papers in the case.

History. — Ga. L. 1924, p. 195, § 5; Code 1933, § 27-2516.
Cross references. — Maintenance of death records generally, § 31-10-17 et seq.

JUDICIAL DECISIONS

Cited in Meyers v. Whittle, 171 Ga. 509, 156 S.E. 120 (1930); Irwin v. Lawrence, 196 Ga. App. 202, 26 S.E.2d 251 (1943).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 718 et seq.
C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2429 et seq.

17-10-42.1. Participation of medical professionals in executions.

Participation in any execution of any convicted person carried out under this article shall not be the subject of any licensure challenge, suspension, or revocation for any physician or medical professional licensed in the State of Georgia.

History. — Code 1981, § 17-10-42.1, enacted by Ga. L. 2006, p. 274, § 1/HB 57.
Editor's notes. — Ga. L. 2006, p. 274, § 2/HB 57, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2006, and shall apply to executions carried out on or after July 1, 2006."

17-10-43. Disposition of body of executed person; payment of expenses of transporting body.

The body of an executed person shall be delivered to the relatives of the person if they so desire; and, in case no claim is made by relatives for the body, it shall be disposed of in the same manner as bodies of inmates dying in a state correctional institution. If the nearest relatives of the person executed desire that the body be transported to the former home of the executed person, if in this state, the expenses of transportation shall be paid by the county governing authority of the county

where the person was convicted, from any funds on hand in the treasury.

History. — Ga. L. 1924, p. 195, § 6; Code 1933, § 27-2517.

Cross references. — Disposition of unclaimed dead bodies generally, § 31-21-20 et seq.

JUDICIAL DECISIONS

Cited in Meyers v. Whittle, 171 Ga. 509, 156 S.E. 120 (1930).

17-10-44. Apparatus, machinery, and appliances.

The Department of Corrections shall provide a place for execution of the death sentence and all necessary apparatus, machinery, and appliances for inflicting the penalty of death.

History. — Ga. L. 1924, p. 195, § 2; Code 1933, § 27-2513; Ga. L. 1956, p. 161, § 28; Ga. L. 1985, p. 283, § 1; Ga. L. 2000, p. 947, § 5.

Editor's notes. — Ga. L. 2000, p. 947, § 1, not codified by the General Assembly, provides that: "It is the intention of the General Assembly to provide for execution by lethal injection for persons sentenced to death after conviction of capital crimes committed on or after May 1, 2000. It is the further intention of the General Assembly that persons sentenced to death for crimes committed prior to the effective date of this Act be executed by lethal injection if the Supreme Court of the United States declares that electrocution violates the Constitution of the United States or if the Supreme Court of Georgia declares that electrocution violates the Constitution of the United States or the Constitution of Georgia." This Act became effective May 1, 2000.

JUDICIAL DECISIONS

Disclosure of identifying information of persons and entities involved in executions. — Georgia Supreme Court held that it was not unconstitutional for the State of Georgia to maintain the confidentiality of the names and other identifying information of the persons and entities involved in executions, pursuant to O.C.G.A. § 42-5-36(d), including those who manufacture the drug or drugs to be used. Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

RESEARCH REFERENCES

ALR. — Manner of inflicting death sentence as cruel or unusual punishment, 30 A.L.R. 1452.

Substantive challenges to propriety of execution by lethal injection in state capital proceedings, 21 A.L.R.6th 1.

ARTICLE 3

MENTALLY INCOMPETENT TO BE EXECUTED

Cross references. — Bails, fines, and punishments, U.S. Const., amend. 8.

Editor's notes. — Ga. L. 1988, p. 1003, § 2, effective July 1, 1988, repealed the

Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 17-10-60 through 17-10-63 and was based on Ga. L. 1981, Ex. Sess., p. 8 (Code enactment act).

17-10-60. "Mentally incompetent to be executed" defined.

As used in this article, the term "mentally incompetent to be executed" means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment.

History. — Code 1981, § 17-10-60, enacted by Ga. L. 1988, p. 1003, § 2.

Law reviews. — For note, "Uncertain Waters: Tennard v. Dretke Provides Swells of Protection for the Mentally Deficient But May Cause Rising Tides of Frivolous Claims," see 56 Mercer L. Rev. 1483 (2005).

JUDICIAL DECISIONS

Cited in Alford v. State, 137 Ga. 458, 73 S.E. 375 (1912); Solesbee v. Balkcom, 205 Ga. 122, 52 S.E.2d 433 (1949); Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991); Hall v. Brannan, 284 Ga. 716, 670 S.E.2d 87 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 63 et seq., 83 et seq.

Am. Jur. Trials. — Capital Cases Involving Mental Retardation, 53 Am. Jur. Trials 1.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 511 et seq. 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2328 et seq.

ALR. — Insanity supervening after conviction and sentence of death, 49 A.L.R. 804.

Right of appeal in proceeding for restoration to competency, 122 A.L.R. 541.

Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 A.L.R.2d 703.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 A.L.R.2d 1161.

Propriety of carrying out death sentences against mentally ill individuals, 111 A.L.R.5th 491.

17-10-61. No execution upon determination of mental incompetency to be executed.

A person under sentence of death shall not be executed when it is determined under the provisions of this article that the person is mentally incompetent to be executed as defined in Code Section 17-10-60.

History. — Code 1981, § 17-10-61, enacted by Ga. L. 1988, p. 1003, § 2.

Law reviews. — For note, "Ford v. Wainwright: Eighth Amendment Prohibits Execution of the Insane," see 38 Mercer L. Rev. 949 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Instructions to physician regarding insanity of one convicted of a capital felony. — In view of the fact that the inquiry under former Code 1933, § 27-2602 (see O.C.G.A. § 17-10-61) was directed to the alleged insanity occurring subsequent to the conviction, the definitions of insanity in former Code 1933, §§ 26-702 and 26-703 (see O.C.G.A. §§ 16-3-2 and 16-3-3) were inapplicable and should not be given in written instructions to physicians appointed pursuant to former Code 1933, § 27-2602. Those instructions should inform the physicians that the issue was the present sanity of the individual and should be determined on the basis of whether the individual is capable of presently understanding the nature and object of the proceedings going on against the individual and rightly comprehends the individual's own condition in reference to such proceedings, and was capable of rendering the individual's attorneys such assistance as a proper defense to the proceedings preferred against the individual demands. Since the basic issue is the individual's sanity at a time subsequent to conviction, or, in effect, the individual's present sanity, the appropriate test should be that as employed upon a special plea of insanity under former Code 1933, § 27-1502 (see O.C.G.A. § 17-7-130). 1976 Op. Att'y Gen. No. 76-123.

RESEARCH REFERENCES

ALR. — Propriety of carrying out death sentences against mentally ill individuals, 111 A.L.R.5th 491.

17-10-62. Exclusive procedure for challenging mental competency to be executed.

Notwithstanding any other provision of this Code, this article provides the exclusive procedure for challenging mental competency to be executed when such challenge is made subsequent to the time of conviction and sentence.

History. — Code 1981, § 17-10-62, enacted by Ga. L. 1988, p. 1003, § 2.

JUDICIAL DECISIONS

Habeas corpus proceeding. — O.C.G.A. § 17-10-60 et seq. is the exclusive procedure for raising a mentally incompetent to be executed challenge after sentencing, O.C.G.A. § 17-10-62, and creates a rebuttable presumption against re-litigation of a finding of competency instead of applying the stricter habeas procedural default standard, O.C.G.A. § 17-10-69; accordingly, this issue should not arise in habeas proceedings in Georgia. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

17-10-63. Filing of application; contents.

(a) An application brought under this article must be filed in the superior court of the county in which the applicant is being detained.

The named respondent shall be the person having actual custody of the applicant.

(b) An application brought under this article shall identify the proceeding in which the applicant was convicted, give the date of the rendition and the final judgment complained of, set forth the fact that a time period for execution has been set, give the date of the signing of the order and the dates of the designated time period for execution, and shall clearly set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed. The application shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The application shall identify any previous proceedings that the applicant may have taken challenging his mental competency to be executed or challenging his mental condition in relation to the conviction and sentence in question. Arguments and citations of authority shall be omitted from the application. The application must be verified with the oath of the applicant or of some other person in his behalf.

History. — Code 1981, § 17-10-63, enacted by Ga. L. 1988, p. 1003, § 2.

17-10-64. Service of application.

Service of an application brought under this article shall be made upon the person having custody of the applicant. If the applicant is being detained under the custody of the Department of Corrections, an additional copy of the application shall be served upon the Attorney General. If the applicant is being detained under the custody of some authority other than the Department of Corrections, an additional copy of the petition shall be served upon the district attorney of the county in which the application is filed.

History. — Code 1981, § 17-10-64, enacted by Ga. L. 1988, p. 1003, § 2.

17-10-65. Answer by respondent.

As soon as possible after the filing and docketing of the application under this article, the respondent shall answer the application. The court may schedule a case for a hearing prior to the filing of responsive pleadings but, in any event, shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously.

History. — Code 1981, § 17-10-65, enacted by Ga. L. 1988, p. 1003, § 2.

17-10-66. Examination of applicant.

(a) By filing an application under this article, the applicant specifically consents to submit to a state examination for the purposes of assessing mental competency to be executed.

(b) Simultaneously with the filing of the application, the applicant, if he or she wishes the court to consider any request for appointment of an expert, shall file such a request and shall state specific facts in support of that request so that the court may determine if the applicant's mental competency to be executed is in fact a significant issue. The applicant shall further submit with the motion a specific statement as to the particular expert requested, the nature of the examination to be conducted, the time period within which an examination can be conducted, and an estimate of the expenses to be incurred.

(c) If the applicant has filed a request for an examination as provided in subsection (b) of this Code section and the applicant makes a sufficient showing that his or her mental competency to be executed is a significant issue, the court shall appoint an expert to make an examination of the applicant, with such examination to be conducted as soon as possible. Payment for such expert shall be made by the Department of Corrections unless otherwise designated by the General Assembly.

History. — Code 1981, § 17-10-66, enacted by Ga. L. 1988, p. 1003, § 2.

17-10-67. When application to be filed.

An application under this article shall not be filed until completion of direct appeal and until an order has been signed by a judge of the trial court setting a time period for the execution.

History. — Code 1981, § 17-10-67, enacted by Ga. L. 1988, p. 1003, § 2.

17-10-68. Proof; disposition.

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions shall be governed by Code Sections 9-11-26 through 9-11-32 and 9-11-37.

(c) If a sworn affidavit is to be introduced into evidence by either party, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case or, in the event a hearing is set less

than five days from the date of the filing of the application, as soon as possible so that opposing counsel has the opportunity to review the affidavit prior to the hearing. The affidavit so served shall be accompanied by notice of the party's intention to introduce it into evidence. The superior court judge considering the application may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) After reviewing the pleadings and evidence offered at the hearing, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. The findings of fact and conclusions of law shall be recorded as part of the record in the case.

(e) If the court finds in favor of the applicant by finding that the applicant has proven his or her mental incompetence to be executed by a preponderance of the evidence, the court shall enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper. If the court denies the application, the court shall direct that immediate telephonic notification be given to the parties and any stay presently entered under this article shall be dissolved instanter.

History. — Code 1981, § 17-10-68, enacted by Ga. L. 1988, p. 1003, § 2.

17-10-69. Prior adjudication as presumption of mental competency.

If an applicant is determined to have previously filed an application under this article and has previously been determined to be mentally competent to be executed, such prior adjudication shall act as a presumption of mental competency and the applicant shall not be entitled to a new hearing on the question of mental competency to be executed absent the applicant's making a prima-facie showing of a substantial change in circumstances sufficient to raise a significant question as to the applicant's mental competency to be executed at the time of filing of any subsequent applications.

History. — Code 1981, § 17-10-69, enacted by Ga. L. 1988, p. 1003, § 2.

JUDICIAL DECISIONS

Habeas corpus proceeding. — O.C.G.A. § 17-10-60 et seq. is the exclusive procedure for raising a mentally incompetent to be executed challenge after sentencing, O.C.G.A. § 17-10-62, and creates a rebuttable presumption against re-litigation of a finding of competency instead of applying the stricter habeas procedural default standard, O.C.G.A. § 17-10-69; accordingly, this issue should not arise in habeas proceedings in Georgia. Perkins v. Hall, 288 Ga. 810, 708

S.E.2d 335 (2011), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

17-10-70. Appeals.

(a) Appeals in cases brought under this article shall be governed by Chapter 6 of Title 5 except that as to final orders of the court which are adverse to the applicant, no appeal shall be ordered unless the Supreme Court of this state issues a certificate of probable cause for the appeal.

(b) If an unsuccessful applicant desires to appeal, he or she must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within three days of the entry of the order denying relief. The applicant shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the applicant, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and shall stay the judgment of the superior court until there is a final adjudication by the Supreme Court.

History. — Code 1981, § 17-10-70, enacted by Ga. L. 1988, p. 1003, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, a comma was inserted following "to the applicant" in subsection (a).

17-10-71. Procedure upon convicted person's regaining mental competency.

If a convicted person under sentence of death who is found to be mentally incompetent to be executed under this article regains his or her mental competency, the fact shall be certified at once by the

appropriate mental health official to the court initially making the finding of mental incompetency. Upon such certification, that court shall enter an appropriate order noting receipt of certification and vacating any previously entered stay of execution. A copy of such order shall be sent to the sentencing court, at which time the sentencing court shall fix a new time period for execution as provided in Code Section 17-10-40. The judge of the court which made the determination on the issue of mental competency shall cause the new order and other proceedings in the case to be presented on the minutes of the court.

History. — Code 1981, § 17-10-71, enacted by Ga. L. 1988, p. 1003, § 2.

CHAPTER 11

ASSESSMENT AND PAYMENT OF COSTS OF CRIMINAL PROCEEDINGS

Article 1

General Provisions

Sec.
17-11-1. Imposition of costs of prosecution upon defendant generally.
17-11-2. Liability of defendant for costs of witnesses.
17-11-3. Liability of defendant for costs of inquest.
17-11-4. Imposition of costs and jail fees upon prosecutor or complainant.
17-11-5. Payment of costs and expenses when venue changed.

Article 2

Reimbursement of Counties for Expenses of Capital Felony Prosecutions

17-11-20. Short title.
Sec.
17-11-21. Definitions.
17-11-22. Basis for reimbursement of counties for capital felony expenses.
17-11-23. When reimbursement payments to be made; manner of reimbursement where requests exceed funds appropriated.
17-11-24. Administration of article generally; adoption of rules and regulations; maintenance of records of capital felony expenses by clerks of superior courts.

Cross references. — Prohibition against compelling payment of costs prior to conviction on final trial, Ga. Const. 1983, Art. I, Sec. I, Para. XXIV. Costs, Rules of the Supreme Court of the State of Georgia, Rule 11. Costs, Rules of the Court of Appeals of the State of Georgia, Rule 17.

U.S. Code. — Stay of execution and the manner of prosecuting offenses punishable by death, Federal Rules of Criminal Procedure, Rules 38(a) and 7(a).

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Assessment of costs in criminal cases, Uniform Superior Court Rules, Rule 36.15.

17-11-1. Imposition of costs of prosecution upon defendant generally.

The costs of a prosecution, except the fees of his own witnesses, shall not be demanded of a defendant until after trial and conviction. If convicted, judgment may be entered against the defendant for all costs accruing in the committing and trial courts and by any officer pending the prosecution. The judgment shall be a lien from the date of his arrest

on all the property of the defendant. The clerk shall issue an execution on the judgment against the property.

History. — Laws 1816, Cobb's 1851 Digest, p. 857; Laws 1820, Cobb's 1851 Digest, p. 859; Laws 1826, Cobb's 1851 Digest, p. 859; Laws 1830, Cobb's 1851 Digest, p. 860; Code 1863, § 4581; Code 1868, § 4602; Code 1873, § 4699; Code 1882, § 4699; Penal Code 1895, § 1078; Penal Code 1910, § 1105; Code 1933, § 27-2801.

Cross references. — Duty of Department of Offender Rehabilitation to bear costs and expenses of trial involving inmate of state penal system who is charged with crime of escape or attempted escape or with offense occurring within confines of state correctional institution, § 42-5-3. Lien for costs of prosecution, § 44-5-210.

Law reviews. — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

JUDICIAL DECISIONS

Misdemeanor prosecutions. — O.C.G.A. § 17-11-1 applies to misdemeanor prosecutions. Gibson v. State, 187 Ga. App. 769, 371 S.E.2d 413, cert. denied, 187 Ga. App. 907, 371 S.E.2d 413 (1988).

"Trial" defined. — "Trial" means such trial in the court having original trial jurisdiction of the case as is the basis of the entry of judgment finally disposing of the action in such court and does not apply to proceedings in an appellate court. Wynne v. Stonecypher, 146 Ga. 5, 90 S.E. 284 (1916).

Judge has no discretion in the matter of taxing costs. — While the word "may" ordinarily denotes permission and not command, the use of that word in the second sentence of this section cannot be construed to mean that the trial judge is vested with discretion in the matter of taxing the costs against the convicted defendant. There is no provision of law for the payment of the fees of the officers of the court when the judge in the judge's discretion fails to tax the costs against the convicted defendant, and it cannot be assumed that it was ever intended that the compensation of these officers should rest in the discretion of the judge. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Judge's duty to enter judgment for costs. — Since the law allows the judge no discretion as to entering judgment for costs against the convicted defendant, but imposes the burden of paying costs as an incident to conviction, the verdict of guilty against the defendant imposes upon the judge the duty of entering judgment against the defendant for the costs. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Amendment of judgment to provide for costs. — If a defendant is convicted, but the judge fails to enter a judgment for costs, it is proper for the judge to enter a nunc pro tunc order amending the former judgment to provide for the payment of costs after the expiration of the term at which the judgment was entered, and even after an execution for the costs has issued. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Judgment for other costs illegal. — It is illegal for a magistrate to give judgment against the prisoner for costs other than those of the prisoner's own witnesses or the prisoner's commitment. Hayden v. State, 40 Ga. 476 (1869).

Costs of bailiffs and jurors are not taxable to criminal defendants. Walden v. State, 258 Ga. 503, 371 S.E.2d 852 (1988); Smith v. State, 262 Ga. 67, 414 S.E.2d 653 (1992).

Fees paid for special grand jurors, traverse jurors, and bailiffs could not properly be included in the sum which the defendant was ordered to pay the defendant's victim as restitution. Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888 (1988).

Assessment of court costs. — Sum which convicted defendant was ordered to

pay represented court costs, rather than fine, which trial court is allowed to assess. Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984).

Costs in cases which have been nol prossed. — No officer has the right to demand or receive of one accused of crime costs on a criminal case which has been nol prossed. Hunter v. State, 104 Ga. App. 576, 122 S.E.2d 172 (1961).

If acquitted on subsequent trial no longer liable for costs. — If one accused of crime is convicted but, upon a subsequent trial granted, is thereafter acquitted, the defendant is no longer liable for the costs. Land v. Jolley, 175 Ga. 788, 166 S.E. 217 (1932).

Amount paid by defendant who is eventually acquitted is without consideration. — Due bill given by the defendant to the clerk in settlement of a bill for costs before there had been any conviction of the accused, who was eventually acquitted, was without legal consideration. Wells v. Potter, 120 Ga. 889, 48 S.E. 354 (1904).

Costs to which district attorney entitled if defendant escapes. — If a prisoner escapes before trial, the solicitor general (now district attorney) is only entitled to the costs which have accrued up to the time of such escape. Robinson v. Smith, 57 Ga. 332 (1876).

Witness costs. — Payment of hotel and airline ticket costs for witnesses come within the meaning of "all costs accruing in the . . . trial courts." Smith v. State, 236 Ga. App. 548, 512 S.E.2d 19 (1999), overruled on other grounds by State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

There is no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. Smith v. State, 272 Ga. 83, 526 S.E.2d 59 (2000).

Procedure for objecting to amounts claimed by witnesses. — If the clerk issues an execution for the costs due witnesses, and the defendant meets the execution with an affidavit of illegality on the ground that the witnesses have claimed and procured the execution to issue for more fees than the witnesses are entitled to receive, it is incumbent upon the defendant to pay amounts appearing to be due in order to authorize the levying officer to stay further proceedings. State v. Everett, 93 Ga. 575, 20 S.E. 73 (1894).

Costs may not be demanded before providing transcript for appeal, if trial not had. — If the accused excepts to the overruling of a demurrer (now motion to dismiss) to the indictment, and brings the case to the Supreme Court before there has been any trial on the merits, the clerk of the court in which the case is pending has no right to demand, as a condition precedent to sending up a transcript of the record, the payment of accrued costs. Wells v. Potter, 120 Ga. 889, 48 S.E. 354 (1904).

If no supersedeas is obtained, the clerk of the trial court is entitled to have judgment awarded against the defendant for the costs accruing in connection with the defendant's prosecution of a writ of error (see O.C.G.A. §§ 5-6-49, 5-6-50) to the Court of Appeals, while the defendant's case is pending in that court. Wynne v. Stonecypher, 146 Ga. 5, 90 S.E. 284 (1916).

Costs are not recoverable in proceeding to recover forfeited recognizance. — Costs of the criminal case out of which a recognizance arises are not recoverable in a proceeding by scire facias to enforce the recognizance as forfeited. When such costs have been taxed in the judgment rendered in the scire facias proceeding a motion to retax, so as to exclude from that judgment these nontaxable costs, should be granted. Cade v. Gordon, 88 Ga. 461, 14 S.E. 706 (1892).

Imprisonment for failure to pay costs. — One adjudged guilty of a misdemeanor and sentenced to pay the costs of the prosecution, and in default of the payment thereof to be confined in the chain gang for a stated term, cannot be held in custody or compelled to labor on the chain gang for fees due officers of court for services which the officers were required by law to render in proceedings instituted by that person, subsequently to the person's conviction and sentence, to review and reverse such judgment and sentence, though liable under the judgment for such fees as costs. Alexander v. Walton, 151 Ga. 645, 107 S.E. 862 (1921).

Extent and priority of lien generally. — All the property of a person arrested and convicted upon a criminal charge, or who may escape from jail, or from any officer, owned by the person at the time of the arrest, is bound for the costs of prosecution, by statutory lien, which attaches also upon the proceeds of the property, when identified. This lien overrides a title to property made by the person, upon the sale for professional services, after the person's arrest and before conviction. Morgan v. Collier, 13 Ga. 493 (1853).

Costs are collectible by levy of fi. fa. — Costs in a criminal prosecution are collectible of the defendant by the levy of a fi. fa. at the termination of a prosecution, if it finally results in the conviction of the defendant. Land v. Jolley, 175 Ga. 788, 166 S.E. 217 (1932).

Judge has the power to order the clerk to issue an execution against the property of the defendant to enforce the collection of the fine and costs. McMeekin v. State, 48 Ga. 335 (1873).

Lien for costs puts purchasers on notice. — If the vendor of an interest in real property is in prison, the vendee is put on notice of the lien for costs, or notice of a fact which, if diligently investigated, would have disclosed the lien. Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942).

Cost of paternity blood test in child abandonment case. — When the state requests pretrial paternity blood testing for a defendant charged with child abandonment, the state must initially pay the cost. A verdict incorporating a finding of parentage would authorize the court to tax the cost of the blood test against the defendant, or under certain circumstances against the prosecutor/prosecutrix or complainant. State v. Slavny, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

Cited in Lumpkin County v. Davis, 185 Ga. 393, 195 S.E. 169 (1938); Holloway v. State, 178 Ga. App. 141, 342 S.E.2d 363 (1986); Alliston v. State, 183 Ga. App. 462, 359 S.E.2d 220 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Ultimate responsibility for costs will fall upon the defendant, the prosecutor, or the fine and forfeiture fund, depending upon the circumstances. 1971 Op. Att'y Gen. No. U71-42.

Court of inquiry is not trial. — This section meant that the costs allowed an officer cannot be collected from a defendant until after the defendant's conviction on trial, and the court of inquiry was not the trial. 1950-51 Op. Att'y Gen. p. 265.

Costs of feeding prisoner while prisoner is imprisoned awaiting trial are part of court costs collectible from defendant. 1962 Op. Att'y Gen. p. 121.

Application fee for warrant. — Fee for application for an arrest or search warrant under O.C.G.A. § 15-10-82 is not part of the costs. 1988 Op. Att'y Gen. No. U88-24.

Fee for issuance of criminal warrant. — Affiant (prosecutor) may not be required to pay the fee for the issuance of a criminal warrant at the time of such issuance. A clear intent is shown to determine the responsibility for such payment at a subsequent time, rather than at the time of the issuance of the criminal warrant. 1969 Op. Att'y Gen. No. 69-364.

Claim of county for fees of county officers. — In cases which are never signed by the defendant or a judge, which are not nol prossed and which are transmitted to the clerk's office prior to the return of the indictment against the officer, the county does not have a claim for any portion of the money received in the clerk's office from an officer of the court based on chargeable fees of the county's officers. 1974 Op. Att'y Gen. No. U74-90.

RESEARCH REFERENCES

ALR. — Validity of employment to obtain evidence, 16 A.L.R. 1433.

Validity of contract to testify, 41 A.L.R. 1322; 45 A.L.R. 1423.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 A.L.R.2d 1376.

Right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

Items of cost of prosecution for which defendant may be held, 65 A.L.R.2d 854.

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926.

Storage or similar caretaking charges as taxable costs in proceeding to forfeit personal property, 60 A.L.R.3d 813.

17-11-2. Liability of defendant for costs of witnesses.

No defendant shall be liable for the costs of any witness of the state, unless such witness was subpoenaed, sworn, and examined during the trial, nor for the costs of more than two witnesses testifying on the same point, unless the court shall certify that the question at issue was of such a character as to require the testimony of more than two witnesses.

History. — Laws 1799, Cobb's 1851 Digest, p. 277; Code 1863, § 3608; Code 1868, § 3632; Code 1873, § 3682; Code 1882, § 3682; Penal Code 1895, § 1079; Penal Code 1910, § 1106; Code 1933, § 27-2802.

Law reviews. — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Limitation as to witnesses testifying on same point applies only to those subpoenaed, sworn, and examined. — Prohibition in this section against charging the accused with the costs of more than two witnesses to the same point relates only to witnesses who have actually been subpoenaed, sworn, and examined. Herrington v. Flanders, 115 Ga. 823, 42 S.E. 222 (1902).

Residence of witnesses. — Person tried and convicted of a criminal offense is taxable for costs with the fees of witnesses sworn and examined in behalf of the state whether the witnesses reside in the county or not. Brown v. State, 86 Ga. 375, 12 S.E. 649 (1890).

Cited in Lumpkin County v. Davis, 185 Ga. 393, 195 S.E. 169 (1938); Holloway v. State, 178 Ga. App. 141, 342 S.E.2d 363 (1986).

RESEARCH REFERENCES

ALR. — Validity of contract to testify, 41 A.L.R. 1322; 45 A.L.R. 1423.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 A.L.R.2d 1376.

Right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Items of cost of prosecution for which defendant may be held, 65 A.L.R.2d 854.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

17-11-3. Liability of defendant for costs of inquest.

Any person convicted of murder or manslaughter in a case where an inquest has been held concerning the cause of death of the victim shall be charged for the costs of the inquest as part of the costs of prosecution.

History. — Orig. Code 1863, § 572; Code 1868, § 636; Code 1873, § 595; Code 1882, § 595; Penal Code 1895, § 1080; Penal Code 1910, § 1107; Code 1933, § 27-2803.

Law reviews. — For article on whether one's property is forfeited after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

This section was an exception to the general rule as to how fees shall be paid. Davis v. County of Bibb, 116 Ga. 23, 42 S.E. 403 (1902).

Cited in Lumpkin County v. Davis, 185 Ga. 393, 195 S.E. 169 (1938).

RESEARCH REFERENCES

ALR. — Items of cost of prosecution for which defendant may be held, 65 A.L.R.2d 854.

17-11-4. Imposition of costs and jail fees upon prosecutor or complainant.

(a) The prosecutor's name shall be endorsed on every indictment, and he shall be compelled to pay all costs and jail fees upon the acquittal or discharge of the person accused when:

(1) The grand jury, by its foreman, on returning "no bill," expresses as its opinion that the prosecution was unfounded or malicious;

(2) A jury on the trial of the prosecution finds it to be malicious; or

(3) The prosecution is abandoned before trial. When it is thus abandoned, the officer who issued the warrant shall enter a judgment against the prosecutor for all the costs and enforce it by an execution in the name of the state or by an attachment for contempt.

(b) A magistrate may, in his discretion, assess costs and jail fees against the person who instigated the prosecution when, at a committal hearing, the action is dismissed for want of probable cause and the magistrate finds that the complaint was unfounded and malicious. This subsection shall not apply to law enforcement personnel.

History. — Laws 1833, Cobb's 1851 Digest, p. 833; Code 1863, § 4518; Code 1868, § 4537; Ga. L. 1871-72, p. 53, § 1; Code 1873, § 4630; Code 1882, § 4630; Penal Code 1895, § 1082; Penal Code 1910, § 1109; Code 1933, § 27-2805; Ga.

L. 1982, p. 3, § 17; Ga. L. 1986, p. 282, § 1.

Cross references. — Assessment of costs in magistrate court criminal cases, Uniform Rules for the Magistrate Courts, Rule 12.3.

JUDICIAL DECISIONS

"Prosecutor" defined. — "Prosecutor," for purposes of this section, was one who instigates a prosecution by making an affidavit charging a named person with the commission of a penal offense on which a warrant was issued or an indictment or accusation was based. Sampson v. State, 43 Ga. App. 89, 157 S.E. 915 (1931); In re Herring, 185 Ga. App. 541, 365 S.E.2d 139 (1988).

"Prosecutor" for purposes of this section was the person who voluntarily goes before the grand jury with the prosecutor's complaint. Sampson v. State, 43 Ga. App. 89, 157 S.E. 915 (1931).

Evidence that return of "no bill, malicious prosecution" is not well-founded. — When a prosecutor is required by rule to show cause why the prosecutor should not be compelled to pay the costs of a criminal case, because of a return by the grand jury of "no bill, malicious prosecution" upon a bill of indictment, it is not incompetent for the prosecutor to show by evidence that such return was not well-founded in the fact. Green v. State, 112 Ga. 52, 37 S.E. 93 (1900).

Whether paragraph (a)(2) or (a)(3) is applicable depends on attachment of jeopardy. — Paragraph (3) (see paragraph (a)(3)) of this section applied when the prosecution is abandoned before the trial, that is, before the trial has reached such a stage as to put the defendant in jeopardy. Paragraph (2) of the section (see paragraph (a)(2)) applied when the trial has reached such a stage as to put the defendant in jeopardy and the jury to find the prosecution to be malicious. Thus, if before the defendant is put in jeopardy the prosecutor abandons the prosecution, the prosecutor may be liable for the costs, but, if the trial before the jury has reached such a stage as to put the defendant in jeopardy it then becomes a jury question whether or not the prosecution is malicious, and, if the jury finds the prosecution is malicious, the costs may be assessed against the prosecutor. Rainey v. State, 50 Ga. App. 256, 177 S.E. 757 (1934).

Failure to endorse prosecutor's name on indictment. — Fact that the name of the prosecutor was not endorsed upon the indictment as required by this section did not involve any right and privileges of a defendant, but only affected the prosecutor, who must pay costs upon the acquittal or discharge of the person accused under circumstances set forth in that section, and any error in this regard was not harmful to a defendant. Lewis v. State, 144 Ga. App. 847, 242 S.E.2d 725 (1978).

Execution on warrant when prosecution abandoned before trial. — When a prosecution is abandoned before trial, the officer who issued the warrant is authorized to enter a judgment against the prosecutor for all costs and enforce the judgment by an execution in the name of the state. An execution on such judgment issued in the name of the accused in the warrant is void. Underwood v. Harvey, 106 Ga. 268, 32 S.E. 124 (1898).

Consent agreement and dismissal of prosecution for child abandonment. — If the prosecuting attorney in a child abandonment case, and not the mother (who was the prosecuting witness), made the determination to enter into a consent agreement and to permit the dismissal of the action against the putative father, the state could not then cast the costs against the prosecuting witness, the trial court having made no finding that the mother abandoned the prosecution. In re Herring, 185 Ga. App. 541, 365 S.E.2d 139 (1988).

Cost of paternity blood test in child abandonment case. — When the state requests pretrial paternity blood testing for a defendant charged with child abandonment, the state must initially pay the cost. A verdict incorporating a finding of parentage would authorize the court to tax the cost of the blood test against the defendant, or under certain circumstances against the prosecutor/prosecutrix or complainant. State v. Slavny, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

Payment of costs may be enforced by imprisonment. Green v. State, 112 Ga. 52, 37 S.E. 93 (1900).

Cited in Lumpkin County v. Davis, 185 Ga. 393, 195 S.E. 169 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Ultimate responsibility for costs will fall upon the defendant, the prosecutor, or the fine and forfeiture fund, depending upon the circumstances. 1971 Op. Att'y Gen. No. U71-42.

"Discharge before trial" occurs at any time before the trial has reached such a stage as to put the accused in jeopardy. 1969 Op. Att'y Gen. No. 69-364.

Fee for issuance of criminal warrant. — Affiant (prosecutor) may not be required to pay the fee for the issuance of a criminal warrant at the time of such issuance. A clear intent is shown to determine the responsibility for such payment at a subsequent time than at the time of the issuance of the criminal warrant. 1969 Op. Att'y Gen. No. 69-364.

RESEARCH REFERENCES

ALR. — Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

17-11-5. Payment of costs and expenses when venue changed.

(a) When the venue in a case is changed, the whole costs of the case, jail fees of the person to be tried, and expenses of the trial in the county to which it was transferred shall be paid by the county from which the case was removed.

(b) The entire court costs, including the costs of the sheriff, bailiff, clerks, and jurors, shall also be paid by the county from which the case was removed and shall have the same priority as jail fees. The county in which the case is tried shall be reimbursed after paying the court costs incurred.

History. — Ga. L. 1871-72, p. 49, § 1; Code 1873, § 4689; Code 1882, § 4689; Ga. L. 1895, p. 70, § 4; Penal Code 1895, § 1083; Penal Code 1910, § 1110; Code 1933, § 27-2806.

JUDICIAL DECISIONS

Cited in Johnston v. State, 118 Ga. 310, 45 S.E. 381 (1903); Lumpkin County v. Davis, 185 Ga. 393, 195 S.E. 169 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Costs to be paid from general funds of the county. — Under former Code 1933, § 27-2806 and Ga. L. 1950, p. 175, § 1 (see O.C.G.A. § 17-11-5), costs in criminal cases transferred to another county on a change of venue should be paid out of the general funds of the county. 1958-59 Op. Att'y Gen. p. 46.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 504 et seq., 535 et seq.

C.J.S. — 22 C.J.S., Criminal Procedure and Rights of the Accused, § 1 et seq.

ARTICLE 2

REIMBURSEMENT OF COUNTIES FOR EXPENSES OF CAPITAL FELONY PROSECUTIONS

Cross references. — Assessment of costs in criminal cases, Uniform Superior Court Rules, Rule 36.15.

U.S. Code. — Procedure for assignment of counsel, Federal Rules of Criminal Procedure, Rule 44(b).

Administrative rules and regulations. — Authority for reimbursement, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Community Affairs, Administration, Executive Division, Rule 110-1-2-.01 et seq.

17-11-20. Short title.

This article shall be known and may be cited as the "Capital Felony Expense Act."

History. — Ga. L. 1979, p. 504, § 1.

17-11-21. Definitions.

As used in this article, the term:

(1) "Capital felony case" means a criminal case in which the death penalty may be imposed upon the defendant under the laws of this state.

(2) "Capital felony expenses" means expenses incurred by a county and paid from county funds as a direct result of a capital felony case being tried by a superior court. The term includes expenses from the date of the arrest of the defendant to the date of the superior court conviction, expenses from the date of the conviction until the date of the last appellate court affirmance of the conviction, expenses from the last appellate court reversal to any subsequent superior court convictions or retrials, expenses from any retrials to the last appellate court action on the conviction, expenses from the date of the arrest of the defendant to the date of the defendant's release if there is no conviction or if the conviction is reversed and there is no retrial, or expenses during any combination of these periods. The term shall not include the following expenses:

(A) Any expenses reimbursed by or pursuant to state law;

(B) The salaries, compensation, and expenses of all county officers and employees, except for any compensation and expenses

of temporary employees employed as a direct result of the capital felony case or extraordinary expenses incurred by county officers and employees as a direct result of the capital felony case; and

(C) County paid supplements to the salaries or compensation of state officers and employees.

(3) "Commissioner" means the commissioner of community affairs.

(4) "County revenue" means the most current available total of adjusted taxes as determined from the annual financial report relating to local government finances filed by the county with the Department of Community Affairs pursuant to Code Section 36-81-8.

History. — Ga. L. 1979, p. 504, § 2; Ga. L. 1983, p. 395, § 1; Ga. L. 1988, p. 1859, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, "County paid" was substituted for "County-paid" at the beginning of subparagraph (2)(C).

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 18, 19, 22 et seq.

17-11-22. Basis for reimbursement of counties for capital felony expenses.

(a) Each county which is responsible for the costs of a capital felony case will be reimbursed for capital felony expenses as provided in this Code section. With respect to one or more capital felony cases, expenses from the date of arrest will be accumulated. When one or more capital felony cases result in capital felony expenses, the accumulation of which is more than 5 percent of county revenue for the calendar year in which the superior court conviction occurs or in which the defendant is released if not convicted, the county will be reimbursed for all such accumulated capital felony expenses in excess of the 5 percent level. After a county has qualified or been reimbursed for capital felony expenses for any calendar year, the county shall be eligible for any capital felony expenses resulting from such case or cases in subsequent calendar years prior to the appeal of such case or cases. County revenues shall not be applicable in determining the amount of reimbursement for capital felony expenses occurring in such subsequent years prior to the appeal of the case or cases.

(b) If one or more capital felony cases are appealed, expenses from the date of the superior court conviction will be accumulated. When the appeal of one or more capital felony cases results in capital felony

expenses, the accumulation of which is more than 5 percent of county revenue for the calendar year in which the last appellate court action on the conviction occurs, the county will be reimbursed for all such capital felony expenses in excess of the 5 percent level. If the county chooses not to seek reimbursement for capital felony expenses from the date of arrest to the date of the superior court conviction and instead seeks reimbursement for its capital felony expenses through the last appellate court action, the county will be reimbursed for all accumulated capital felony expenses in excess of the 5 percent level.

(c) If a capital felony case is appealed and the conviction is reversed, capital felony expenses for any subsequent retrial and appeals will be handled in accordance with the provisions of subsections (a) and (b) of this Code section.

(d) No capital felony expenses for which reimbursement has already been made will again be included in any subsequent calculations or reimbursement requests.

History. — Ga. L. 1979, p. 504, § 3; Ga. L. 1983, p. 395, § 2; Ga. L. 1988, p. 1859, § 2.

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

17-11-23. When reimbursement payments to be made; manner of reimbursement where requests exceed funds appropriated.

(a)(1) Reimbursement payments for eligible capital felony expenses under this article will be made to the governing authority of each county incurring capital felony expenses. The payments will be made during the second quarter of a calendar year for capital felony expenses eligible for reimbursement during the immediately preceding calendar year; provided, however, that, if a county is reimbursed during the second quarter of a calendar year and has additional capital felony expenses eligible for reimbursement during the remainder of such calendar year resulting from the same case or cases, payments will be made during the fourth quarter of such calendar year for the additional capital felony expenses eligible for reimbursement.

(2) Reimbursement payments shall be made from funds appropriated for such purpose pursuant to subsection (a) of Code Section 17-11-24, and no payments are required to be made if funds are not available or have not been appropriated.

(b)(1) In the event that requests for reimbursement exceed the amount appropriated for this article, the commissioner shall have the right to reduce each request proportionally so that the total amount

of requests shall not exceed the total amount of funds available for reimbursement payments at the time of the request.

(2) Notwithstanding any other provisions of this Code section, during the first payment cycle of a state fiscal year (fourth quarter of a calendar year) not more than one-half of the funds available for reimbursement will be expended for reimbursement purposes.

History. — Ga. L. 1979, p. 504, § 5; Ga. L. 1983, p. 395, § 3; Ga. L. 1988, p. 1859, § 3.

17-11-24. Administration of article generally; adoption of rules and regulations; maintenance of records of capital felony expenses by clerks of superior courts.

(a) The commissioner shall administer this article and shall make payments to counties for the reimbursement of capital felony expenses as provided by this article. The payments shall be made from funds appropriated to the Department of Community Affairs specifically for the purpose of making reimbursements pursuant to this article.

(b) The commissioner shall adopt rules and regulations for the administration of this article. The rules and regulations shall be distributed to the county governing authorities and to the clerks of the superior courts.

(c) The clerks of the superior courts will be the local administrators of this article; and, consistent with rules and regulations promulgated by the commissioner as provided by subsection (b) of this Code section, the clerks will maintain records of capital felony expenses for the purposes of this article. Based on such records, the clerk of each superior court will certify to the commissioner, during the first quarter of each calendar year, capital felony expenses eligible for reimbursement during the preceding calendar year.

History. — Ga. L. 1979, p. 504, § 4; Ga. L. 1983, p. 395, § 4.

CHAPTER 12

LEGAL DEFENSE FOR INDIGENTS

Article 1

Georgia Public Defender Council

Sec.

17-12-1. Short title; Georgia Public Defender Council; responsibilities.
17-12-2. Definitions.
17-12-3. Council created; membership.
17-12-4. Authority of council; annual audit.
17-12-5. Director; qualifications; powers and responsibilities.
17-12-6. Assistance of council to public defenders.
17-12-7. Councilmembers; responsibilities; voting; removal; quorum; meetings; officers; expenses.
17-12-8. Approval by council of programs for representation of indigents; public access to policies and standards [Repealed].
17-12-9. Continuing legal education for public defenders and staff.
17-12-10. Annual reporting.
17-12-10.1. Legislative oversight committee created; membership; audits.
17-12-10.2. Civil liability.
17-12-11. Mental health advocacy division; duties, responsibilities, and management.
17-12-12. Georgia capital defender division; duties, responsibilities, and management.
17-12-12.1. Payment of attorney in event of conflict of interest in capital cases; number of attorneys appointed; county governing authority's financial responsibility; expenses.
17-12-13. Effective date of article [Repealed].
17-12-14. Applicability of article [Repealed].

Article 1A

Representation of Indigents

Sec.

17-12-19.1 through 17-12-19.14. [Repealed].

Article 2

Public Defenders

17-12-20. Public defender selection panel for each circuit; appointment of public defender; removal; vacancies.
17-12-21. Qualifications for public defender position.
17-12-22. Procedure for appointment of attorneys for indigent defendants in event of public defender's conflict of interest; identification of conflict.
17-12-23. Cases in which public defender representation required; timing of representation; juvenile divisions; contracts with local governments.
17-12-24. Financial eligibility for indigent defense services representation; operation of public defender's office.
17-12-25. Salary of public defender; private practice prohibited.
17-12-25.1. Accountability court supplement.
17-12-26. Budget of the council.
17-12-27. Appointment of assistant public defenders; salary; promotions.
17-12-28. Appointment of investigator; role and responsibilities; compensation; promotions.
17-12-29. Employment of supplemental personnel; compensation.
17-12-30. Classification of personnel; responsibilities; compensation; local supplements.

Sec.
17-12-31. Employment of additional personnel.
17-12-32. Contracting with the council for personnel paid by local government.
17-12-33. Assistant public defenders' private practice of law or concurrent judicial service prohibited; admission to bar in Georgia.
17-12-34. Pro rata sharing of expenses and resources by counties in each circuit.
17-12-35. Acceptance of other funding.
17-12-36. Alternative delivery system; annual review of operations by council; record keeping.
17-12-37. Effective date of article.

Article 3

Assistance by Third-Year Law Students or Staff Instructors

17-12-40. Definitions.
17-12-41. Assistance of public defender by third-year law student or staff instructor.
17-12-42. Judge may prescribe type of assistance provided by law student or staff instructor; certification by law school dean.
17-12-43. Clerk of court to maintain records; limited period of assistance.
17-12-44. Exception to qualification requirements for public defender or assistant public defender.
17-12-45. Effective date of article.

Article 3A

Recovery of Attorney's Fees and Costs

17-12-50. Definitions.
17-12-51. Repayment of attorney's fees as condition of probation.
17-12-52. Recovery of payment or reimbursement by a county or municipality.

Article 4

Verification of Indigency

17-12-80. Verification of indigency required; procedure; timing of notification of eligibility.

Article 5

Office of Multicounty Public Defender

17-12-100 through 17-12-108. [Repealed].

Article 6

Georgia Capital Defender

17-12-120 through 17-12-128. [Repealed].

Cross references. — Constitutional guarantee of access to courts, Ga. Const. 1983, Art. I, Sec. I, Para. XII. Constitutional guarantee of benefit of counsel, Ga. Const. 1983, Art. I, Sec. I, Para. XIV.

Administrative rules and regulations. — Grants of Georgia Indigent Defense Council, Official Compilation of the Rules and Regulations of the State of Georgia, Title 294.

RESEARCH REFERENCES

ALR. — Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 A.L.R.4th 874.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

ARTICLE 1

GEORGIA PUBLIC DEFENDER COUNCIL

Cross references. — Provision of legal services to indigents by law students, T. 15, C. 20. Application and appointment of counsel, Uniform State Court Rules, Rule 29.2.

Editor's notes. — Ga. L. 2003, p. 191, § 1, effective December 31, 2003, repealed the Code sections formerly codified as this article, and enacted the current article. The former article consisted of Code Sections §§ 17-12-1 through 17-12-14, relating to local indigent defense programs, and was based on Ga. L. 1968, p. 999, §§ 1 - 13; Ga. L. 1974, p. 1100, § 1; Ga. L. 1982, p. 1181, §§ 1, 2.

U.S. Code. — Right to and assignment of counsel, Federal Rules of Criminal Procedure, Rule 44.

Law reviews. — For article, "The Indigent Defendant in Georgia Prior to Gideon v. Wainwright," see 2 Ga. St. B.J. 207 (1965). For article discussing legal representation for indigents under the Georgia Criminal Justice Defense Act, proposed in Georgia in 1977, see 13 Ga. St. B.J. 141 (1977). For article, "Raising the Bar: Indigent Defense and the Right to a Partisan Lawyer," see 69 Mercer L. Rev. 697 (2018). For article, "Privileging Public Defense Research," see 69 Mercer L. Rev. 771 (2018).

For note on the 2003 enactment of this article, see 20 Ga. St. U.L. Rev. 105 (2003).

For comment on Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), establishing an indigent's right to appointed counsel in nonfelony criminal cases, see 22 J. of Pub. L. 191 (1973).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the issues dealt with, decisions under former Ga. L. 1968, p. 999, and T. 17, C. 12, Art. 1 are included in the annotations for this article.

Article not exclusive method for providing indigents right to counsel. — While the former Georgia Criminal Justice Act should have provided effective means of affording counsel to indigent defendants, it was not the exclusive method for accomplishing that end. Perry v. State, 120 Ga. App. 304, 170 S.E.2d 350 (1969) (decided under former Ga. L. 1968, p. 999).

Inadequacy of "Declaration of Indigency" form as indirectly denying defendant right to appointed counsel. — See Stapp v. State, 249 Ga. 289, 290 S.E.2d 439 (1982) (decided under former Ga. L. 1968, p. 999).

Remand was required since the record did not show how it was determined that the defendant did not qualify for appointed legal assistance and revealed that the trial court failed to exercise the court's affirmative duty of determining whether the defendant exercised reasonable diligence in attempting to retain counsel. McQueen v. State, 228 Ga. App. 732, 492 S.E.2d 720 (1997) (decided under former O.C.G.A. T. 17, C. 12, Art. 1).

Insufficiency of record on appeal. — Since it was not clear from the record that when the defendant received the court's order the defendant was required to provide proof of indigency, whether the court considered the defendant's proof of indigency, or whether the court found that the court could not determine indigency due to the defendant's failure or refusal to provide the necessary proof of indigency, the case was remanded for a hearing to determine whether or not the defendant was indigent. Mapp v. State, 199 Ga. App. 47, 403 S.E.2d 833 (1991) (decided under former O.C.G.A. T. 17, C. 12, Art. 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 357 et seq., 375 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, §§ 441 et seq. 22A C.J.S., Criminal Procedure and Rights of the Accused, § 725 et seq.

ALR. — Duty to advise accused as to right to assistance of counsel, 3 A.L.R.2d 1003.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution, 93 A.L.R.2d 747.

Construction and effect of statutes providing for office of public defender, 36 A.L.R.3d 1403.

Accused's right to represent himself in state criminal proceedings — modern state cases, 98 A.L.R.3d 13.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 A.L.R.4th 183.

Recovery under state law of attorney's fees by lay pro se litigant, 14 A.L.R.5th 947.

17-12-1. Short title; Georgia Public Defender Council; responsibilities.

(a) This chapter shall be known and may be cited as the "Georgia Indigent Defense Act of 2003."

(b) The Georgia Public Defender Council shall be an independent agency within the executive branch of state government.

(c) The council shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter.

History. — Code 1981, § 17-12-1, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2007, p. 65, § 1/SB 139; Ga. L. 2015, p. 519, § 7-1/HB 328.

Cross references. — Appointment of counsel for indigent defendants, Uniform Superior Court Rules, Rule 29.

U.S. Code. — Right to and assignment of counsel, Federal Rules of Criminal Procedure, Rule 44.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on legal ethics, see 59 Mercer L. Rev. 253 (2007).

JUDICIAL DECISIONS

Construction with former § 17-12-10. — Georgia Indigent Defense Act, in replacing former O.C.G.A. § 17-12-10(c), did not preclude a trial court from ordering restitution of attorney fees as part of the court's general power to impose reasonable conditions of probation under O.C.G.A. § 42-8-35; thus, a defendant was properly ordered to reimburse the costs of the defendant's legal representation and that aspect of the defendant's sentence was not a nullity. State v. Pless, 282 Ga. 58, 646 S.E.2d 202 (2007).

Failure to exercise diligence in procuring counsel. — Trial court did not abuse the court's discretion by proceeding with trial and refusing to delay the proceedings after concluding that the defendant did not exercise reasonable diligence in procuring counsel because the record showed that the defendant repeatedly claimed, over a period of three months, that the defendant was in the process of retaining counsel, and the defendant was advised on multiple occasions by the trial court to make a better effort to do so.

Hatcher v. State, 320 Ga. App. 366, 739 S.E.2d 805 (2013).

Transcript costs for indigents. — It was error to hold that under O.C.G.A. § 17-12-34 of the Georgia Indigent Defense Act of 2003, the Georgia Public Defender Standards Council was required to pay for indigent defendants' costs of transcripts in criminal cases; under laws existing before the act, counties were required to pay for such transcripts, and the act does not repeal these laws by implication. Ga. Public Defender Stds. Council v. State of Ga., 284 Ga. App. 660, 644 S.E.2d 510 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Placement of Georgia Public Defenders Standards Council in executive branch. — General Assembly was authorized to place the Georgia Public Defenders Standards Council (GPDSC) in the executive branch. A suit by GPDSC, whether by pro bono counsel or otherwise, against the state for so placing the GPDSC in the executive branch (or for any other reason) would be ultra vires and illegal. 2009 Op. Att'y Gen. No. 2009-2.

Responsibilities of Director of Georgia Public Defender Standards Council. — Director of the Georgia Public Defender Standards Council has broad authority and is responsible for the day to day operation of the agency. The Council's limited responsibilities, to be carried out concurrently with the director, include setting standards, conducting audits, making financial disclosures, receiving funds, providing for legal education, reporting to the General Assembly, and providing procedures for the appointment of conflict council. 2009 Op. Att'y Gen. No. 2009-5.

17-12-2. Definitions.

As used in this chapter, the term:

(1) "Assistant public defender" means an attorney who is employed by any circuit public defender.

(2) "Circuit public defender" means the head of a public defender office providing indigent defense representation within any given judicial circuit of this state.

(3) "Circuit public defender office" means the office of any of the several circuit public defenders.

(4) "Council" means the Georgia Public Defender Council.

(5) "Director" means the director of the Georgia Public Defender Council.

(6) "Indigent person" or "indigent defendant" means:

(A) A person charged with a misdemeanor, violation of probation, or a municipal or county offense punishable by imprisonment who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person or his or her dependents;

(B) A juvenile charged with a delinquent act or a violation of probation punishable by detention whose parents earn less than 125 percent of the federal poverty guidelines unless there is evidence that the juvenile or his or her parents have other resources that might reasonably be used to employ a lawyer without undue hardship on the juvenile, his or her parents, or the parent's dependents; and

(C) A person charged with a felony who earns or, in the case of a juvenile, whose parents earn, less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person, his or her dependents, or, in the case of a juvenile, his or her parents or the parent's dependents.

In no case shall a person whose maximum income level exceeds 150 percent of the federal poverty level or, in the case of a juvenile, whose household income exceeds 150 percent of the federal poverty level be an indigent person or indigent defendant.

(7) "Legislative oversight committee" means the Legislative Oversight Committee for the Georgia Public Defender Council.

(8) "Public defender" means an attorney who is employed in a circuit public defender office or who represents an indigent person pursuant to this chapter.

History. — Code 1981, § 17-12-2, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2006, p. 752, § 4/SB 503; Ga. L. 2008, p. 846, § 15/HB 1245; Ga. L. 2015, p. 519, § 7-2/HB 328.

JUDICIAL DECISIONS

Indigency determination factoring in parents income appropriate. — While the issue of a defendant's indigency for the purposes of obtaining court-appointed counsel could not be reviewed, it was not inappropriate to consider under O.C.G.A. § 17-12-2(6)(A), along with the defendant's income, the income of the defendant's parents as the defendant still lived at home. Thomas v. State, 297 Ga. App. 416, 677 S.E.2d 433 (2009).

Inquiry into eligibility for appointed counsel. — Trial court did not commit reversible error in failing to conduct a specific inquiry to determine the defendant's eligibility for appointed counsel because the defendant had not previously applied for appointed counsel and expressly rejected the opportunity to do so. Longo v. City of Dunwoody, 351 Ga. App. 735, 832 S.E.2d 884 (2019), cert. denied, 2020 Ga. LEXIS 255 (Ga. 2020).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1085 et seq.

17-12-3. Council created; membership.

(a) There is created the Georgia Public Defender Council to be composed of nine members. Other than county commission members, members of the council shall be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants.

(b) Effective July 1, 2011, the council shall be reconstituted. The members serving on the council immediately prior to July 1, 2011, shall cease to serve on that date, but such prior members shall be eligible for reappointment to succeed themselves or to fill another position on the council.

(c) The nine members of the council shall be appointed as follows:

(1) Five members shall be appointed by the Governor. The Governor shall appoint three county commissioners who have been elected and are serving as members of a county governing authority in this state. The county commissioner councilmembers appointed by the Governor shall be from different geographic regions of this state. The Governor may solicit recommendations for such appointees from the Association County Commissioners of Georgia. Each county commissioner councilmember shall serve a term of four years; provided, however, that the initial appointments shall be for one, two, and three years, respectively, as designated by the Governor for each appointment, and thereafter, such members shall serve terms of four years. A county commission councilmember shall be eligible to serve so long as he or she retains the office by virtue of which he or she is serving on the council. The Governor shall appoint two other members to the council, one of whom shall be a circuit public defender, who shall serve terms of four years;

(2) Two members shall be appointed by the Lieutenant Governor and each shall serve terms of four years; provided, however, that the initial appointments shall be for one and four years, respectively, as designated by the Lieutenant Governor for each appointment, and thereafter, such members shall serve terms of four years; and

(3) Two members shall be appointed by the Speaker of the House of Representatives and each shall serve terms of four years; provided, however, that the initial appointments shall be for two and three years, respectively, as designated by the Speaker of the House of Representatives for each appointment, and thereafter, such members shall serve terms of four years.

(d) All initial terms shall begin on July 1, 2011, and their successors' terms shall begin on July 1 following their appointment. Any vacancy

for a member shall be filled by the appointing authority, and such appointee shall serve the balance of the vacating member's unexpired term. Any member of the council may be appointed to successive terms.

(e) In making the appointments of members of the council who are not county commissioners, the appointing authorities shall seek to identify and appoint persons who represent a diversity of backgrounds and experience and may solicit suggestions from the State Bar of Georgia, local bar associations, the Georgia Association of Criminal Defense Lawyers, the councils representing the various categories of state court judges in Georgia, and the Prosecuting Attorneys' Council of the State of Georgia, as well as from the public and other interested organizations and individuals within this state. The appointing authorities may solicit recommendations for county commissioners from the Association County Commissioners of Georgia. The appointing authorities shall not appoint a prosecuting attorney as defined in paragraph (6) of Code Section 19-13-51, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council of the State of Georgia to serve on the council.

History. — Code 1981, § 17-12-3, enacted by Ga. L. 2011, p. 91, § 1/HB 238; Ga. L. 2015, p. 519, § 7-3/HB 328.

Editor's notes. — Ga. L. 2011, p. 91, § 1/HB 238, repealed former Code Section 17-12-3, pertaining to the creation and membership of the Georgia Public Defender Standards Council, and enacted the present Code section, effective July 1, 2011. The former Code section was based on Code 1981, § 17-12-3, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, Ex. Sess., p. ES3, § 11/HB 1EX; Ga. L. 2006, p. 752, § 5/SB 503; Ga. L. 2008, p. 846, § 16/HB 1245.

U.S. Code. — Right to and assignment of counsel, Federal Rules of Criminal Procedure, Rule 44.

RESEARCH REFERENCES

C.J.S. — 14A C.J.S., Civil Rights, § 401.

17-12-4. Authority of council; annual audit.

(a) The council:

(1) Shall be a legal entity;

(2) Shall have perpetual existence;

(3) May contract;

(4) May own property;

(5) May accept funds, grants, and gifts from any public or private source, which shall be used to defray the expenses incident to implementing its purposes;

(6) May adopt and use an official seal; and

(7) May establish a principal office.

(b) The council shall establish auditing procedures as may be required in connection with the handling of public funds. The state auditor shall be authorized and directed to make an annual audit of the transactions of the council and to make a complete report of the same to the General Assembly. The annual audit shall disclose all moneys received by the council and all expenditures made by the council by revenue source, including all programs and special projects itemized in the General Appropriations Act. The annual audit shall include an itemization by revenue source of encumbered and reserved money. Revenue sources shall include each county governing authority's expenditures which are made pursuant to Code Sections 17-12-31 and 17-12-32 and city or county expenditures which are made pursuant to subsection (d) of Code Section 17-12-23. The state auditor shall also make an audit of the affairs of the council at any time when requested to do so by a majority of the council or by the Governor or General Assembly.

(c) The council may not provide compensation from its funds to any administrative or clerical personnel employed by the council if the personnel are then receiving retirement compensation from any retirement or pension fund created by Title 47 to provide compensation for past services as a judicial officer, prosecuting attorney, indigent defense attorney, court officer, or law enforcement officer except for county or municipal retirement funds.

History. — Code 1981, § 17-12-4, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 17/HB 1245; Ga. L. 2011, p. 91, § 2/HB 238.

17-12-5. Director; qualifications; powers and responsibilities.

(a) To be eligible for appointment as the director, a candidate shall be a member in good standing of the State Bar of Georgia with at least seven years' experience in the practice of law. The director shall be appointed by the Governor and shall serve at the pleasure of the Governor.

(b)(1) The director shall work with and provide support services and programs for circuit public defender offices and other attorneys representing indigent persons in criminal or juvenile cases in order to improve the quality and effectiveness of legal representation of such persons and otherwise fulfill the purposes of this chapter. Such services and programs shall include, but shall not be limited to, technical, research, and administrative assistance; educational and training programs for attorneys, investigators, and other staff; assistance with the representation of indigent defendants with mental disabilities; assistance with the representation of juveniles; assistance with death penalty cases; and assistance with appellate advocacy.

(2) The director may establish divisions within the office to administer the services and programs as may be necessary to fulfill the purposes of this chapter. The director shall establish a mental health advocacy division and the Georgia capital defender division.

(3) The director may hire and supervise such staff employees and may contract with outside consultants on behalf of the office as may be necessary to provide the services contemplated by this chapter.

(c) The director shall have and may exercise the following power and authority:

(1) The power and authority to take or cause to be taken any or all action necessary to perform any duties, responsibilities, or functions which the director is authorized by law to perform and to exercise any power or authority which the council is authorized under subsection (a) of Code Section 17-12-4 to exercise; and

(2) The power and authority to assist the council in the performance of its duties, responsibilities, and functions and the exercise of its power and authority.

(d) The director shall:

(1) Prepare and submit to the council a proposed budget for the council. The director shall also prepare and submit an annual report containing pertinent data on the operations, costs, and needs of the council and such other information as the council may require;

(2) Develop such procedures as the director determines may be necessary to carry out the provisions of this chapter;

(3) Administer and coordinate the operations of the council;

(4) Maintain proper records of all financial transactions related to the operation of the council;

(5) At the director's discretion, solicit and accept on behalf of the council any funds that may become available from any source, including government, nonprofit, or private grants, gifts, or bequests;

(6) Coordinate the services of the council with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this chapter;

(7) Provide for the training of attorneys and other staff involved in the legal representation of persons subject to this chapter;

(8) Attend all council meetings, except those meetings or portions thereof that address the question of appointment or removal of the director;

(9) Ensure that the expenditures of the council are not greater than the amounts budgeted or available from other revenue sources;

(10) Hire or remove a mental health advocate who shall serve as director of the division of the office of mental health advocacy;

(11) Hire or remove the capital defender who shall serve as the director of the division of the office of the Georgia capital defender; and

(12) Evaluate each circuit public defender's job performance.

(e) The director shall not:

(1) Provide direct legal representation to any person entitled to services pursuant to this chapter; and

(2) Engage in the private practice of law for profit.

History. — Code 1981, § 17-12-5, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2008, p. 846, § 18/HB 1245; Ga. L. 2011, p. 91, § 3/HB 238; Ga. L. 2015, p. 519, § 7-4/HB 328.

OPINIONS OF THE ATTORNEY GENERAL

Responsibilities of Director of Georgia Public Defender Standards Council. — Director of the Georgia Public Defender Standards Council has broad authority and is responsible for the day to day operation of the agency. The Council's limited responsibilities, to be carried out concurrently with the director, include setting standards, conducting audits, making financial disclosures, receiving funds, providing for legal education, reporting to the General Assembly, and providing procedures for the appointment of conflict council. 2009 Op. Att'y Gen. No. 2009-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Attorneys at Law, §§ 225 et seq., 232 et seq., 278 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 441 et seq.

17-12-6. Assistance of council to public defenders.

(a) The council may assist the public defenders throughout the state in their efforts to provide adequate legal defense to the indigent. Assistance may include:

(1) The preparation and distribution of a basic defense manual and other educational materials;

(2) The preparation and distribution of model forms and documents employed in indigent defense;

(3) The promotion of and assistance in the training of indigent defense attorneys;

(4) The provision of legal research assistance to public defenders; and

(5) The provision of such other assistance to public defenders as may be authorized by law.

(b) The council:

(1) Shall be the fiscal officer for the circuit public defender offices and shall account for all moneys received from each governing authority; and

(2) May collect, maintain, review, and publish in print or electronically records and statistics for the purpose of evaluating the delivery of indigent defense representation in Georgia.

History. — Code 1981, § 17-12-6, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 19/HB 1245; Ga. L. 2010, p. 838, § 10/SB 388; Ga. L. 2015, p. 519, § 7-5/HB 328.

17-12-7. Councilmembers; responsibilities; voting; removal; quorum; meetings; officers; expenses.

(a) All members of the council shall at all times act in the best interest of indigent defendants who are receiving legal representation under the provisions of this chapter.

(b) All members of the council shall be entitled to vote on any matter coming before the council unless otherwise provided by law or by rules adopted by the council concerning conflicts of interest.

(c) Each member of the council shall serve until a successor has been appointed. Removal of councilmembers shall be for cause and shall be in accordance with policies and procedures adopted by the council.

(d) Unless otherwise provided in this article, a quorum shall be a majority of the members of the council who are then in office, and decisions of the council shall be by majority vote of the members present, except that a majority of the entire council shall be required to approve the appointment of the chairperson and for annual approval of an alternative delivery system pursuant to Code Section 17-12-36 and other matters as set forth in Code Section 17-12-36. The vote of two-thirds of the members of the entire council shall be required to remove the chairperson of the council or to overturn the director's decision regarding the removal of a circuit public defender.

(e) The council shall meet at least semiannually and at such other times and places as it deems necessary or convenient for the performance of its duties.

(f) The council shall elect a chairperson and such officers from the members of the council as it deems necessary and shall adopt such rules for the transaction of its business as it desires. The chairperson and officers shall serve for a term of two years and may be removed without

cause by a vote of two-thirds of the members of the entire council and for cause by a majority vote of the entire council. The chairperson shall retain a vote on all matters except those in which the chairperson has a conflict of interest or the removal of the chairperson for cause. The council shall keep and maintain minutes of all council meetings.

(g) The members of the council shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties as members of the council. Any expenses incurred by the council shall be paid from the general operating budget of the council.

History. — Code 1981, § 17-12-7, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2011, p. 91, § 4/HB 238; Ga. L. 2014, p. 866, § 17/SB 340; Ga. L. 2015, p. 519, § 7-6/HB 328.

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1085 et seq.

17-12-8. Approval by council of programs for representation of indigents; public access to policies and standards.

Reserved. Repealed by Ga. L. 2015, p. 519, § 7-7/HB 328, effective July 1, 2015.

Editor's notes. — This Code section was based on Code 1981, § 17-12-8, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, Ex. Sess., p. ES3, § 12/HB 1EX; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2005, p. 910, § 1/HB 366; Ga. L. 2006, p. 752, § 6/SB 503; Ga. L. 2008, p. 846, § 20/HB 1245; Ga. L. 2011, p. 91, § 5/HB 238.

17-12-9. Continuing legal education for public defenders and staff.

The council shall be authorized to conduct or approve for credit or reimbursement, or both, basic and continuing legal education courses or other appropriate training programs for the circuit public defenders or their staff members. The council, in accordance with such policies as it shall adopt, shall be authorized to provide reimbursement, in whole or in part, for the actual expenses incurred by any circuit public defender or their staff members in attending any approved course or training program from funds as may be appropriated or otherwise made available to the council. The circuit public defenders or their staff members shall be authorized to receive reimbursement for actual expenses incurred in attending approved courses or training programs. The council shall adopt policies governing the approval of courses and training programs for credit or reimbursement as may be necessary to administer this Code section properly.

History. — Code 1981, § 17-12-9, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 21/HB 1245; Ga. L. 2011, p. 91, § 6/HB 238.

17-12-10. Annual reporting.

(a) Upon request, the council shall prepare annually a report of its activities in order to provide the General Assembly, the Governor, and the Supreme Court of Georgia with an accurate description and accounting of the preceding year's expenditures and revenue, including moneys received from cities and county governing authorities.

(b) Upon request, the council shall provide to the General Assembly, the Governor, and the Supreme Court of Georgia a detailed analysis of all grants and funds, whether public or private, applied for or granted, together with how and in what manner the same are to be utilized and expended.

(c) Upon request, the director shall prepare annually a report in order to provide the General Assembly, the Supreme Court, and the Governor with information on the council's assessment of the delivery of indigent defense services, including, but not limited to, the costs involved in operating each program and each governing authority's indigent person verification system, methodology used, costs expended, and savings realized.

History. — Code 1981, § 17-12-10, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 22/HB 1245; Ga. L. 2011, p. 91, § 7/HB 238; Ga. L. 2015, p. 519, § 7-8/HB 328.

17-12-10.1. Legislative oversight committee created; membership; audits.

(a) There is created the Legislative Oversight Committee for the Georgia Public Defender Council which shall be composed of eight persons: three members of the House of Representatives appointed by the Speaker of the House of Representatives, three members of the Senate appointed by the Senate Committee on Assignments or such person or entity as established by Senate rule, and one member of the House of Representatives and one member of the Senate appointed by the Governor. The members of such committee shall be selected within ten days after the convening of the General Assembly in each odd-numbered year and shall serve until their successors are appointed.

(b) The Speaker of the House of Representatives shall appoint a member of such committee to serve as chairperson, and the Senate Committee on Assignments or such person or entity as established by Senate rule shall appoint one member of the committee to serve as vice chairperson during each even-numbered year. The Senate Committee

on Assignments or such person or entity as established by Senate rule shall appoint a member of such committee to serve as chairperson, and the Speaker of the House of Representatives shall appoint one member to serve as vice chairperson during each odd-numbered year. Such committee shall meet at least once each year and, upon the call of the chairperson, at such additional times as deemed necessary by the chairperson.

(c) It shall be the duty of such committee to review and evaluate:

(1) Information on new programs submitted by the council;

(2) Information on policies proposed by the council;

(3) The strategic plans for the council;

(4) Program evaluation reports and budget recommendations of the council;

(5) The fiscal impact of fees and fines on counties;

(6) The reports submitted pursuant to Code Section 15-21A-7 in order to identify, among other things, opportunities to reduce or consolidate fees, fines, and surcharges; and

(7) Such other information or reports as deemed necessary by such committee.

(d) The council and director shall cooperate with such committee and provide such information or reports as requested by the committee for the performance of its functions.

(e) The council shall submit its budget estimate to the director of the Office of Planning and Budget in accordance with subsection (a) of Code Section 45-12-78.

(f) The members of such committee shall receive the allowances authorized for legislative members of legislative committees. The funds necessary to pay such allowances shall come from funds appropriated to the House of Representatives and the Senate.

(g) The legislative oversight committee shall be authorized to request that a performance audit of the council be conducted.

History. — Code 1981, § 17-12-10.1, enacted by Ga. L. 2004, Ex. Sess., p. ES3, § 13/HB 1EX; Ga. L. 2007, p. 65, § 2/SB 139; Ga. L. 2008, p. 846, § 23/HB 1245; Ga. L. 2011, p. 91, § 8/HB 238; Ga. L. 2015, p. 519, § 7-9/HB 328.

17-12-10.2. Civil liability.

The members of the council as created by this article, the members of the circuit public defender supervisory panel created by Article 2 of this chapter, and other policy-making or administrative personnel acting in

a policy-making or administrative capacity shall not be subject to civil liability resulting from any act or failure to act in the implementation and carrying out of the purposes of this chapter.

History. — Code 1981, § 17-12-10.2, § 14/HB 1EX; Ga. L. 2008, p. 846, enacted by Ga. L. 2004, Ex. Sess., p. ES3, § 24/HB 1245.

17-12-11. Mental health advocacy division; duties, responsibilities, and management.

(a) The mental health advocacy division shall represent in any court in this state indigent persons found not guilty by reason of insanity at the time of the crime or found mentally incompetent to stand trial and shall be the successor to the office of mental health advocacy created by Article 4 of this chapter as it existed on June 30, 2008. Any assets or resources of the office of mental health advocacy shall be transferred to the council. The mental health advocacy division office shall serve all counties of this state.

(b) Whenever any person has been found not guilty by reason of insanity at the time of the crime pursuant to Code Section 17-7-131 or found mentally incompetent to stand trial pursuant to Code Section 17-7-130 and has been determined to be an indigent person, the court in which such case is pending shall notify the mental health advocacy division, and the division may assume the defense and representation of such person in all matters pursuant to Code Sections 17-7-130 and 17-7-131, as applicable, if the resources, funding, and staffing of the division allow; provided, however, that the circuit public defender or other attorney who represented the indigent person at the time of the finding of not guilty by reason of insanity at the time of the crime or the finding of mentally incompetent to stand trial shall have the option to retain responsibility for the representation of any such person.

(c) Nothing in this Code section shall prevent the circuit public defender, the court, or the court appointed attorney from requesting the participation of the mental health advocacy division prior to a finding of not guilty by reason of insanity at the time of the crime or a finding of mentally incompetent to stand trial. The circuit public defender, the court, or the court appointed attorney may request that the mental health advocacy division assist in the case prior to a plea being entered and accepted by the court.

(d) If for any reason the mental health advocacy division is unable to represent any indigent person found not guilty by reason of insanity at the time of the crime or found mentally incompetent to stand trial, such representation shall be provided as otherwise provided by law.

(e) The director shall be responsible for management of the mental health advocacy division; provided, however, that the director may

delegate day-to-day operations of the division to the mental health advocate.

History. — Code 1981, § 17-12-11, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, Ex. Sess., p. ES3, § 15/HB 1EX; Ga. L. 2008, p. 846, § 25/HB 1245.

17-12-12. Georgia capital defender division; duties, responsibilities, and management.

(a) The Georgia capital defender division shall represent all indigent persons charged with a capital felony for which the death penalty is being sought in any court in this state and shall be the successor to the Office of the Georgia Capital Defender created by Article 6 of this chapter as it existed on June 30, 2008. Any assets or resources of the Office of the Georgia Capital Defender shall be transferred to the council. The Georgia capital defender division shall serve all counties of this state.

(b) Whenever any person accused of a capital felony for which the death penalty is being sought has been determined to be an indigent person who has requested the assistance of counsel, the court in which the charges are pending shall notify the Georgia capital defender division, and the division shall assume the defense of such person except as provided in Code Section 17-12-12.1.

(c) No person shall be assigned the primary responsibility of representing an indigent person accused of a capital offense for which the death penalty is sought unless such person is authorized to practice law in this state and is otherwise competent to counsel and defend a person charged with a capital felony.

(d) The Georgia capital defender division or appointed counsel's defense of a defendant in a case in which the death penalty is sought shall include all proceedings in the trial court and any appeals to the Supreme Court of Georgia. Neither the Georgia capital defender division nor appointed counsel shall assist with any petition for a writ of habeas corpus in federal court.

(e) The director shall be responsible for management of the Georgia capital defender division; provided, however, that the director may delegate day-to-day operations of the division to the capital defender.

History. — Code 1981, § 17-12-12, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 26/HB 1245.

Law reviews. — For article, "The Indigent Defendant in Georgia," see 26 Ga. B.J. 395 (1964). For article supporting the adoption of comprehensive right to counsel legislation, see 3 Ga. St. B.J. 157 (1966).

For note suggesting attorney's due process right to be compensated for representing an indigent, see 16 Mercer L. Rev. 367 (1964).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1953, Nov.-Dec. Sess., p. 478, §§ 1, 2; Ga. L. 1968, p. 999, § 4, and former §§ 17-12-60 and 17-12-61, are included in the annotations for this Code Section.

Purpose of Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1 insofar as that law related to appeals in forma pauperis was to ensure that no person convicted of a capital felony shall be denied the right of appeal because of that person's poverty. McCrary v. State, 229 Ga. 733, 194 S.E.2d 480 (1972).

Lack of counsel after sentenced to death violates right to counsel. — Lack of counsel after the death sentence is imposed deprives the accused of the accused's vital constitutional right to counsel and renders the accused's trial and sentence void. Sims v. Balkcom, 220 Ga. 7, 136 S.E.2d 766 (1964) (decided under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 2).

Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1 et seq. was not unconstitutional as violating Ga. Const. 1945, Art. III, Sec. VII, Para. VIII; Art. VI, Sec. IX, Para. I; Art. VII, Sec. IV, Para. I (see Ga. Const. 1983, Art. III, Sec. V, Para. III; Art. VI, Sec. I, Para. V; Art. IX, Sec. IV, Para. I). Bibb County v. Hancock, 211 Ga. 429, 86 S.E.2d 511 (1955).

Section superseded by O.C.G.A. § 17-12-44. — With the enactment of O.C.G.A. § 17-12-44, it would seem that former O.C.G.A. § 17-12-60 had been, in effect, superseded. Straughan & Straughan v. Douglas, 260 Ga. 821, 400 S.E.2d 906 (1991) (decided under former § 17-12-60).

State may not force counsel on defendant. — State may not constitutionally hale the person into the state's criminal courts and there force a lawyer upon the person, when the person insists that the person wants to conduct the person's own defense. Taylor v. Hopper, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980) (decided under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1).

Judge has no duty to force counsel on defendant. — Trial judge does not have a duty to attempt to force unwanted counsel upon a defendant who has resolutely declared the defendant's purpose to dismiss that counsel. Taylor v. Hopper, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980) (decided under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1).

Appointment of counsel. — Trial court acted within the court's discretion in replacing the defendant's appointed private attorneys with salaried counsel from the capital defender's division of the Georgia Public Defender Standards Council (GPDSC) because retaining the defendant's current counsel would perpetuate the funding problems that had plagued the case; evidence was presented that the GPDSC, and possibly the county, currently had funds available for travel and other investigative expenses. Phan v. State, 290 Ga. 588, 723 S.E.2d 876 (2012).

Compensation under § 17-12-5. — Although an attorney applies for appointment under former O.C.G.A. §§ 17-12-60 and 17-12-61, this does not preclude an attorney from seeking compensation under O.C.G.A. § 17-12-5(b). In re Whatley, 256 Ga. 289, 347 S.E.2d 602 (1986) (decided under former §§ 17-12-60 and 17-12-61).

Compensation under § 17-12-5(b). — Although an attorney applies for appointment under former O.C.G.A. § 17-12-12, this did not preclude the attorney from seeking compensation under § 17-12-5(b). In re Whatley, 256 Ga. 289, 347 S.E.2d 602 (1986).

Constitutional right to counsel. — Indigent defendant was constitutionally entitled to the appointment of counsel at the defendant's upcoming murder trial even if the defendant was currently being provided pro bono representation by an attorney who was receiving compensation from sources other than the defendant. Roberts v. State, 263 Ga. 764, 438 S.E.2d 905 (1994) (decided under former § 17-12-60).

Cited in Fulton County v. State, 282 Ga. 570, 651 S.E.2d 679 (2007).

OPINIONS OF THE ATTORNEY GENERAL

No requirement existed that counsel be appointed for indigent habeas corpus petitioner. 1971 Op. Att'y Gen. No. U71-147 (decided under former law).

Construction with constitutional duty to render certain services without compensation. — Under Ga. Const. 1945, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XIV), when a person is charged with a crime in this state, and the court is satisfied that the defendant by reason of the defendant's poverty is indigent and unable to the pay attorney's fee, it is then the duty of the judge to appoint a member of the bar to investigate such a defendant without compensation. However, under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1, counsel may be paid for counsel's service when the defendant has been charged with a capital felony and is unable to pay counsel. 1958-59 Op. Att'y Gen. p. 80 (decided under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1).

Amended motion for new trial would fall under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1. 1960-61 Op. Att'y Gen. p. 119 (decided under Ga. L. 1953, Nov.-Dec. Sess., p. 478, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Attorneys at Law, §§ 237 et seq., 249 et seq., 294 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, §§ 344 et seq., 363 et seq.

ALR. — Right of defendant in criminal case to conduct defense in person, or to participate with counsel, 17 A.L.R. 266; 77 A.L.R.2d 1233.

Incompetency, negligence, illness or the like of counsel as ground for new trial or reversal in criminal case, 24 A.L.R. 1025; 64 A.L.R. 436.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel, 84 A.L.R. 544.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 100 A.L.R. 321; 55 A.L.R.2d 1072.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant, 148 A.L.R. 183.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorneys' fees as costs on such proceeding, 100 A.L.R.2d 397.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Determination of indigency of accused entitling him to appointment of counsel, 51 A.L.R.3d 1108.

Accused's right to represent himself in state criminal proceeding — modern state cases, 98 A.L.R.3d 13.

17-12-12.1. Payment of attorney in event of conflict of interest in capital cases; number of attorneys appointed; county governing authority's financial responsibility; expenses.

(a) If there is a conflict of interest such that the Georgia capital defender division is unable to defend any indigent person accused of a capital felony for which the death penalty is being sought, the director shall determine and appoint counsel to represent the defendant. The director shall establish the contractual agreement with the defendant's counsel for payment of representing the defendant, and, when feasible and prudent, a flat fee structure shall be utilized.

(b) A maximum of two attorneys shall be paid by the council pursuant to a contractual agreement or at an hourly rate established by the council with state funds appropriated to the council. State funds shall be appropriated to the council for use by the Georgia capital defender division for the first $150,000.00 paid for each death penalty case. Funding for attorney's fees and expenses between $150,000.01 and $250,000.00 for each death penalty case shall be paid through state appropriations for 75 percent of such attorney's fees and expenses, and the county governing authority where the indictment was returned shall pay 25 percent of such attorney's fees and expenses. Funding for all attorney's fees and expenses in excess of $250,000.00 for each death penalty case shall be paid through state appropriations for 50 percent of such attorney's fees and expenses, and the county governing authority where the indictment was returned shall pay 50 percent of such attorney's fees and expenses.

(c) The council, with the assistance of the Georgia capital defender division, shall establish guidelines for all expense requests for cases in which the death penalty is sought, including, but not limited to, attorney's fees, expert witness fees, investigative fees, travel and accommodation expenses, and copy and transcription costs.

(d) A county governing authority may provide supplemental compensation to counsel appointed pursuant to this Code section.

History. — Code 1981, § 17-12-12.1, enacted by Ga. L. 2008, p. 846, § 27/HB 1245.

Law reviews. — For note suggesting attorney's due process right to be compensated for representing an indigent, see 16 Mercer L. Rev. 367 (1964).

JUDICIAL DECISIONS

Constitutionality. — Because appointment of counsel to represent a defendant in a death penalty case occurred before the statute's effective date, the application of former O.C.G.A. § 17-12-127(b) regarding payment of costs and attorney's fees by the Georgia Public Defender Standards Council did not violate the prohibition on the state's assumption of prior debts as set forth in Ga. Const. 1983, Art. VII, Sec. IV, Para. X. Ga. Pub. Defender Stds. Council v. State, 285 Ga. 169, 675 S.E.2d 25 (2009).

County was not responsible to pay portion of costs that were not ordinarily incurred in a courtroom proceeding. Fulton County v. State, 282 Ga. 570, 651 S.E.2d 679 (2007).

County was responsible to pay fees and costs. — Georgia Public Defender Standards Council was required to pay attorney's fees and expenses in a death penalty case to appointed counsel pursuant to former O.C.G.A. § 17-12-127(b) because nothing in former O.C.G.A. § 17-12-124 required that the Council fund representation only for defendants who were indicted or sent a death penalty notice after a certain date and counsel were appointed after the effective date of former § 17-12-127(b). Ga. Pub. Defender Stds. Council v. State, 285 Ga. 169, 675 S.E.2d 25 (2009).

Cited in Putnal v. State, 303 Ga. 569, 814 S.E.2d 307 (2018).

OPINIONS OF THE ATTORNEY GENERAL

Compensation for appellate representation. — Former Georgia Criminal Justice Act authorized compensation of attorneys for representation of indigents in appellate proceedings. 1971 Op. Att'y Gen. No. U71-96 (decided under former Ga. L. 1968, p. 999, § 4).

RESEARCH REFERENCES

ALR. — Lien of attorney on public fund or property, 24 A.L.R. 933.

Adjustment or determination of compensation of discharged attorney as condition of substitution of attorney by court order, 124 A.L.R. 725.

Construction of state statutes providing for compensation of attorney for services under appointment by court in defending indigent accused, 18 A.L.R.3d 1074.

Right of court-appointed attorney to contract with his indigent client for fee, 43 A.L.R.3d 1426.

Amount of attorneys' compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

17-12-13. Effective date of article.

Repealed by Ga. L. 2011, p. 91, § 9/HB 238, effective July 1, 2011.

Editor's notes. — This Code section was based on Code 1981, § 17-12-13, enacted by Ga. L. 2003, p. 191, § 1.

17-12-14. Applicability of article.

Repealed by Ga. L 2003, p. 191, § 1, effective December 21, 2003.

Editor's notes. — This Code section was based on Ga. L. 1968, p. 999, § 13.

ARTICLE 1A

REPRESENTATION OF INDIGENTS

17-12-19.1 through 17-12-19.14.

Repealed by Ga. L. 2004, Ex. Sess., p. ES3, § 16/HB 1EX, effective December 31, 2004.

Editor's notes. — This article was based on Code 1981, §§ 17-12-19.1—17-12-19.14, enacted by Ga. L. 2004, Ex. Sess., p. ES3, § 16/HB 1EX.

ARTICLE 2

PUBLIC DEFENDERS

Editor's notes. — Ga. L. 2003, p. 191, § 1, effective January 1, 2005, repealed the Code sections formerly codified as this article and enacted the current article. The former article consisted of Code Sections 17-12-30 through 17-12-51 and was

based on Ga. L. 1979, p. 367, §§ 1-12, 14-16; Ga. L. 1990, p. 8, § 17; Ga. L. 1993, p. 308, §§ 1-3; Code 1981, § 17-12-38.1, enacted by Ga. L. 1994, p. 355, § 1; Code 1981, §§ 17-12-45 through 17-12-51 enacted by Ga. L. 1996, p. 1636, § 1; Ga. L. 1998, p. 128, § 17; Ga. L. 1998, p. 568, § 1.

U.S. Code. — Right to and assignment of counsel, Federal Rules of Criminal Procedure, Rule 44.

Law reviews. — For article, "The Indigent Defendant in Georgia Prior to Gideon v. Wainwright," see 2 Ga. St. B.J. 207 (1965). For article, "Privileging Public Defense Research," see 69 Mercer L. Rev. 771 (2018).

For note on the 2003 enactment of this article, see 20 Ga. St. U.L. Rev. 105 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1085 et seq.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, §§ 725 et seq. 765 et seq.

ALR. — Construction and effect of statutes providing for office of public defender, 36 A.L.R.3d 1403.

Public defender's immunity from liability for malpractice, 6 A.L.R.4th 774.

17-12-20. Public defender selection panel for each circuit; appointment of public defender; removal; vacancies.

(a) On and after July 1, 2011, there is created in each judicial circuit in this state a circuit public defender supervisory panel to be composed of three members, all of whom shall be attorneys who regularly practice in that particular judicial circuit. The chief judge of the superior court of the circuit shall appoint one member. The Governor shall appoint one member. In a single county judicial circuit, the chairperson of the governing authority or sole commissioner shall appoint one member; in multicounty judicial circuits, the chairpersons of the governing authorities or sole commissioners shall caucus and appoint one member. When a caucus is needed to appoint a member of the supervisory panel, the chairperson or sole commissioner of the largest county by population in the judicial circuit shall convene the caucus. Members of the circuit public defender supervisory panel shall be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants. A prosecuting attorney as defined in paragraph (6) of Code Section 19-13-51, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council of the State of Georgia shall not serve as a member of the circuit public defender supervisory panel after July 1, 2005. On and after July 1, 2008, no employees of the council shall serve as a member of the circuit public defender supervisory panel. Members of the circuit public defender supervisory panel shall reside in the judicial circuit in which they serve. The circuit public defender supervisory panel members shall serve for a term of five years. Any vacancy for an appointed member shall be filled by the appointing authority within 60 days of the vacancy occurring.

(b)(1) By majority vote of its membership, the circuit public defender supervisory panel shall annually elect a chairperson and secretary. The chairperson shall conduct the meetings and deliberations of the panel and direct all activities. The secretary shall keep accurate records of all the meetings and deliberations and perform such other duties as the chairperson may direct. The panel may be called into session upon the direction of the chairperson or by the council.

(2) By majority vote of its membership, the circuit public defender supervisory panel shall nominate not more than five people to serve as the circuit public defender in the circuit. The director shall select the circuit public defender from the panel's list of nominees. A circuit public defender shall serve a term for up to four years and may be appointed for successive terms but shall not be reappointed if he or she was removed pursuant to subsection (c) of this Code section.

(c) A circuit public defender may be removed for cause by the director. If a circuit public defender wants to appeal such removal, he or she may appeal the decision to the council. By a vote of two-thirds of the members of the entire council, the council may overturn the director's decision. Any appeal regarding a removal request shall be submitted to the council within 15 days of the effective date of the removal, and the council shall take action in hearing the appeal at its next regularly scheduled meeting and take final action within 30 days thereafter. A circuit public defender who has been removed by the director who has filed an appeal with the council shall continue to serve as the circuit public defender until the council reaches a decision on the appeal.

(d) A circuit public defender supervisory panel may convene at any time during its circuit public defender's term of office and shall convene at least annually for purposes of reviewing the circuit public defender's job performance and the performance of the circuit public defender office. The director and circuit public defender shall be notified at least two weeks in advance of the convening of the circuit public defender supervisory panel. The circuit public defender shall be given the opportunity to appear before the circuit public defender supervisory panel and present evidence and testimony. The chairperson shall determine the agenda for the annual review process, but, at a minimum, such review shall include usage of state and local funding, expenditures, and budgeting matters. The chairperson shall make an annual report on or before the thirtieth day of September of each year concerning the circuit public defender supervisory panel's findings regarding the job performance of the circuit public defender and his or her office to the director on a form provided to the panel by the director. If at any time the circuit public defender supervisory panel finds that the circuit public defender is performing in a less than satisfactory manner or finds information of specific misconduct, the circuit public

defender supervisory panel may by majority vote of its members adopt a resolution seeking review of its findings and remonstrative action by the director. Such resolution shall specify the reason for such request. All evidence presented and the findings of the circuit public defender supervisory panel shall be forwarded to the director within 15 days of the adoption of the resolution. The director shall initiate action on the circuit public defender supervisory panel's resolution within 30 days of receiving the resolution. The director shall notify the circuit public defender supervisory panel, in writing, of any actions taken pursuant to submission of a resolution under this subsection.

(e) If a vacancy occurs for the position of circuit public defender, the director shall appoint an interim circuit public defender to serve until the director has appointed a replacement. Within 30 days of the vacancy occurring, the circuit public defender supervisory panel shall meet and nominate not more than five people to serve as a replacement circuit public defender. The director shall select the replacement circuit public defender from the panel's list of nominees.

History. — Code 1981, § 17-12-20, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, Ex. Sess., p. ES3, § 17/HB 1EX; Ga. L. 2008, p. 846, § 28/HB 1245; Ga. L. 2011, p. 91, § 10/HB 238; Ga. L. 2013, p. 141, § 17/HB 79; Ga. L. 2015, p. 519, § 7-10/HB 328.

Editor's notes. — Ga. L. 2004, p. ES3, § 27/HB 1EX, provides that: "Section 17 of this Act shall become effective on January 1, 2005; provided, however, that for purposes of the appointment of the members of the circuit public defender selection panels in conformity with Section 17 of this Act as may be necessary or appropriate to prepare for and phase in full implementation of Article 2 of Chapter 12 of Title 17 of the Official Code of Georgia Annotated as enacted by Ga. L. 2003, p. 191, Section 17 of this Act shall become effective upon approval of this Act by the Governor or upon its becoming law without such approval." The Act was approved by the Governor on June 15, 2004.

Law reviews. — For comment, "The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit," see 66 Mercer L. Rev. 781 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1968, p. 999, § 6, are included in the annotations for this Code section.

Public defender may practice private civil law, but not private criminal law. 1974 Op. Att'y Gen. No. U74-60 (decided under Ga. L. 1968, p. 999, § 6.)

Judge of the recorder's court is engaged in the practice of criminal law for the purposes of Ga. L. 1968, p. 999, § 6. 1973 Op. Att'y Gen. No. U73-120 (decided under Ga. L. 1968, p. 999, § 6.)

RESEARCH REFERENCES

ALR. — Construction and effect of statutes providing for office of public defender, 36 A.L.R.3d 1403.

17-12-21. Qualifications for public defender position.

To be eligible to fill the position of circuit public defender, a person must:

(1) Have attained the age of 25 years;

(2) Have been duly admitted and licensed to practice law in the superior courts for at least three years;

(3) Be a member in good standing of the State Bar of Georgia; and

(4) If previously disbarred from the practice of law, have been reinstated as provided by law.

History. — Code 1981, § 17-12-21, enacted by Ga. L. 2003, p. 191, § 1.

17-12-22. Procedure for appointment of attorneys for indigent defendants in event of public defender's conflict of interest; identification of conflict.

(a) The director, with input from the council, shall establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest. Such procedure may include, but shall not be limited to, the appointment of individual counsel on a case-by-case basis or the utilization of another circuit public defender office. Whatever procedure the director establishes for each circuit's conflict of interest cases shall be adhered to by the circuit public defender office. It is the intent of the General Assembly that the director consider the most efficient and effective system to provide legal representation where the circuit public defender office has a conflict of interest.

(b) The circuit public defender shall establish a method for identifying conflicts of interest at the earliest possible opportunity. If there is a conflict of interest such that the circuit public defender office cannot represent a defendant and an attorney who is not employed by the circuit public defender office is appointed, such attorney shall have a contractual relationship with the council to represent indigent persons in conflict of interest cases, and such relationship may include, but shall not be limited to, a flat fee structure.

(c) Attorneys who seek appointment in conflict cases shall have such experience or training in the defense of criminal cases as is necessary in light of the complexity of the case to which he or she is appointed and shall meet such qualifications and standards for the representation of indigent defendants as are established by the council.

History. — Code 1981, § 17-12-22, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 29/HB 1245; Ga. L. 2010, p. 226, § 2A/HB 889; Ga. L. 2011, p. 91, § 11/HB 238.

Law reviews. — For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

Authority of trial court over withdrawal determination. — O.C.G.A. § 17-12-22 of the Indigent Defense Act of 2003, O.C.G.A. § 17-12-1 et seq., did not remove a trial court's authority to determine whether a conflict of interest between an indigent criminal defendant and a public defender who was assigned to represent the defendant's interest required withdrawal of the defender as it only removed the appointment of assigned counsel from the trial court's authority; there was no conflict between § 17-12-22 and Ga. Unif. Super. Ct. R. 4.3, as § 17-12-22 was enacted to facilitate the identification of conflicts before a public defender undertook representation, and when a conflict arose or was discovered after representation had commenced, a trial court still had authority to determine the issue of withdrawal. Odum v. State, 283 Ga. App. 291, 641 S.E.2d 279 (2007).

17-12-23. Cases in which public defender representation required; timing of representation; juvenile divisions; contracts with local governments.

(a) The circuit public defender shall provide representation in the following actions and proceedings:

(1) Any case prosecuted in a superior court under the laws of the State of Georgia in which there is a possibility that a sentence of imprisonment or probation or a suspended sentence of imprisonment may be adjudged;

(2) A hearing on a revocation of probation in a superior court;

(3) Any juvenile court case where the juvenile may face a disposition of confinement, commitment, or probation; and

(4) Any direct appeal of any of the proceedings enumerated in paragraphs (1) through (3) of this subsection.

(b) In each of the actions and proceedings enumerated in subsection (a) of this Code section, entitlement to the services of counsel begins not more than three business days after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process and such person makes an application for counsel to be appointed.

(c) Each circuit public defender shall establish a juvenile division within the circuit public defender office to specialize in the defense of juveniles.

(d) A city or county may contract with the circuit public defender office for the provision of criminal defense for indigent persons accused

of violating city or county ordinances or state laws. If a city or county does not contract with the circuit public defender office, the city or county shall be subject to all applicable policies and standards adopted by the council for representation of indigent persons in this state.

History. — Code 1981, § 17-12-23, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2006, p. 710, § 5/SB 203; Ga. L. 2008, p. 846, § 30/HB 1245; Ga. L. 2011, p. 91, § 12/HB 238.

U.S. Code. — Right to and assignment of counsel, Federal Rules of Criminal Procedure, Rule 44.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 61 (2006).

For comment on Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), establishing an indigent's right to appointed counsel in nonfelony criminal cases, see 22 J. of Pub. L. 191 (1973). For comment, "The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit," see 66 Mercer L. Rev. 781 (2015).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. §§ 17-12-4 and 17-12-11 are included in the annotations for this Code Section.

Duty exists whether felony or misdemeanor charged. — Former O.C.G.A. § 17-12-4 required that counsel be appointed for indigent defendants, whether charged with a felony or misdemeanor, if such persons could be imprisoned under the state law of Georgia if found guilty. Lowrance v. State, 183 Ga. App. 421, 359 S.E.2d 196 (1987) (decided under former O.C.G.A. § 17-12-4).

Procedure used by county in appointing attorney for indigent did not violate due process since, in the event the public defender's office was unavailable, attorneys were appointed from an alphabetical list in an equitable manner and special considerations were given in death penalty cases. Lewis v. State, 255 Ga. 101, 335 S.E.2d 560 (1985) (decided under former O.C.G.A. § 17-12-4).

Court's discretion. — While the court does not have the duty to appoint counsel for defendants who do not meet the indigency standard, the court does have the discretion to do so and this discretion must be affirmatively exercised, based on the individual circumstances of each case; the court cannot simply deny all such requests as a matter of policy. Flanagan v. State, 218 Ga. App. 598, 462 S.E.2d 469 (1995) (decided under former O.C.G.A. § 17-12-4).

Trial court erred in denying a nonindigent defendant's request for appointed counsel and proceeding to trial without first ascertaining whether the defendant exercised reasonable diligence in attempting to retain counsel or considering other special circumstances. Flanagan v. State, 218 Ga. App. 598, 462 S.E.2d 469 (1995) (decided under former O.C.G.A. § 17-12-4).

Trial court did not abuse the court's discretion in refusing to appoint counsel for a nonindigent defendant. Pierce v. State, 222 Ga. App. 245, 474 S.E.2d 112 (1996) (decided under former O.C.G.A. § 17-12-4).

If a trial court did not hold a plea withdrawal hearing and did not make a record of the court's determination of the defendant's indigency for appeal, the appellate court could not determine if the trial court abused the court's discretion or followed the procedures of O.C.G.A. §§ 17-12-2(5), 17-12-31, 17-12-4(a) and Ga. Unif. Super. Ct. R. 29.2, 29.3, 29.5. Schlau v. State, 261 Ga. App. 303, 582 S.E.2d 243 (2003) (decided under former O.C.G.A. § 17-12-4).

Trial court's failure to delay trial long enough to ascertain whether retained defense counsel's absence was attributable to reasons beyond the defendant's control violated the defendant's right to counsel of

the defendant's choosing. Turman v. State, 272 Ga. App. 570, 613 S.E.2d 126 (2005) (decided under former O.C.G.A. § 17-12-11).

Trial court did not abuse the court's discretion by proceeding with trial and refusing to delay the proceedings after concluding that the defendant did not exercise reasonable diligence in procuring counsel because the record showed that the defendant repeatedly claimed, over a period of three months, that the defendant was in the process of retaining counsel, and the defendant was advised on multiple occasions by the trial court to make a better effort to do so. Hatcher v. State, 320 Ga. App. 366, 739 S.E.2d 805 (2013).

Effect of execution of eligibility form for court-appointed counsel. — Defendant's execution of an "eligibility affidavit form," essentially a financial statement made for the purpose of informing county indigent defense program of an accused's financial condition, constituted a request for court-appointed counsel once judicial proceedings were initiated and did not constitute an invocation of the right to counsel for Fifth Amendment purposes; thus, a statement given to police while in custody was not taken in violation of the defendant's constitutional rights because at the time the defendant completed the form, no adversarial criminal proceeding had been initiated against the defendant and no Sixth Amendment concerns had come into play; reversing Hatcher v. State, 212 Ga. App. 46, 441 S.E.2d 673 (1994). State v. Hatcher, 264 Ga. 556, 448 S.E.2d 698 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 291 (1995) (decided under former O.C.G.A. § 17-12-4).

Noncompliance held denial of counsel. — Failure to comply with former O.C.G.A. § 17-12-4 and implementing rules effectively denied the defendant counsel since no inquiry was made of the defendant regarding the defendant's efforts to retain an attorney and the defendant's inability to pay the required retainer. Butler v. State, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991) (decided under former O.C.G.A. § 17-12-4).

Mandamus is proper remedy for failure of public defender's office to appoint appellate counsel. — Trial court properly held that the trial court did not have authority to appoint appellate counsel for a defendant because, under the Georgia Indigent Defense Act of 2003, a defendant was required to direct a request for indigent representation directly to the public defender's office. It appeared that the defendant, who had been sentenced to prison, would be eligible under O.C.G.A. § 17-12-23; although the defendant claimed that the public defender's office would not heed the defendant's requests, the defendant was not without a remedy as the defendant could apply for a writ of mandamus under O.C.G.A. § 9-6-20. Bynum v. State, 289 Ga. App. 636, 658 S.E.2d 196 (2008).

Right to appointed counsel on direct appeal. — Convicted defendant had the right to appointed counsel on direct appeal; therefore, a trial court was required to determine that the defendant knowingly and voluntarily waived the defendant's right to counsel prior to allowing the defendant's appointed counsel to withdraw. A remand was required for consideration of whether the waiver was knowing and voluntary. Calmes v. State, 312 Ga. App. 769, 719 S.E.2d 516 (2011), cert. denied, No. S12C0538, 2012 Ga. LEXIS 324 (Ga. 2012).

Cited in Potter v. State, 283 Ga. 576, 662 S.E.2d 128 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1085 et seq.

ALR. — Right to aid of counsel in application or hearing for habeas corpus, 162 A.L.R. 922.

17-12-24. Financial eligibility for indigent defense services representation; operation of public defender's office.

(a) The circuit public defender, any other person or entity providing indigent defense services, or the system established pursuant to Code Section 17-12-80 shall determine if a person or juvenile arrested, detained, or charged in any manner is an indigent person entitled to representation under this chapter.

(b) The circuit public defenders shall administer and coordinate the day-to-day operations of their respective offices and shall supervise the assistant public defenders and other staff serving in the office.

(c) The circuit public defender shall keep and maintain appropriate records, which shall include the number of persons represented, including cases assigned to other counsel based on conflict of interest; the offenses charged; the outcome of each case; the expenditures made in carrying out the duties imposed by this chapter; and any other information requested by the council.

History. — Code 1981, § 17-12-24, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2006, p. 752, § 7/SB 503; Ga. L. 2008, p. 846, § 31/HB 1245.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 17-12-2 are included in the annotations for this Code Section.

"Indigent person." — If defendant retains trial counsel and then claims indigence on appeal, the defendant bears the burden of making that fact known to the trial court or some responsible state official. Seay v. State, 220 Ga. App. 418, 469 S.E.2d 496 (1996) (decided under former O.C.G.A. § 17-12-2).

Because the trial court did not hold a plea withdrawal hearing and did not make a record of the court's determination of the defendant's indigency for appeal, the appellate court could not determine if the trial court abused the court's discretion or followed the procedures of former O.C.G.A. §§ 17-12-2(5), 17-12-32, 17-12-4(a) and Ga. Unif. Super. Ct. R. 29.2, 29.3, 29.5. Schlau v. State, 261 Ga. App. 303, 582 S.E.2d 243 (2003).

Defendant failed to show that the trial court abused the court's discretion in determining that the defendant was not entitled to a transcript free of charge and, contrary to the defendant's claim, the trial court was not required as a matter of law to follow the public defender's determination of indigence for that purpose. Roberson v. State, 335 Ga. App. 606, 782 S.E.2d 671 (2016), aff'd, 300 Ga. 632, 797 S.E.2d 104 (2017).

17-12-25. Salary of public defender; private practice prohibited.

(a) Each circuit public defender shall receive an annual salary of $99,526.00, and cost-of-living adjustments may be given by the General Assembly in the General Appropriations Act by a percentage not to exceed the average percentage of the general increase in salary as may from time to time be granted to employees of the executive, judicial, and

legislative branches of government; provided, however, that any increase for such circuit public defender shall not include within-grade step increases for which classified employees as defined by Code Section 45-20-2 are eligible. Any increase granted pursuant to this subsection shall become effective at the same time that funds are made available for the increase for such employees. The Office of Planning and Budget shall calculate the average percentage increase. Each circuit public defender may also be entitled to an accountability court salary supplement as set forth in Code Section 17-12-25.1.

(b) The county or counties comprising the judicial circuit may supplement the salary of the circuit public defender in an amount as is or may be authorized by local Act or in an amount as may be determined by the governing authority of the county or counties, whichever is greater.

(c) No circuit public defender shall engage in the private practice of law for profit or serve concurrently in any judicial office.

History. — Code 1981, § 17-12-25, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, Ex. Sess., p. ES3, § 18/HB 1EX; Ga. L. 2008, p. 846, § 32/HB 1245; Ga. L. 2009, p. 745, § 1/SB 97; Ga. L. 2012, p. 446, § 2-18/HB 642; Ga. L. 2015, p. 919, § 1-7/HB 279.

Editor's notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: "Personnel, equipment, and facilities that were assigned to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act." This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: "Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90."

Ga. L. 2015, p. 919, § 4-1(b)/HB 279, not codified by the General Assembly, provides that: "(b)(1) Part I of this Act shall become effective only if funds are appropriated for purposes of Part I of this Act in an appropriations Act enacted at the 2015 regular session of the General Assembly.

"(2) If funds are so appropriated, then Part I of this Act shall become effective on July 1, 2015, for purposes of making the initial appointments of the Court of Appeals Judges created by Part I of this Act, and for all other purposes, Part I of this Act shall become effective on January 1, 2016.

"(3) If funds are not so appropriated, then Part I of this Act shall not become effective and shall stand repealed on July 1, 2015."

Funds were appropriated at the 2015 session of the General Assembly.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, T. 27, C. 32 and former O.C.G.A. § 17-12-5 are included in the annotations for this Code Section.

Additional compensation when representation protracted. — Local rule authorizing a trial judge to approve compensation in addition to a fee schedule if there was protracted representation due to extraordinary circumstances was con-

sistent with the former Georgia Criminal Justice Act. Dickens v. State, 147 Ga. App. 25, 248 S.E.2d 36 (1978).

Attorney applying for appointment under former O.C.G.A. §§ 17-12-60 and 17-12-61 was not precluded from seeking compensation. In re Whatley, 256 Ga. 289, 347 S.E.2d 602 (1986) (decided under former O.C.G.A. § 17-12-5).

In appealing compensation, mandamus is proper remedy. — Proper remedy for appointed counsel to pursue in appealing compensation for a criminal case is mandamus against the governing authority of the county. Davis v. Bomar, 123 Ga. App. 493, 181 S.E.2d 509 (1971) (decided under former Code 1933, Ch. 32, T. 27).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1968, p. 999, § 6, are included in the annotations for this Code Section.

Public defender may practice private civil law, but not private criminal law. 1974 Op. Att'y Gen. No. U74-60 (decided under Ga. L. 1968, p. 999, § 6).

Judge of the recorder's court was engaged in the practice of criminal law for the purposes of the former provisions. 1973 Op. Att'y Gen. No. U73-120 (decided under Ga. L. 1968, p. 999, § 6).

17-12-25.1. Accountability court supplement.

(a) Whenever a circuit has implemented a drug court division, mental health court division, or veterans court division, then on and after January 1, 2016, the state shall pay the circuit public defender in such circuit an annual accountability court supplement of $6,000.00. Such supplement shall be paid from state funds by the Georgia Public Defender Council in equal monthly installments as regular compensation.

(b) Notwithstanding Code Sections 17-12-27 and 17-12-28, the accountability court salary supplement paid pursuant to this Code section shall not be included in any calculation of compensation paid to assistant circuit public defenders or investigators that is measured as a percentage of a circuit public defender's salary.

(c) When a local law provides for a salary to be paid based on a percentage of, total compensation for, or similar mathematical relationship to a circuit public defender's salary, the accountability court salary supplement paid pursuant to this Code section shall not be included in the calculation of compensation to be paid by a county, municipality, or consolidated government.

(d) Notwithstanding subsection (b) of Code Section 17-12-25 and Code Section 17-12-30, on and after January 1, 2016, no county or counties comprising the circuit shall increase an aggregate county salary supplement paid to the circuit public defender or a state-paid position appointed pursuant to this article, if such supplement is $50,000.00 or more.

History. — Code 1981, § 17-12-25.1, enacted by Ga. L. 2015, p. 919, § 1-8/HB 279; Ga. L. 2016, p. 864, § 17/HB 737.

Editor's notes. — Ga. L. 2015, p. 919, § 4-1(b)(1) and (2)/HB 279, not codified by the General Assembly, provides: "(b)(1) Part I of this Act shall become effective only if funds are appropriated for purposes of Part I of this Act in an appropriations Act enacted at the 2015 regular session of the General Assembly.

"(2) If funds are so appropriated, then Part I of this Act shall become effective on July 1, 2015, for purposes of making the initial appointments of the Court of Appeals Judges created by Part I of this Act, and for all other purposes, Part I of this Act shall become effective on January 1, 2016." Funds were appropriated at the 2015 session of the General Assembly.

17-12-26. Budget of the council.

The council shall prepare and submit to the director of the Office of Planning and Budget its budget estimate necessary for fulfilling the purposes of this chapter in accordance with Code Section 45-12-78. The council shall be authorized to seek, solicit, apply for, and utilize funds from any public or private source to use in fulfilling the purposes of this chapter.

History. — Code 1981, § 17-12-26, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, Ex. Sess., p. ES3, § 19/HB 1EX; Ga. L. 2006, p. 72, § 17/SB 465; Ga. L. 2006, p. 752, § 8/SB 503; Ga. L. 2007, p. 65, § 3/SB 139; Ga. L. 2008, p. VO1, § 1-9/HB 529; Ga. L. 2008, p. 846, § 33/HB 1245.

Code Commission notes. — The amendment of this Code section by Ga. L. 2008, p. VO1, §§ 1-9, irreconcilably conflicted with and was treated as superseded by Ga. L. 2008, p. 846, § 33/HB 1245. See County of Butts v. Strahan, 151 Ga. 417 (1921).

Editor's notes. — Ga. L. 2008, p. VO1, which amended this Code section, was passed by the General Assembly as HB 529 at the 2007 regular session but vetoed by the Governor on May 30, 2007. The General Assembly overrode that veto on January 28, 2008, and the Act became effective on that date.

JUDICIAL DECISIONS

Cited in Ga. Public Defender Stds. Council v. State of Ga., 284 Ga. App. 660, 644 S.E.2d 510 (2007).

17-12-27. Appointment of assistant public defenders; salary; promotions.

(a) Subject to the provisions of this Code section, the circuit public defender in each judicial circuit is authorized to appoint:

(1) One assistant public defender for each superior court judge authorized for the circuit, excluding the chief judge and senior judges; and

(2) Subject to funds being appropriated by the General Assembly or otherwise available, additional assistant public defenders as may be authorized by the council. In authorizing additional assistant

public defenders, the council shall consider the caseload, present staff, and resources available to each circuit public defender and shall make authorizations as will contribute to the efficiency of individual circuit public defenders and the effectiveness of providing adequate legal defense for indigent defendants.

(b) Each assistant public defender appointed pursuant to subsection (a) of this Code section shall be classified based on education, training, and experience. The jobs of assistant public defenders and the minimum qualifications required for appointment or promotion to each job shall be established by the council based on education, training, and experience and in accordance with the provisions of Code Sections 17-12-30 and 17-12-34.

(c) Each assistant public defender appointed pursuant to this Code section shall be compensated based on a salary range established in accordance with subsection (c) of Code Section 17-12-30. The salary range for each job established in accordance with subsection (b) of this Code section shall be as follows:

(1) Assistant public defender I. Not less than $38,124.00 nor more than 65 percent of the compensation of the circuit public defender;

(2) Assistant public defender II. Not less than $40,884.00 nor more than 70 percent of the compensation of the circuit public defender;

(3) Assistant public defender III. Not less than $45,108.00 nor more than 80 percent of the compensation of the circuit public defender; and

(4) Assistant public defender IV. Not less than $52,176.00 nor more than 90 percent of the compensation of the circuit public defender.

(d) All personnel actions involving attorneys appointed pursuant to this Code section shall be made by the circuit public defender in writing in accordance with the provisions of Code Section 17-12-30.

(e)(1) All salary advancements shall be based on quality of work, education, and performance.

(2) The salary of an assistant public defender appointed pursuant to this Code section may be increased at the first of the calendar month following the anniversary of his or her appointment.

(3) The salary of any assistant public defender who, subsequent to his or her appointment pursuant to this Code section, is awarded an LL.M. or S.J.D. degree by a law school recognized by the State Bar of Georgia from which a graduate of or student enrolled therein is permitted to take the bar examination or by a law school accredited by the American Bar Association or the Association of American Law

Schools may be increased effective on the first day of the calendar month following the award of the degree, provided that such advancement does not exceed the maximum of the salary range applicable to the attorney's job classification.

(f) Any assistant public defender appointed pursuant to this Code section may be promoted to the next highest job at any time the attorney meets the minimum qualifications for such job, but in order to be eligible for promotion, the attorney shall have served not less than 12 months in the job from which the attorney is to be promoted. When an assistant public defender is promoted to the next highest job, the assistant public defender shall enter the higher job at an annual salary greater than the annual salary the assistant public defender was receiving immediately prior to the promotion.

(g) All full-time state paid employees of the office of the circuit public defender shall be state employees in the unclassified service as defined by Chapter 20 of Title 45 with all benefits of such appointed state employees as provided by law. A circuit public defender, assistant public defender, or local public defender may be issued an employee identification card by his or her employing agency; provided, however, that no employer of any such public defender shall issue nor shall any public defender display, wear, or carry any badge, shield, card, or other item that is similar to a law enforcement officer's badge or that could be reasonably construed to indicate that the public defender is a peace officer or law enforcement official.

(h) Notwithstanding the provisions of subsection (g) of this Code section, an employee of a local public defender office who was an employee of the office on June 30, 2004, and who becomes a circuit public defender or an employee of a circuit public defender office before July 1, 2005, may elect, with the consent of the former employer and the consent of the council, to remain an employee of the entity for which the employee worked as a local public defender; and such entity shall be his or her employer for all purposes, including, without limitation, compensation and employee benefits. The right to make an election pursuant to this subsection shall expire on July 1, 2005. The council shall reimburse the appropriate entity for compensation, benefits, and employer contributions under the federal Social Security Act, but the total payment from the council to the entity on behalf of the employee shall not exceed the amount otherwise payable to or for the employee under the circumstance where the employee had become a state employee.

History. — Code 1981, § 17-12-28, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, Ex. Sess., p. ES3, § 20/HB 1EX; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2006, p. 752, § 9/SB 503; Ga. L. 2009, p. 745, § 2/SB 97; Ga. L. 2012, p. 446, § 2-19/HB 642.

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 2012, "Chapter 20" was substituted for "Chapter" in the first sentence of subsection (g).

Editor's notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: "Personnel, equipment, and facilities that were assigned to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act." This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: "Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90."

Law reviews. — For comment, "The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit," see 66 Mercer L. Rev. 781 (2015).

JUDICIAL DECISIONS

Cited in Ga. Public Defender Stds. Council v. State of Ga., 284 Ga. App. 660, 644 S.E.2d 510 (2007).

17-12-28. Appointment of investigator; role and responsibilities; compensation; promotions.

(a) Subject to the provisions of this Code section, the circuit public defender in each judicial circuit is authorized to appoint one investigator to assist the circuit public defender in the performance of his or her official duties in the preparation of cases for trial. Subject to funds being appropriated by the General Assembly or otherwise available, the circuit public defender in each judicial circuit may appoint additional investigators as may be authorized by the council. In authorizing additional investigators, the council shall consider the caseload, present staff, and resources available to each circuit public defender and shall make authorizations as will contribute to the efficiency of individual circuit public defenders and the effectiveness of circuit public defenders throughout the state in providing adequate legal defense for indigent defendants.

(b) An investigator appointed pursuant to this Code section shall be not less than 21 years of age and shall serve at the pleasure of the circuit public defender.

(c) An investigator appointed pursuant to this Code section shall:

(1) Assist the attorneys within the office of the circuit public defender in the preparation of cases for preliminary hearings, pretrial hearings, and trial; and

(2) Perform other duties as are required by the circuit public defender.

(d) Each investigator appointed pursuant to this Code section shall be compensated based on a salary range established pursuant to Code

Section 17-12-30. The salary range for the investigator appointed pursuant to this Code section shall be not less than $30,828.00 nor more than 70 percent of the compensation of the circuit public defender from state funds.

(e)(1) Except as otherwise provided in this subsection, an investigator appointed pursuant to this Code section shall be appointed initially to the entry grade of the job on the state-wide pay ranges.

(2) Any person who is employed in a nonstate paid investigator's position within the office of the circuit public defender may be transferred to a state paid position. Such transfer shall be to the job and salary range commensurate with the education and experience of the employee.

(3) Any person who is employed as a peace officer by an agency of the executive branch of state government who is appointed as an investigator pursuant to this Code section without a break in service may be appointed to an annual salary at least equal to the annual salary the person received on the last day of employment immediately preceding said appointment.

(4) Any person who was a certified peace officer employed on a full-time basis by this state, the United States or any of the several states, or a political subdivision or authority thereof may be appointed to the salary that gives the officer credit for experience as a full-time certified peace officer.

(f) Personnel appointed pursuant to this Code section shall be reimbursed for actual expenses incurred in the performance of their official duties.

History. — Code 1981, § 17-12-28, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, Ex. Sess., p. ES3, § 21/HB 1EX; Ga. L. 2008, p. 846, § 34/HB 1245.

JUDICIAL DECISIONS

Cited in Ga. Public Defender Stds. Council v. State of Ga., 284 Ga. App. 660, 644 S.E.2d 510 (2007).

RESEARCH REFERENCES

ALR. — Right of indigent defendant in state criminal case to assistance of investigators, 81 A.L.R.4th 259.

17-12-29. Employment of supplemental personnel; compensation.

(a) Each circuit public defender is authorized to employ administrative, clerical, and paraprofessional personnel as may be authorized by the council based on funds appropriated by the General Assembly or otherwise available; provided, however, that each circuit public defender shall be authorized not less than two such personnel. In authorizing administrative, clerical, and paraprofessional personnel, the council shall consider the caseload, present staff, and resources available to each circuit public defender and shall make authorizations as will contribute to the efficiency of individual circuit public defenders in providing effective criminal defense for indigent defendants.

(b) Personnel appointed pursuant to this Code section shall be compensated based on a salary range developed in accordance with Code Section 17-12-30.

(c) All personnel actions involving personnel appointed pursuant to this Code section shall be in accordance with the provisions of Code Section 17-12-30.

History. — Code 1981, § 17-12-27, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, Ex. Sess., p. ES3, § 22/HB 1EX.

JUDICIAL DECISIONS

Cited in Ga. Public Defender Stds. Council v. State of Ga., 284 Ga. App. 660, 644 S.E.2d 510 (2007).

17-12-30. Classification of personnel; responsibilities; compensation; local supplements.

(a) All state paid personnel employed by the circuit public defenders pursuant to this article shall be employees of the executive branch of state government and shall be in the unclassified service as defined by Code Section 45-20-2.

(b) Personnel employed by the circuit public defenders pursuant to this article shall have the authority, duties, powers, and responsibilities as are authorized by law or as assigned by the circuit public defender and shall serve at the pleasure of the circuit public defender.

(c)(1) The council shall establish salary ranges for each state paid position authorized by this article or any other provision of law. Salary ranges shall be similar to the state-wide and senior executive ranges adopted pursuant to the rules of the State Personnel Board and shall provide for minimum, midpoint, and maximum salaries not to exceed the maximum allowable salary. In establishing the salary

ranges, all amounts will be rounded off to the nearest whole dollar. The council may, from time to time, revise the salary ranges to include across-the-board increases which the General Assembly may from time to time authorize in the General Appropriations Act.

(2) The circuit public defender shall fix the compensation of each state paid employee appointed pursuant to this article in accordance with the job to which the person is appointed and the appropriate salary range.

(3) All salary advancements shall be based on quality of work, training, and performance. The salary of state paid personnel appointed pursuant to this article may be increased at the first of the calendar month following the annual anniversary of the person's appointment. No employee's salary shall be advanced beyond the maximum established in the applicable pay range.

(4) Any reduction in salary shall be made in accordance with the salary range for the position and the policies adopted by the council.

(5) The compensation of state paid personnel appointed pursuant to this article shall be paid in equal installments by the council as provided by this subsection from funds appropriated for such purpose. The council may authorize employees compensated pursuant to this Code section to participate in voluntary salary deductions as provided by Article 3 of Chapter 7 of Title 45.

(6) The governing authority of the county or counties comprising a judicial circuit may supplement the salary or fringe benefits of any state paid position appointed pursuant to this article.

(7) The governing authority of any municipality within the judicial circuit may, with the approval of the circuit public defender, supplement the salary or fringe benefits of any state paid position appointed pursuant to this article.

History. — Code 1981, § 17-12-30, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, Ex. Sess., p. ES3, § 23/HB 1EX; Ga. L. 2007, p. 65, § 4/SB 139; Ga. L. 2009, p. 745, § 2/SB 97; Ga. L. 2011, p. 91, § 13/HB 238; Ga. L. 2012, p. 446, § 2-20/HB 642.

Editor's notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: "Personnel, equipment, and facilities that were assigned to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act." This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: "Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90."

JUDICIAL DECISIONS

Cited in Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

17-12-31. Employment of additional personnel.

(a) The circuit public defender in each judicial circuit may employ additional assistant circuit public defenders, deputy circuit public defenders, or other attorneys, investigators, paraprofessionals, clerical assistants, and other employees or independent contractors if the employment of such additional personnel is provided for by local law or if the employment of such additional personnel is specifically authorized and funded by the governing authority of the county or counties comprising the judicial circuit. The circuit public defender shall define the duties and fix the title of any attorney or other employee of the office of the circuit public defender.

(b) Personnel employed by the circuit public defender pursuant to this Code section shall serve at the pleasure of the circuit public defender and shall be compensated by the county or counties comprising the judicial circuit in the manner and in an amount fixed either by local Act or by the circuit public defender with the specific approval of the county or counties comprising the judicial circuit.

History. — Code 1981, § 17-12-31, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 35/HB 1245.

Law reviews. — For comment, "The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit," see 66 Mercer L. Rev. 781 (2015).

17-12-32. Contracting with the council for personnel paid by local government.

The governing authority of any county or municipality within the judicial circuit which provides additional personnel for the office of circuit public defender may contract with the council to provide such additional personnel in the same manner as is provided for state paid personnel in this article. Any such personnel shall be considered state employees and shall be entitled to the same fringe benefits as other state paid personnel employed by the circuit public defender pursuant to this article. The governing authority of such county or municipality shall transfer to the council such funds as may be necessary to cover the compensation, benefits, travel, and other expenses for such personnel.

History. — Code 1981, § 17-12-32, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2006, p. 752, § 10/SB 503.

JUDICIAL DECISIONS

Cited in Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

17-12-33. Assistant public defenders' private practice of law or concurrent judicial service prohibited; admission to bar in Georgia.

(a) Any assistant public defender or other attorney at law employed full time by the circuit public defender who is compensated in whole or in part by state funds shall not engage in the private practice of law for profit or serve concurrently in any judicial office.

(b) Any assistant public defender or any other attorney at law employed by the circuit public defender shall be a member of the State Bar of Georgia and shall be admitted to practice before the appellate courts of this state. The assistant public defender shall serve at the pleasure of the circuit public defender and shall have such authority, powers, and duties as may be assigned by the circuit public defender.

History. — Code 1981, § 17-12-33, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2008, p. 846, § 36/HB 1245.

17-12-34. Pro rata sharing of expenses and resources by counties in each circuit.

The governing authority of the county shall provide, in conjunction and cooperation with the other counties in the judicial circuit and in a pro rata share according to the population of each county, appropriate offices, utilities, telephone expenses, materials, and supplies as may be necessary to equip, maintain, and furnish the office or offices of the circuit public defender in an orderly and efficient manner. The provisions of an office, utilities, telephone expenses, materials, and supplies shall be subject to the budget procedures required by Article 1 of Chapter 81 of Title 36.

History. — Code 1981, § 17-12-34, enacted by Ga. L. 2003, p. 191, § 1.

JUDICIAL DECISIONS

Transcript costs for indigents. — It was error to hold that under O.C.G.A. § 17-12-34 of the Georgia Indigent Defense Act of 2003, the Georgia Public Defender Standards Council was required to pay for indigent defendants' costs of transcripts in criminal cases; under laws existing before the Act, counties were required to pay for such transcripts and the Act does not repeal these laws by implication. Ga. Public Defender Stds. Council v. State of Ga., 284 Ga. App. 660, 644 S.E.2d 510 (2007).

17-12-35. Acceptance of other funding.

A circuit public defender office may contract with and may accept funds and grants from any public or private source.

History. — Code 1981, § 17-12-35, enacted by Ga. L. 2003, p. 191, § 1.

17-12-36. Alternative delivery system; annual review of operations by council; record keeping.

(a) The council may permit a judicial circuit composed of a single county to continue in effect an alternative delivery system to the one set forth in this article if:

(1) The delivery system:

(A) Has a full-time director and staff and had been fully operational for at least two years on July 1, 2003; or

(B) Is administered by the county administrative office of the courts or the office of the court administrator of the superior court and had been fully operational for at least two years on July 1, 2003;

(2) The council, by majority vote of the entire council, determines that the delivery system meets or exceeds its policies as the council adopts;

(3) The governing authority of the county comprising the judicial circuit enacts a resolution expressing its desire to continue its delivery system and transmits a copy of such resolution to the council not later than September 30, 2004; and

(4) The governing authority of the county comprising the judicial circuit enacts a resolution agreeing to fully fund its delivery system.

(b) A judicial circuit composed of a single county may request an alternative delivery system only one time; provided, however, that if such judicial circuit's request for an alternative delivery system was disapproved on or before December 31, 2004, such judicial circuit may make one further request on or before September 1, 2005. The council shall allow such judicial circuit to have a hearing on such judicial circuit's request.

(c) The council shall make a determination with regard to continuation of an alternative delivery system not later than December 1, 2005, and if the council determines that such judicial circuit's alternative delivery system does not meet the requirements as established by the council, the council shall notify such judicial circuit of its deficiencies in

writing and shall allow such judicial circuit an opportunity to cure such deficiencies. The council shall make a final determination with regard to continuation of an alternative delivery system on or before December 31, 2005. Initial and subsequent approvals of alternative delivery systems shall be by a majority vote of the entire council.

(d) Any circuit whose alternative delivery system is disapproved at any time shall be governed by the provisions of this article other than this Code section.

(e) In the event an alternative delivery system is approved, the council shall annually review the operation of such system and determine whether such system is meeting the requirements as established by the council and is eligible to continue operating as an approved alternative delivery system. In the event the council determines that such system is not meeting the requirements as established by the council, the council shall provide written notice to such system of the deficiencies and shall provide such system an opportunity to cure such deficiencies.

(f) In the event an alternative delivery system is approved, it shall keep and maintain appropriate records, which shall include the number of persons represented; the offenses charged; the outcome of each case; the expenditures made in providing services; and any other information requested by the council.

(g) In the event the council disapproves an alternative delivery system either in its initial application or annual review, such system may appeal such decision to the council under such rules and procedures as shall be prescribed by the council.

(h) An approved alternative delivery system shall be paid by the council, from funds available to the council, in an amount equal to the amount that would have been allocated to the judicial circuit for the minimum salary of the circuit public defender, the assistant circuit public defenders, the investigator, and the administrative staff, exclusive of benefits, if the judicial circuit was not operating an alternative delivery system.

History. — Code 1981, § 17-12-36, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, Ex. Sess., p. ES3, § 24/HB 1EX; Ga. L. 2005, p. 910, § 2/HB 366; Ga. L. 2008, p. 846, §§ 37, 38/HB 1245; Ga. L. 2011, p. 91, § 14/HB 238; Ga. L. 2015, p. 519, § 7-11/HB 328.

17-12-37. Effective date of article.

This article shall become effective on January 1, 2005; provided, however, that the council and the circuit public defender selection panels shall be authorized to take administrative actions as may be

necessary or appropriate to prepare for and phase-in full implementation of this article on or after December 31, 2003.

History. — Code 1981, § 17-12-37, enacted by Ga. L. 2003, p. 191, § 1.

ARTICLE 3

ASSISTANCE BY THIRD-YEAR LAW STUDENTS OR STAFF INSTRUCTORS

Editor's notes. — Ga. L. 2003, p. 191, § 1, effective January 1, 2005, repealed the Code sections formerly codified as this article and enacted the current article. The former article consisted of Code Sections 17-12-60 through 17-12-62, relating to defense of indigents in capital cases, and was based on Ga. L. 1953, Nov.-Dec. Sess., p. 478, §§ 1-3; Ga. L. 1990, p. 8, § 17; Ga. L. 1992, p. 1963, § 1; Ga. L. 1993, p. 1402, § 18.

Law reviews. — For article, "See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum," see 26 Ga. St. U.L. Rev. 361 (2010).

For note on the 2003 enactment of this article, see 20 Ga. St. U.L. Rev. 105 (2003).

17-12-40. Definitions.

As used in this article, the term:

(1) "Circuit public defender" means any circuit public defender of this state or assistants of such officer.

(2) "Criminal proceeding" means any investigation, trial, juvenile proceeding, adjudicatory hearing, or other legal proceeding by which a person's liability for a crime is investigated or determined, commencing with the investigation and including the final disposition of the case.

(3) "Law school" means a law school within or outside this state which is approved by the American Bar Association or which is authorized to operate under Code Section 20-3-250.8.

(4) "Staff instructor" means a full-time professional staff instructor of a law school in this state who has been admitted to the bar of another state but who has not yet been admitted to the bar of this state.

(5) "Third-year law student" means a student regularly enrolled and in good standing in a law school within or outside this state who has satisfactorily completed at least two-thirds of the requirements for the first professional degree in law (J.D. or its equivalent) in not less than four semesters or six quarters of residence.

History. — Code 1981, § 17-12-40, enacted by Ga. L. 2003, p. 191, § 1.

17-12-41. Assistance of public defender by third-year law student or staff instructor.

An authorized third-year law student or staff instructor, when under the supervision of a circuit public defender, may assist in criminal proceedings within this state as if admitted and licensed to practice law in this state except that all pleadings and other entries of record must be signed by a circuit public defender or by his or her duly appointed assistant and that, in the conduct of a trial or other criminal proceeding, a circuit public defender or his or her duly appointed assistant must be physically present.

History. — Code 1981, § 17-12-41, enacted by Ga. L. 2003, p. 191, § 1.

17-12-42. Judge may prescribe type of assistance provided by law student or staff instructor; certification by law school dean.

A third-year law student or staff instructor may be authorized to assist a circuit public defender in such form and manner as the judge of the court may prescribe, taking care that the requirements of this article and the good moral character of the third-year law student or staff instructor are properly certified by the dean of the law school.

History. — Code 1981, § 17-12-42, enacted by Ga. L. 2003, p. 191, § 1.

17-12-43. Clerk of court to maintain records; limited period of assistance.

As to each third-year law student or staff instructor authorized to assist a circuit public defender, there shall be kept on file in the office of the clerk of the court in the county where such authority is to be exercised the dean's certificate, the student's and instructor's oaths, and the judge's order as contemplated under Code Section 17-12-42. The authority to assist a circuit public defender as allowed under this Code section shall extend for no longer than 18 months. If during this period any change occurs in the status of the student or instructor at the law school in which he or she was enrolled or employed, that is, if the student ceases his or her enrollment, is suspended, or is expelled or if the instructor ceases his or her employment or is released by the school, any such authority shall terminate and be revoked.

History. — Code 1981, § 17-12-43, enacted by Ga. L. 2003, p. 191, § 1.

17-12-44. Exception to qualification requirements for public defender or assistant public defender.

Any third-year law student or staff instructor authorized to assist a circuit public defender under this article is not required to possess the qualifications for appointment to the office of circuit public defender or appointment as an assistant circuit public defender as provided in Article 1 of this chapter.

History. — Code 1981, § 17-12-44, enacted by Ga. L. 2003, p. 191, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, "article" was substituted for "Code section".

17-12-45. Effective date of article.

This article shall become effective on January 1, 2005.

History. — Code 1981, § 17-12-45, enacted by Ga. L. 2003, p. 191, § 1.

ARTICLE 3A

RECOVERY OF ATTORNEY'S FEES AND COSTS

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, T. 17, Ch. 12, A. 2A, as enacted by Ga. L. 2006, p. 710, § 6/SB 203, was redesignated as T. 17, Ch. 12, A. 3A.

Law reviews. — For article on the 2006 enactment of this article, see 23 Ga. St. U.L. Rev. 61 (2006).

RESEARCH REFERENCES

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2059 et seq.

17-12-50. Definitions.

As used in this article, the term:

(1) "Paid in part" means payment by a county or municipality for a part of the cost of the provision of indigent defense services pursuant to a contract with a circuit public defender office as set forth in subsection (d) of Code Section 17-12-23. The term shall not include payment by a county or municipality for office space and other supplies as set forth in Code Section 17-12-34.

(2) "Public defender" means an attorney employed by a circuit public defender office or any other attorney who is paid from public funds to represent an indigent person in a criminal case.

History. — Code 1981, § 17-12-50, enacted by Ga. L. 2006, p. 710, § 6/SB 203; Ga. L. 2008, p. 846, § 39/HB 1245.

17-12-51. Repayment of attorney's fees as condition of probation.

(a) When a defendant who is represented by a public defender, who is paid in part or in whole by a county, enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other expenses of the defense if the payment does not impose a financial hardship upon the defendant or the defendant's dependent or dependents. The defendant shall make the payment through the community supervision officer to the county.

(b) When a defendant who is represented by a public defender, who is paid in part or in whole by a municipality, enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other expenses of the defense if the payment does not impose a financial hardship upon the defendant or the defendant's dependent or dependents. The defendant shall make the payment through the community supervision officer to the municipality.

(c) If a defendant who is represented by a public defender, who is paid for entirely by the state, enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other costs of the defense if the payment does not impose a financial hardship upon such defendant or such defendant's dependent or dependents. Such defendant shall make such payment through the community supervision officer to the Georgia Public Defender Council for payment to the general fund of the state treasury.

(d) In determining whether or not a payment imposed under this Code section imposes a financial hardship upon a defendant or defendant's dependent or dependents and in determining the amount of the payment to impose, the court shall consider the factors set forth in Code Section 17-14-10. The public defender may provide the court with an estimate of the cost for providing to the defendant the legal representation and other expenses of the defense. If requested by the defendant, the court shall hold a hearing to determine the amount to be paid.

(e) This Code section shall not apply to a disposition involving a child pursuant to Chapter 11 of Title 15, relating to juvenile proceedings.

History. — Code 1981, § 17-12-51, enacted by Ga. L. 2006, p. 710, § 6/SB 203; Ga. L. 2008, p. 846, § 40/HB 1245; Ga. L. 2015, p. 422, § 5-34/HB 310; Ga. L. 2015, p. 519, § 7-12/HB 328.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Legislative intent. — Defendant sentenced in 2005 for conduct occurring in 2004 was properly required to reimburse a county for court-appointed attorney fees; the Georgia Supreme Court held that such authority was inherent in a trial court's broad sentencing powers and that O.C.G.A. § 17-12-51(a), which was enacted in 2006, indicated some legislative intent to authorize imposition of such a condition. Pless v. State, 286 Ga. App. 235, 648 S.E.2d 752 (2007).

17-12-52. Recovery of payment or reimbursement by a county or municipality.

(a) A county or municipality may recover payment or reimbursement from a person who has received legal assistance from a public defender paid in part or in whole by the county or municipality:

(1) If the person was not eligible to receive such legal assistance; or

(2) If the person has been ordered to pay for the legal representation and other expenses of the defense pursuant to Code Section 17-12-51 and has not paid for the legal services.

(b) An action shall be brought within four years after the date on which the legal services were received.

(c) In determining the amount of the payment imposed under this Code section, the court shall consider the factors set forth in Code Section 17-14-10. The public defender may provide the court with an estimate of the cost for providing to the defendant the legal representation and other expenses of the defense.

(d) This Code section shall not apply to proceedings involving a child pursuant to Chapter 11 of Title 15, relating to juvenile proceedings.

History. — Code 1981, § 17-12-52, enacted by Ga. L. 2006, p. 710, § 6/SB 203.

ARTICLE 4

VERIFICATION OF INDIGENCY

Editor's notes. — Ga. L. 2003, p. 191, § 1, effective December 31, 2003, repealed the Code sections originally codified as this article, and enacted the provisions on mental health advocacy for the insane. The former article consisted of Code Sec-

tions 17-12-70 through 17-12-72 and was based on Ga. L. 1984, p. 495, § 1 and Ga. L. 1990, p. 8, § 17.

Ga. L. 2008, p. 846, § 41, effective July 1, 2008, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 17-12-80 through 17-12-88, relating to mental health advocacy for the insane, and was based on Code 1981, §§ 17-12-80 through 17-12-88, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17. For present comparable provisions, see Code section 17-12-11.

17-12-80. Verification of indigency required; procedure; timing of notification of eligibility.

(a) In order to retain funding as provided in Code Sections 15-21-74 and 15-21A-6, a governing authority shall verify that the applicant qualifies as an indigent person. The governing authority shall establish the methodology for verification and fund such process. The governing authority shall produce auditable information to the council to substantiate its verification process as requested by the council or its director.

(b) The council shall establish policies to determine approval of an indigent person verification system and shall annually provide written notification to the Georgia Superior Court Clerks' Cooperative Authority as to whether or not a governing authority has an approved indigent person verification system.

(c) The governing authority shall advise the circuit public defender, if applicable, or the administrator of the indigent defense system for the jurisdiction of the name of each person who has applied for legal services and provide identifying information for those persons who are financially eligible for services within one business day of such person's application for services.

History. — Code 1981, § 17-12-80, enacted by Ga. L. 2008, p. 846, § 41/HB 1245; Ga. L. 2011, p. 91, § 15/HB 238; Ga. L. 2015, p. 519, § 7-13/HB 328.

ARTICLE 5

OFFICE OF MULTICOUNTY PUBLIC DEFENDER

Editor's notes. — Ga. L. 2003, p. 191, § 1, effective December 31, 2003, repealed the Code sections formerly codified as this article, and enacted the current article. The former article consisted of Code Sections 17-12-90 through 17-12-97 and was based on Ga. L. 1992, p. 1963, § 2.

17-12-100 through 17-12-108.

Repealed by Ga. L. 2003, p. 191, § 1, effective December 31, 2004.

Editor's notes. — This article was based on Code 1981, §§ 17-12-100 through 17-12-108, enacted by Ga. L. 2003, p. 191, § 1.

ARTICLE 6

GEORGIA CAPITAL DEFENDER

Editor's notes. — Ga. L. 2008, p. 846, § 42, effective July 1, 2008, repealed the Code sections formerly codified under this article, relating to the Georgia Capital Defender. For comparable provisions, see Code sections 17-12-12 and 17-12-12.1.

17-12-120 through 17-12-128.

Repealed by Ga. L. 2008, p. 846, § 42/HB 1245, effective July 1, 2008.

Editor's notes. — This article was based on Code 1981, §§ 17-12-120 through 17-12-127, 17-12-127.1, and 17-12-128, enacted by Ga. L. 2003, p. 191, § 1 and Ga. L. 2004, p. 631, § 17.

CHAPTER 13

CRIMINAL EXTRADITION

Article 1

General Provisions

Sec.
17-13-1. Requirements as to applications for requisitions for extradition of fugitives from justice of this state.
17-13-2. Duty of Governor to make requisitions.
17-13-3. Expense of returning fugitives to be first authorized by county governing authority.
17-13-4. Arrest and delivery to authorities of fugitive from foreign country.
17-13-5. Execution of warrants for arrest of fugitives from justice.

Article 2

Uniform Criminal Extradition Act

17-13-20. Short title.
17-13-21. Definitions.
17-13-22. Duty of Governor to have fugitives from justice arrested and delivered to executive authorities of other states.
17-13-23. Form of demand for extradition of person charged with crime in another state.
17-13-24. Extradition of person imprisoned or awaiting trial in another state or who has left the demanding state under compulsion.
17-13-25. Extradition of persons not present in demanding state at time of commission of crime.
17-13-26. Investigation of case upon receipt of demand for extradition.
17-13-27. Issue of Governor's warrant of arrest; recitals.
17-13-28. Manner and place of execution of warrant.
17-13-29. Authority of arresting officers; penalties for refusal to assist arresting officers.
17-13-30. Rights of accused person; application for writ of habeas corpus; hearing; penalty.
17-13-31. Duty of district attorney to answer and defend habeas corpus action.
17-13-32. Confinement in jail of person being extradited to another state when necessary.
17-13-33. Arrest of person charged with crime in another state under warrant based upon oath or affidavit of another person.
17-13-34. Arrest without warrant of a person charged with a crime in another state.
17-13-35. Commitment of person accused of crime in another state to county jail pending receipt of demand from other state generally.
17-13-36. Granting of bail.
17-13-37. Procedure where accused not arrested within time specified in warrant.
17-13-38. Forfeiture of bail bond.
17-13-39. Surrender of persons under criminal prosecution or sentence in this state to demanding state.
17-13-40. Conduct of inquiry as to guilt or innocence of accused.
17-13-41. Recall of warrant of arrest or issuance of another warrant by Governor.
17-13-42. Demand for return of fugitives in other states by Governor of this state; issuance of warrant to person receiving fugitive.
17-13-43. Application for issuance of demand.
17-13-44. Payment of expenses.
17-13-45. Immunity from service of process of persons brought into state in civil actions based on facts in criminal charge.
17-13-46. Execution and filing of written waiver of extradition proceedings by accused; delivery of accused to demanding state.
17-13-47. Effect of article as to right, power, or privilege of state to try demanded person.

Sec.
17-13-48. Trial of person brought into state for other criminal prosecutions while in state.
Sec.
17-13-49. Uniform interpretation and construction.

JUDICIAL DECISIONS

Primary law governing extradition proceedings is found in the Constitution of the United States, and the acts of Congress in pursuance thereof. McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953).

RESEARCH REFERENCES

ALR. — Test of "dual criminality" where extradition to or from foreign nation is sought, 132 A.L.R. Fed. 525.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Cooperation between Georgia and other states generally, T. 28, C. 6.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 49, 64 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 19, 20, 24 et seq.

ALR. — Extradition: mission or motive of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

Permitting prisoner under sentence in federal court to be taken for trial before state court, 22 A.L.R. 886; 62 A.L.R. 279.

Extradition of fugitive in custody under charge in asylum state, 42 A.L.R. 585.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 54 A.L.R. 281.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 A.L.R. 419.

One not in demanding state at time of offense, but who afterward entered and left state, as fugitive from justice within extradition law, 91 A.L.R. 1262.

Right to try one brought within jurisdiction illegally or as a result of a mistake as to identity, 28 A.L.R. Fed. 685; 25 A.L.R.4th 157.

17-13-1. Requirements as to applications for requisitions for extradition of fugitives from justice of this state.

In addition to rules adopted by the Governor, the following rules shall be observed as a condition precedent to obtaining a requisition by him for the extradition of any fugitive from the justice of this state:

(1) The application for a requisition shall be made to the Governor by a district attorney, prosecuting attorney of a state court, judge of

a city or state court, or the mayor of any municipal corporation of this state and must show the full name of the fugitive for whom extradition is asked, the crime charged, the state or territory to which he has fled, the full name of the person suggested to act as agent of this state to receive and convey the fugitive to this state, the agent in no case to be the prosecutor; but the Governor may, in his discretion, appoint some other suitable person as agent of this state to receive and convey the fugitive. The application must also show that the ends of public justice require that the fugitive shall be brought back to this state for trial and that the requisition is not wanted for the purpose of enforcing the collection of a debt or for any private purpose whatever but solely for the purpose of a criminal prosecution as provided by law;

(2) The application shall be accompanied by the affidavit of the prosecutor, if any, stating that the requisition is wanted for the sole purpose of punishing the accused and not in any way to collect a debt or money or to enforce the payment thereof;

(3) If the fugitive has been indicted, two certified copies of the indictment or presentment shall be forwarded to the Governor with the application; and

(4) If no indictment has been preferred and an affidavit is the basis of the requisition, the affidavit shall describe the crime committed, with all the particularity required in an indictment, and two certified copies of the affidavit shall accompany the petition for the requisition.

History. — Ga. L. 1884-85, p. 141, § 1; Penal Code 1895, § 1275; Penal Code 1910, § 1357; Code 1933, § 44-101; Ga. L. 1983, p. 884, § 3-22.

JUDICIAL DECISIONS

Standard of review for asylum state. — Court considering release on habeas corpus can do no more than decide whether extradition documents on their face are in order, whether petitioner has been charged with a crime in the demanding state, whether the petitioner is the person named in the request for extradition, and whether the petitioner is a fugitive. The court may not look beyond the demanding state's charges to determine if the extradition request was a pretext to enable that state to commit the petitioner civilly. Oliver v. Barrett, 269 Ga. 512, 500 S.E.2d 908 (1998).

Cited in Dobbs v. Anderson, 170 Ga. 826, 154 S.E. 342 (1930); Brown v. State, 243 Ga. App. 430, 533 S.E.2d 453 (2000).

RESEARCH REFERENCES

ALR. — Extradition: mission or motive of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167; 54 A.L.R. 281.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry, 94 A.L.R. 1493.

Constitutionality, construction, and ap-

plication of statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, 151 A.L.R. 239.

Determination, in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 40 A.L.R.2d 1151.

17-13-2. Duty of Governor to make requisitions.

When an application is made as provided in Code Section 17-13-1 and in accordance with other rules adopted by the Governor, he shall make his requisition for the extradition of the fugitive under the seal of the office of the Governor, according to law.

History. — Ga. L. 1884-85, p. 141, § 2; Penal Code 1895, § 1276; Penal Code 1910, § 1358; Code 1933, § 44-102; Ga. L. 1983, p. 649, § 1.

RESEARCH REFERENCES

ALR. — Extradition: mission or motive of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

17-13-3. Expense of returning fugitives to be first authorized by county governing authority.

Before any expenses shall be incurred by any officer or duly authorized agent of the state for bringing back to the county where the crime was committed any fugitive from the justice of this state, who may be beyond the limits of the state, so as to become a charge upon any county where the crime was committed, the incurring of any such expense and the amount thereof shall be first authorized by the county governing authority.

History. — Ga. L. 1914, p. 123, § 1; Code 1933, § 44-201.

17-13-4. Arrest and delivery to authorities of fugitive from foreign country.

Whenever a fugitive from justice from a foreign country is found within this state, and by the treaty stipulations of the United States the person is to be surrendered to the authorities of the foreign country upon requisition from the proper officers, the Governor, by his warrant, shall cause him to be arrested and delivered over to such authorities.

History. — Orig. Code 1863, § 60; Code 1868, § 56; Code 1873, § 53; Code 1882, § 53; Penal Code 1895, § 1270; Penal Code 1910, § 1352; Code 1933, § 44-301.

JUDICIAL DECISIONS

Person who goes from one state to another before serving full sentence. — If a person is convicted of a felony committed by that person in one state, and the person goes into another state, whether voluntarily or involuntarily, before serving the full term for which the person was sentenced, the person thereby becomes a fugitive from justice. Brown v. Lowry, 185 Ga. 539, 195 S.E. 759 (1937); Frazier v. Grimes, 221 Ga. 375, 145 S.E.2d 39 (1965).

If a person is convicted of a felony committed by that person in one state, and the person goes into another state, whether voluntarily or involuntarily, before serving the full term for which the person was sentenced, the person thereby becomes a fugitive from justice within the meaning of U.S. Const., Art. IV, Sec. II. King v. Mount, 196 Ga. 461, 26 S.E.2d 419 (1943).

Extradition of convict whose parole revoked. — Paroled convict whose parole has been revoked because of a violation of the conditions of parole may be extradited from one state to another on the ground that the convict is a convict whose sentence has not expired and who therefore is charged with a crime. Frazier v. Grimes, 221 Ga. 375, 145 S.E.2d 39 (1965).

Cited in Dobbs v. Anderson, 170 Ga. 826, 154 S.E. 342 (1930).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 62, 85 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 52 et seq.

17-13-5. Execution of warrants for arrest of fugitives from justice.

When the Governor or other officer issues a warrant of arrest, it is the duty of the sheriffs, their deputies, coroners, and constables to execute it when placed in their hands.

History. — Orig. Code 1863, § 64; Code 1868, § 60; Code 1873, § 57; Code 1882, § 57; Penal Code 1895, § 1274; Penal Code 1910, § 1356; Code 1933, § 44-305.

JUDICIAL DECISIONS

In habeas corpus case, burden is on petitioner to show why extradition warrant should not be executed. — When, in the trial of a habeas corpus case, it appears that the respondent is holding the petitioner in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, the burden is cast upon the petitioner to show some valid and sufficient reason why the warrant should not be executed since there is a presumption that the Governor complied with the Constitution and law, and this presumption continues until the contrary appears. Baldwin v. Grimes, 216 Ga. 390, 116 S.E.2d 207 (1960).

Cited in Scheinfain v. Aldredge, 191 Ga. 479, 12 S.E.2d 868 (1940); Hart v. Mount, 196 Ga. 452, 26 S.E.2d 453 (1943).

ARTICLE 2

UNIFORM CRIMINAL EXTRADITION ACT

Law reviews. — For comment on Watson v. Grimes, 218 Ga. 631, 129 S.E.2d 795 (1963), see 26 Ga. B.J. 92 (1963).

JUDICIAL DECISIONS

O.C.G.A. T. 17, C. 13, A. 1 is an enactment of the Uniform Criminal Extradition Act. Fain v. Thurman, 247 Ga. 569, 277 S.E.2d 503 (1981).

Construction with Interstate Detainer Agreement. — Prisoner incarcerated in a jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to the procedural protections of that act particularly the right to a pretransfer hearing before being transferred to another jurisdiction, pursuant to Art. IV of the Detainer Agreement. Lambert v. Jones, 250 Ga. 603, 299 S.E.2d 716 (1983).

Constitutionality of extradition procedures. — Interstate extradition is intended to be a summary proceeding. Therefore, its summary nature does not offend any constitutional guarantees to which the fugitive is entitled. McCullough v. Stynchcombe, 243 Ga. 24, 252 S.E.2d 453 (1979).

O.C.G.A. T. 17, C. 13, A. 1 is not unconstitutional on the grounds that the statute does not provide for notice, hearing, and adjudication of the issues of identity of the accused as the offender, whether the accused was sufficiently charged in the demanding state, and whether the accused is a fugitive from justice as to the demanding state prior to the accused's delivery up and removal from this state to the demanding state. Fain v. Thurman, 247 Ga. 569, 277 S.E.2d 503 (1981).

Double jeopardy. — No double jeopardy can arise out of a decision in an extradition proceeding. Broughton v. Griffin, 244 Ga. 365, 260 S.E.2d 75 (1979).

Summary nature of extradition procedures. — Once a habeas corpus court has found extradition papers to be legally sufficient, any further consideration of the petitioner's defenses, including any defense based on an enforceable judgment, violates the clear intention of the legislature in enacting the Uniform Criminal Extradition Act, O.C.G.A. § 17-13-20 et seq., that an extradition proceeding be of a summary nature. Prince v. Mitchell, 257 Ga. 30, 354 S.E.2d 422 (1987).

Issue to be properly decided by demanding state. — While a mother's right to custody awarded by a Georgia court under former § 19-9-40 et seq. may certainly be raised as a defense to Tennessee charges of kidnapping the child and may even be dispositive of the issue of whether the mother and grandmother took the child unlawfully, that issue nonetheless was to be properly decided in Tennessee, the court of the demanding state, not by a court in the asylum state, Georgia. Prince v. Mitchell, 257 Ga. 30, 354 S.E.2d 422 (1987).

Cited in Harmon v. State, 222 Ga. 845, 152 S.E.2d 861 (1967); Stynchcombe v. Boulware, 240 Ga. 295, 240 S.E.2d 86 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Arrest of fugitives in this state generally. — Unless the fugitive from a foreign state commits some criminal act in this state, a Georgia court will not issue a warrant for the fugitive's arrest except pursuant to this article, in which case the sheriff is then required, under extradition procedures, to deliver the fugitive before the proper Georgia court where the fugitive has the right to contest the fugitive's extradition by writ of habeas corpus. 1972 Op. Att'y Gen. No. 72-24.

Penalty for delivery of fugitive to foreign bondsman rather than proper court. — If the sheriff fails to deliver the fugitive before the proper court, and instead delivers the fugitive up to the foreign bondsman, the fugitive will be subject to criminal prosecution. 1972 Op. Att'y Gen. No. 72-24.

Pick up and return of parolees. — Parolees under supervision in this state pursuant to the former Uniform Act for Out-of-State Parolee Supervision could be picked up and returned to the sending state upon compliance with the requirements of the Act and without necessity of extradition proceedings. 1965-66 Op. Att'y Gen. No. 66-39.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 10, 11, 57 et seq.

ALR. — One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167; 54 A.L.R. 281.

Extradition of fugitive in custody under charge in asylum state, 42 A.L.R. 585.

Action for malicious prosecution or false arrest based on extradition proceeding, 55 A.L.R. 353.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 A.L.R. 902.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 A.L.R. 419.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552; 40 A.L.R.2d 1151.

One removed from demanding state or country as a fugitive from justice within contemplation of extradition laws, 85 A.L.R. 118.

One not in demanding state at time of offense, but who afterward entered and left state, as fugitive from justice within extradition law, 91 A.L.R. 1262.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.

Surrender of convict to authorities of other jurisdiction as precluding punishment or further punishment under original conviction, 147 A.L.R. 941.

Constitutionality, construction, and application of federal Fugitive Felon Act, 154 A.L.R. 1168.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 A.L.R.3d 1443.

Extradition of juveniles, 73 A.L.R.3d 700.

Validity, construction, and application of interstate agreement on detainers, 98 A.L.R.3d 160.

Right to try one brought within jurisdiction illegally or as a result of a mistake as to identity, 28 A.L.R. Fed. 685; 25 A.L.R.4th 157.

17-13-20. Short title.

This article shall be known and may be cited as the "Uniform Criminal Extradition Act."

History. — Ga. L. 1951, p. 726, § 32; Ga. L. 2004, p. 631, § 17.

Law reviews. — For article analyzing history and operation of interstate criminal extraditions in Georgia, see 24 Ga. B.J. 219 (1961).

JUDICIAL DECISIONS

Habeas petition dismissed. — Trial court properly dismissed an inmate's petition for habeas corpus for failing to state a claim upon which relief could be granted based on a finding that such was prematurely filed in that no governor's warrant had been issued or served from the seeking state at the time the petition was filed and the inmate had only been arrested for Georgia offenses; moreover, to the extent that the inmate might have been seeking to challenge an arrest without a warrant pursuant to O.C.G.A. § 17-13-34, insufficient facts were pled which supported such a claim. Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

Cited in Mathews v. Foster, 209 Ga. 699, 75 S.E.2d 427 (1953).

RESEARCH REFERENCES

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 30.

17-13-21. Definitions.

As used in this article, the term:

(1) "Executive authority" includes the Governor and any person performing the functions of governor in a state other than this state.

(2) "Governor" includes any person performing the functions of governor by authority of the laws of this state.

(3) "State," referring to a state other than this state, includes the District of Columbia and any other state or territory, organized or unorganized, of the United States of America.

History. — Ga. L. 1951, p. 726, § 1; Ga. L. 1978, p. 1754, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 65.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 1.

17-13-22. Duty of Governor to have fugitives from justice arrested and delivered to executive authorities of other states.

Subject to this article, the Constitution of the United States, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

History. — Ga. L. 1951, p. 726, § 2.

JUDICIAL DECISIONS

Use of "demand" not required. — Actual use of the word "demand" in the requisition is not required. Pahno v. Mathews, 226 Ga. 216, 173 S.E.2d 704 (1970).

Use of "request" constitutes a demand. — Requisition of the Governor of another state using the word "request" rather than "demand," constitutes a demand by that state upon this state to return the prisoner, as is required by this section. Pahno v. Mathews, 226 Ga. 216, 173 S.E.2d 704 (1970).

Misdemeanor conviction is extraditable. Graham v. State, 231 Ga. 820, 204 S.E.2d 630 (1974).

Offenses for which fugitive may be tried. — Fugitive from justice may be tried for any offense committed in the state to which the fugitive is returned, though the offense may have been committed before the demand and surrender, and though it be not the particular offense on account of which the fugitive was brought back for trial. Lascelles v. State, 90 Ga. 347, 16 S.E. 945, 35 Am. St. R. 216 (1892), aff'd, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 549 (1893).

Not a fugitive from justice if not in demanding state at time of indictment. — Person for whose delivery a demand has been made under U.S. Const., art. IV, sec. II, cl. 2, and who shows conclusively, and upon conceded facts, that the person was not within the demanding state at the time stated in the indictment, nor at any time when the acts were, if ever, committed, is not a fugitive from justice. Dawson v. Smith, 150 Ga. 350, 103 S.E. 846 (1920) (superseded by later cases, see Aikens v. Turner, 241 Ga. 401, 245 S.E.2d 660 (1978); Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539 (1979)).

Applicability to persons who voluntarily enter state. — Neither the language of Ga. L. 1951, p. 726, § 2 nor former Penal Code 1910, § 1352 (see O.C.G.A. § 17-13-4 or O.C.G.A § 17-13-22) limited the arrest and rendition to one who voluntarily comes within this state. Kelly v. Mangum, 145 Ga. 57, 88 S.E. 556 (1916).

Warrant is but prima facie evidence sufficient to hold accused. — In extradition proceedings, if the Governor of the state upon whom the demand is made issues a warrant for the apprehension and delivery of such a person, the warrant is but prima facie sufficient to hold the accused, and it is open to the accused, on habeas corpus proceedings, to show some valid and sufficient reason why the warrant should not be executed, the presumption being that the Governor has complied with the law. Dawson v. Smith, 150 Ga. 350, 103 S.E. 846 (1920).

Guilt not in issue on writ of habeas corpus. — Courts of the asylum state cannot, upon a writ of habeas corpus, inquire into the guilt or innocence of the accused. Barranger v. Baum, 103 Ga. 465, 30 S.E. 524, 68 Am. St. R. 113 (1898); Blackwell v. Jennings, 128 Ga. 264, 57 S.E. 484 (1907).

Burden in habeas corpus case of showing why warrant should not be executed. — When, in the trial of a habeas corpus case, it appears that the respondent holds the petitioner in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, the burden is cast upon the petitioner to show some valid and sufficient reason why the warrant should not be executed. The presumption is that the Governor has complied with the Constitution and the law, and this presumption continues until the contrary appears. Mathews v. Foster, 209 Ga. 699, 75 S.E.2d 427 (1953); Baldwin v. Grimes, 216 Ga. 390, 116 S.E.2d 207 (1960).

Allegations insufficient to bar extradition. — Allegations that the state waited a year and half to send a warrant and that the conviction was only a misdemeanor, and that the petitioner had obtained work, married, and now has a family, and has incurred obligations, even if proved, are not sufficient to act as a bar to extradition proceedings. Graham v. State, 231 Ga. 820, 204 S.E.2d 630 (1974).

Cited in Hart v. Mangum, 146 Ga. 497, 91 S.E. 543 (1917); Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

OPINIONS OF THE ATTORNEY GENERAL

General Assembly intended that misdemeanors be covered. — This section, by the use of the words "other crime," clearly expresses the intention of the General Assembly that the Governor shall extradite persons charged with a misdemeanor in other states. 1958-59 Op. Att'y Gen. p. 251.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 90 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 3 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 2.

ALR. — Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 A.L.R.3d 1085.

17-13-23. Form of demand for extradition of person charged with crime in another state.

No demand for the extradition of a person charged with a crime in another state shall be recognized by the Governor unless in writing, alleging, except in cases arising under Code Section 17-13-25, that the accused was present in the demanding state at the time of the commission of the alleged crime and that thereafter he fled from the state, and accompanied by a copy of an indictment found, or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon, or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation, or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of the state; and the copy of the indictment, information, affidavit, judgment of conviction, or sentence must be authenticated by the executive authority making the demand.

History. — Ga. L. 1951, p. 726, § 3.

JUDICIAL DECISIONS

How presence of accused in demanding state when crime committed ascertained. — Whether or not the accused was present in the demanding state at the time of the commission of the crime may be ascertained from the demand as well as from the accompanying documents. Mitchell v. Dodd, 238 Ga. 638, 235 S.E.2d 15 (1977).

All reasonable presumptions are indulged to sustain the sufficiency of the instrument charging the crime. Baker v. Smith, 233 Ga. 644, 212 S.E.2d 819 (1975).

Mere defects overlooked so long as charge constitutes a crime. — So long as the charge made against one whose extradition is sought legally constitutes a crime, mere defects in the indictment as an instrument of criminal proceedings will be disregarded. Baker v. Smith, 233 Ga. 644, 212 S.E.2d 819 (1975).

Demand based solely on warrant for arrest is insufficient. — Demand for extradition must be based not on a warrant for arrest but on an indictment, on information supported by affidavit, or on an affidavit made before a magistrate together with any warrant for arrest issued thereon. The thrust of this rule is not directed so much to the recitals in the extradition warrant as to the fact that an arrest warrant without more is not sufficient. Carver v. Stynchcombe, 243 Ga. 477, 254 S.E.2d 856 (1979).

Indictment for escape not required. — There is no requirement that the fugitive be separately indicted for escape or that there be an affidavit before a magistrate attesting to the escape. McLeod v. Barrett, 271 Ga. 569, 522 S.E.2d 219 (1999).

If indictment accompanies requisition, this state will make no further determination as to probable cause. — If a copy of an indictment accompanies the requisition, no further determination of the existence of probable cause to arrest will be made by this state for in the interest of comity and the expeditious administration of justice the state will rely on the official representation that probable cause to arrest has been constitutionally found in the demanding state. Batton v. Griffin, 241 Ga. 548, 246 S.E.2d 667 (1978).

Foreign state's indictment sufficient to describe circumstance of crime's committal. — Indictment from another state substantially charging the person demanded with having committed a crime under the law of the foreign state, as required by O.C.G.A. § 17-13-23, sufficiently describes the "circumstance of its committal" as required by the Uniform Criminal Extradition Act, O.C.G.A. § 17-13-20 et seq. Grubbs v. Stynchcombe, 251 Ga. 39, 302 S.E.2d 552 (1983).

Requirement that signature of prosecutor or prosecuting officer appear on indictment. — It is not necessary that the requisition show that the prosecutor's name has been endorsed on the back of the indictment or that the indictment has been signed by the proper prosecuting officer, although these matters may be required by the statutes of the demanding state. Baker v. Smith, 233 Ga. 644, 212 S.E.2d 819 (1975).

Witnesses need not be listed on the information. Baker v. Smith, 233 Ga. 644, 212 S.E.2d 819 (1975).

Recitation in requisition that it is accompanied by affidavit. — It is not necessary that the requisition or the governor's warrant recite that the requisition is accompanied by an affidavit made before a magistrate. Wollweber v. Martin, 226 Ga. 20, 172 S.E.2d 605 (1970).

No warrant need accompany affidavit, unless warrant was issued. — Affidavit is a supporting document of the Governor's requisition. It does not need to be accompanied by a warrant unless in fact a warrant was issued. Gramlick v. Griffin, 230 Ga. 20, 195 S.E.2d 446 (1973).

Affidavit not rendered insufficient by reason of fact that warrant does not issue. — If no warrant is in fact issued upon the affidavit which accompanies the requisition, then the affidavit is not rendered insufficient by reason of that fact. Gramlick v. Griffin, 230 Ga. 20, 195 S.E.2d 446 (1973).

Affidavit made and sworn to by the prosecuting attorney, which asserts that the prosecutor knows the contents of the information and believes the contents to be true, is sufficient. Baker v. Smith, 233 Ga. 644, 212 S.E.2d 819 (1975).

Necessity for certification of affidavit by judge or clerk of court. — If the affidavit of complaint upon which extradition is sought shows that it was made before a magistrate, it is not necessary that a judge or clerk of court certify that such was the case. Wollweber v. Martin, 226 Ga. 20, 172 S.E.2d 605 (1970).

Sufficiency of information supported by affidavit which lacks notarial seal. — Information supported by affidavits which are executed in the presence of a notary public and authenti-

cated by the Governor of another state, although lacking a notarial seal, is sufficient to authorize the warrant of the Governor of Georgia. Baker v. Smith, 233 Ga. 644, 212 S.E.2d 819 (1975).

Affidavit sworn to before a named person designated as "notary public, county prosecutor or county judge" is a description sufficient to show that such person was a "magistrate" within the meaning of Ga. L. 1951, p. 726, § 3 (see O.C.G.A. § 17-13-23). Bryant v. Griffin, 220 Ga. 154, 137 S.E.2d 640 (1964).

Evidentiary facts need not be stated in the affidavit. Wollweber v. Martin, 226 Ga. 20, 172 S.E.2d 605 (1970).

Sufficiency of averment that relator was in demanding state when crime committed. — When a requisition for extradition incorporates by reference an attached authenticated copy of an indictment of the demanding state, specifically charging the relator with having committed a crime in that state on a day certain, and if the requisition asserts that the relator fled from the demanding state, the requisition has sufficiently averred that the relator was in the demanding state at the time the crime was committed. Mitchell v. Dodd, 238 Ga. 638, 235 S.E.2d 15 (1977).

Sufficiency of papers supported by affidavit executed before notary public. — Extradition papers, otherwise admittedly in order, are not insufficient if accompanied by an information and an affidavit in support thereof executed in the presence of a notary public rather than an affidavit executed before a magistrate. Nevil v. Tyson, 230 Ga. 438, 197 S.E.2d 340 (1973).

Habeas corpus petition to challenge warrant. — Detainee who was arrested pursuant to a fugitive warrant could challenge through a petition for habeas corpus the factual basis of the allegation that the detainee was present in the demanding state at the time of the crime. St. Lawrence v. Bartley, 269 Ga. 94, 495 S.E.2d 18 (1998).

Not error to deny habeas corpus and remand for delivery to demanding state if section complied with. — If no question is presented or raised as to the legality or the sufficiency of the documents originally transmitted by the Governor of the demanding state, and if those documents, together with the demand of the Governor of the demanding state for extradition, comply in all respects with the requirements of this section, it is not error for the trial court to deny the habeas corpus and to remand the petitioner to the custody of the sheriff for delivery over to the proper authorities of the demanding state. DeWitt v. O'Neal, 225 Ga. 645, 171 S.E.2d 144 (1969).

Erroneous issuance of warrant grounds for relief. — In a habeas corpus proceeding, if it was shown that the Governor issued an extradition warrant pursuant to the mandatory terms of the Constitution and O.C.G.A. § 17-13-23, i.e., with the understanding that the petitioner had committed a crime in the demanding state and had fled therefrom, relief should have been granted based on a stipulation that the petitioner had not committed a crime while in the demanding state. Jenkins v. Garrison, 265 Ga. 42, 453 S.E.2d 698 (1995).

Extradition of one at large on bail pending appeal of federal conviction. — One at large on bail pending appeal of one's federal conviction can be extradited by a sister state for the purpose of serving sentences imposed by that state. Extradition under such circumstances does not violate constitutional due process rights of the party extradited. Crane v. State, 233 Ga. 264, 210 S.E.2d 800 (1974).

Defendant was not fugitive from justice. — Because a detainee who was arrested pursuant to a fugitive warrant proved by a preponderance of the evidence that the detainee was not present in the demanding state at the time of the crime, the habeas court did not err in finding that the detainee was not a fugitive from justice. St. Lawrence v. Bartley, 269 Ga. 94, 495 S.E.2d 18 (1998).

Cited in West v. Graham, 211 Ga. 662, 87 S.E.2d 849 (1955); Winslow v. Grimes, 214 Ga. 262, 104 S.E.2d 76 (1958); Clonts v. Stynchcombe, 229 Ga. 672, 194 S.E.2d 94 (1972); Watson v. Stynchcombe, 240 Ga. 169, 240 S.E.2d 56 (1977); Harris v. Massey, 241 Ga. 580, 247 S.E.2d 55 (1978); Frazier v. Rutledge, 243 Ga. 39, 252 S.E.2d 465 (1979); Ingram v. Dodd,

243 Ga. 788, 256 S.E.2d 778 (1979); Brown v. State, 243 Ga. App. 430, 533 S.E.2d 453 (2000); Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 68 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 19, 20, 25 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 3.

ALR. — One who left demanding state by official permission as a fugitive from justice for purposes of extradition, 67 A.L.R. 1480.

Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 A.L.R. 595.

Sufficiency of statements in demanding papers in extradition proceedings as allegation or proof of presence of accused in demanding state at time of commission of alleged crime or that accused is a fugitive, 135 A.L.R. 973.

Constitutionality, construction, and application of statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, 151 A.L.R. 239.

Determination, in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 40 A.L.R.2d 1151.

Necessity and sufficiency of identification of accused as the person charged, to warrant extradition, 93 A.L.R.2d 912.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 A.L.R.3d 1085.

17-13-24. Extradition of person imprisoned or awaiting trial in another state or who has left the demanding state under compulsion.

(a) When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this state may agree with the executive authority of the other state for the extradition of the person before the conclusion of the proceedings or of his term of sentence in the other state, upon condition that the person be returned to the other state, at the expense of this state, as soon as the prosecution in this state is terminated.

(b) The Governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state who is charged in the manner provided in Code Section 17-13-43 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

History. — Ga. L. 1951, p. 726, § 5; Ga. L. 1955, p. 587, § 3.

JUDICIAL DECISIONS

Sufficiency of supporting documents is always open to judicial inquiry. — Question as to whether or not the extradition warrant under which an alleged fugitive from justice is held is supported by documents from the de-

manding state legally sufficient to authorize the person's extradition is always open to judicial inquiry in a habeas corpus proceeding. Brown v. Grimes, 214 Ga. 388, 104 S.E.2d 907 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 24, 143.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 18.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 5.

ALR. — Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 A.L.R. 595.

17-13-25. Extradition of persons not present in demanding state at time of commission of crime.

The Governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in Code Section 17-13-23 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand and the provisions of this article not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime and has not fled therefrom.

History. — Ga. L. 1951, p. 726, § 6.

JUDICIAL DECISIONS

Section not preempted by federal law. — If the defendant was charged with taking actions in Georgia which resulted in the commission of a crime in Florida, the defendant contended that since the defendant never "fled" Florida, and federal law only authorizes extradition to states from which the fugitive has fled, the defendant was not subject to extradition in this case and that O.C.G.A. § 17-13-25, which authorizes extradition in cases such as this, should be preempted by federal law; the Supreme Court found no basis for a finding of preemption in the defendant's argument and thus found that the section could form the basis for the defendant's extradition. Haupt v. Mitchell, 256 Ga. 844, 353 S.E.2d 345 (1987).

Absence from demanding state when crime committed is not a defense. — That accused was not present in the demanding state at the time of the alleged commission of the offense no longer presents a valid defense. Aikens v. Turner, 241 Ga. 401, 245 S.E.2d 660 (1978).

Absence from demanding state not a defense when the offense is nonsupport. — Fact that the accused was not present in the other state at the time of the alleged commission of the offense of nonsupport is not a valid defense to an extradition proceeding brought under this section for the offense of nonsupport does not require the presence of the accused in the demanding state at the time of the alleged commission of the crime. Johnstone v. Deyton, 233 Ga. 146, 210 S.E.2d 692 (1974).

Demanding state's requisition showing the crime was committed in this state. — In a habeas corpus proceeding where the requisition of the Governor of the demanding state conclusively shows that the crime charged was committed in this state and not in the demanding state, the person so accused cannot be extradited as a fugitive from justice under 18

U.S.C. § 3182. Watson v. Grimes, 218 Ga. 631, 129 S.E.2d 795 (1963).

Governor's warrant is prima facie evidence of requirements for issuance. — Warrant of the Governor in an extradition is prima facie evidence of the existence of every fact of a crime necessary for the warrant's issuance. Sellers v. Griffin, 226 Ga. 565, 176 S.E.2d 75 (1970).

One seeking habeas corpus must overcome prima facie case of Governor's warrant. — Person held upon a Governor's warrant in an extradition proceeding and who is seeking to be released on a habeas corpus writ must introduce evidence sufficient to overcome the prima facie case on the issue for which the person is being prosecuted in the demanding state. Sellers v. Griffin, 226 Ga. 565, 176 S.E.2d 75 (1970).

Erroneous issuance of warrant grounds for relief. — In a habeas corpus proceeding, if it is shown that the Governor issued an extradition warrant pursuant to the mandatory terms of the Constitution and O.C.G.A. § 17-13-23, i.e., with the understanding that the petitioner had committed a crime in the demanding state and had fled therefrom, relief should have been granted based on a stipulation that the petitioner had not committed a crime while in the demanding state. Jenkins v. Garrison, 265 Ga. 42, 453 S.E.2d 698 (1995).

Cited in Jackson v. Pittard, 211 Ga. 427, 86 S.E.2d 295 (1955); Mitchum v. Stynchcombe, 227 Ga. 226, 179 S.E.2d 919 (1971); Nevil v. Tyson, 230 Ga. 438, 197 S.E.2d 340 (1973); Rutledge v. Tolbert, 240 Ga. 116, 239 S.E.2d 520 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 28, 29.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 11, 12.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 6.

ALR. — One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167; 54 A.L.R. 281.

17-13-26. Investigation of case upon receipt of demand for extradition.

When a demand for the surrender of a person charged with a crime shall be made upon the Governor of this state by the executive authority of another state, the Governor may call upon the Attorney General or any prosecuting officer in this state to investigate or assist in investigating the demand, to report to him the situation and circumstances of the person so demanded, and to advise whether he ought to be surrendered.

History. — Ga. L. 1951, p. 726, § 4.

JUDICIAL DECISIONS

Extradition hearings need not be personally conducted by the Governor so long as the final decision is personally made by the Governor. Hooten v. State, 245 Ga. 250, 264 S.E.2d 192, cert. denied, 446 U.S. 942, 100 S. Ct. 2168, 64 L. Ed. 2d 797 (1980).

Section not exclusive means for obtaining information. — While the Governor's executive counsel is not expressly included under this section, that provision is not the exclusive means available to the Governor to obtain information regarding

extradition. Lively v. Fulcher, 244 Ga. 771, 262 S.E.2d 93 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 90, 96, 97.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 40.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 4.

17-13-27. Issue of Governor's warrant of arrest; recitals.

If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the seal of the office of the Governor and directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History. — Ga. L. 1951, p. 726, § 7; Ga. L. 1983, p. 649, § 2.

JUDICIAL DECISIONS

This section refers to the facts relating to the requisition and supporting documents of the demanding state, not to the facts of the offense charged. Wollweber v. Martin, 226 Ga. 20, 172 S.E.2d 605 (1970).

Violation of state extradition law as basis of 42 U.S.C. § 1983 action. — Violation of state extradition law can serve as the basis of a 42 U.S.C. § 1983 action if the violation of state law causes the deprivation of rights protected by the Constitution and statutes of the United States. Harden v. Pataki, 320 F.3d 1289 (11th Cir. 2003).

Recitation that requisition is accompanied by affidavit. — It is not necessary that the requisition or the Governor's warrant recite that the requisition is accompanied by an affidavit made before a magistrate. Wollweber v. Martin, 226 Ga. 20, 172 S.E.2d 605 (1970).

Failure of the extradition warrant to list the documents supporting the requisition does not mean that the extradition warrant does not substantially recite the facts necessary to the validity of the warrant's issuance. Carver v. Stynchcombe, 243 Ga. 477, 254 S.E.2d 856 (1979).

Affidavit showing no crime committed. — When the affidavit supporting the request for extradition shows that no crime was committed, the affadavit is insufficient to sustain an extradition warrant. Brown v. Grimes, 214 Ga. 388, 104 S.E.2d 907 (1958).

Sufficiency of supporting documents always open to judicial inquiry. — Question as to whether or not the extradition warrant under which an alleged fugitive from justice is held is supported by documents from the demanding state legally sufficient to authorize the fugitive's extradition is always open to judicial inquiry in a habeas corpus proceeding. Brown v. Grimes, 214 Ga. 388, 104 S.E.2d 907 (1958).

Burden of showing why warrant should not be executed. — When, in the trial of a habeas corpus case, it appears that the respondent is holding the petitioner in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, the burden is cast upon the

petitioner to show some valid and sufficient reason why the warrant should not be executed since there is a presumption that the Governor complied with the Constitution and law and this presumption continues until the contrary appears. Baldwin v. Grimes, 216 Ga. 390, 116 S.E.2d 207 (1960).

If the warrant is regular on the warrant's face, the burden is cast upon the petitioner to show some valid and sufficient reason why the warrant should not be executed. The presumption is that the Governor has complied with the Constitution and the law, and this presumption continues until the contrary appears. Wollweber v. Martin, 226 Ga. 20, 172 S.E.2d 605 (1970).

Cited in Lively v. Fulcher, 244 Ga. 771, 262 S.E.2d 93 (1979); Smith v. Hutson, 250 Ga. 870, 301 S.E.2d 880 (1983); Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 108 et seq.

C.J.S. — 35 C.J.S., (Rev), Extradition and Detainers, § 41 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 7.

ALR. — Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 A.L.R. 595.

17-13-28. Manner and place of execution of warrant.

The warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state, to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to other provisions of this article, to the duly authorized agent of the demanding state.

History. — Ga. L. 1951, p. 726, § 8.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 117 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 40 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 8.

JUDICIAL DECISIONS

Cited in Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

17-13-29. Authority of arresting officers; penalties for refusal to assist arresting officers.

Every peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any

criminal process directed to them, with like penalties against those who refuse their assistance.

History. — Ga. L. 1951, p. 726, § 9.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 138.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 9.

17-13-30. Rights of accused person; application for writ of habeas corpus; hearing; penalty.

(a) No person arrested upon a warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender, of the crime with which he is charged, and that he has the right to demand and procure legal counsel. If the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of the court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When the writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody and to the agent of the demanding state.

(b) Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant, in willful disobedience of subsection (a) of this Code section, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $1,000.00 or be imprisoned not more than six months, or both.

History. — Ga. L. 1951, p. 726, §§ 10, 11.

Cross references. — Habeas corpus generally, T. 9, C. 14.

JUDICIAL DECISIONS

Presumption is that Governor has complied with constitution and law, and this presumption continues until the contrary appears. McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953).

Authority of court once extradition granted. — Once the Governor has granted extradition, a court in a habeas corpus proceeding can do no more than decide whether the extradition documents on their face are in order; whether the petitioner has been charged with a crime in the demanding state; whether the petitioner is the person named in the request for extradition; and whether the petitioner is a fugitive. Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979); Stynchcombe v. Smith, 244 Ga. 548, 261 S.E.2d 342 (1979).

Habeas corpus relief denied. — Trial court properly denied a prisoner's petition for a writ of habeas corpus pursuant to O.C.G.A. § 17-13-30 seeking to block extradition; O.C.G.A. § 42-5-50 did not prevent defendant from being extradited while the defendant's motion for a new trial was pending. Bradford v. Brown, 277 Ga. 92, 586 S.E.2d 631 (2003).

Trial court properly dismissed an inmate's petition for a writ of habeas corpus for failing to state a claim upon which relief could be granted based on a finding that such was prematurely filed in that no governor's warrant had been issued or served from the seeking state at the time the petition was filed and the inmate had only been arrested for Georgia offenses; moreover, to the extent that the inmate might have been seeking to challenge an arrest without a warrant pursuant to O.C.G.A. § 17-13-34, insufficient facts were pled which supported such a claim. Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

Georgia habeas court did not err by not examining a probable cause determination by a Washington magistrate because extradition documents were facially valid, a defendant had four felony charges pending in Washington, the defendant was the same person named in the extradition documents, and the defendant was a fugitive from Washington authorities; there was sufficient prima facie evidence to show that the defendant was a fugitive from justice. Smith v. State, 284 Ga. 356, 667 S.E.2d 95 (2008).

State meets the state's burden if the state produces an executive warrant, valid on the warrant's face. Cota v. Benson, 239 Ga. 695, 238 S.E.2d 332 (1977).

Executive warrant is prima facie sufficient to hold petitioner. — When in the trial of a habeas corpus case, it appears that the respondent holds the petitioner in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, it is prima facie sufficient to hold the petitioner. McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953).

Executive warrant casts upon petitioner burden of showing why the warrant should not be executed. McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953).

Petitioner must establish petitioner is not person named in warrant. — If petitioner contended that the superior court erred in denying the petitioner's petition for a writ of habeas corpus since there was no evidence that the petitioner, Dan Covert, was the "Dan Covert" named in the governor's warrant, there was no error since if the petitioner was not the person named in the governor's warrant, the petitioner had the burden to show that the petitioner was not. Covert v. Lee, 256 Ga. 357, 349 S.E.2d 450 (1986).

Requisition not supported by indictment or affidavit contradicts prima facie showing made by warrant. — Because the respondent tendered in evidence the requisition of the Governor of another state without a copy of an indictment found or an affidavit made before a magistrate, pursuant to 18 U.S.C. § 3182, the respondent in effect contradicted the prima facie showing made by the warrant alone, and thus showed that the petitioner was being illegally restrained in that the warrant was not based on a valid requisition and the trial court erred in remanding the petitioner to the respondent. McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953).

Habeas corpus proceedings summary and defenses should be raised in demanding state. — Once a habeas corpus court has found the extradition papers to be legally sufficient, a further inquiry into a petitioner's statutory and constitutional defenses violates the clear intention that an extradition proceeding be of a summary nature. Defenses that the statute of limitations has run on the offense for which the petitioner is being extradited, that the petitioner has been denied a speedy trial, and all other due process questions are issues to be properly decided by courts in the demanding state, not by courts in any asylum state. Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

Absence from demanding state at time of commission of alleged crime is no longer a defense which is cognizable in

an extradition proceeding. Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

Hardship resulting from delay in warrant as defense. — Allegations that the state where a petitioner for habeas corpus was arrested and convicted waited a year and a half to send a warrant and that the conviction was only a misdemeanor, and that the petitioner had obtained work, married, and now has a family, and has incurred obligations, even if proved, are not sufficient to act as a bar to extradition proceedings. Graham v. State, 231 Ga. 820, 204 S.E.2d 630 (1974).

Erroneous issuance of warrant grounds for relief. — In a habeas corpus proceeding, if it is shown that the Governor issued an extradition warrant pursuant to the mandatory terms of the Constitution and O.C.G.A. § 17-13-23, i.e., with the understanding that the petitioner had committed a crime in the demanding state and had fled therefrom, relief should have been granted based on a stipulation that the petitioner had not committed a crime while in the demanding state. Jenkins v. Garrison, 265 Ga. 42, 453 S.E.2d 698 (1995).

Cited in Smithwick v. Olson, 229 Ga. 494, 192 S.E.2d 337 (1972); Ward v. Jarvis, 240 Ga. 668, 242 S.E.2d 134 (1978); Treadaway v. Baker, 241 Ga. 95, 243 S.E.2d 41 (1978); Harris v. Massey, 241 Ga. 580, 247 S.E.2d 55 (1978); McCullough v. Stynchcombe, 243 Ga. 24, 252 S.E.2d 453 (1979); Johnson v. Mitchell, 256 Ga. 339, 349 S.E.2d 186 (1986); Marini v. Gibson, 267 Ga. 398, 478 S.E.2d 767 (1996).

OPINIONS OF THE ATTORNEY GENERAL

Extradition procedure generally. — Unless the fugitive from a foreign state commits some criminal act in this state, a Georgia court will not issue a warrant for the fugitive's arrest except pursuant to this article, in which case the sheriff is then required, under extradition procedures, to deliver the fugitive before the proper court in this state where the fugitive has the right to contest extradition by writ of habeas corpus. 1972 Op. Att'y Gen. No. 72-24.

Delivery of fugitive to foreign bondsman. — If the sheriff fails to deliver the fugitive before the proper court, and instead delivers the fugitive up to the foreign bondsman, the fugitive will be subject to criminal prosecution. 1972 Op. Att'y Gen. No. 72-24.

Considerations of proper identity may outweigh waiver of extradition. — While it would seem that this section would not apply if the prisoner has already waived extradition, the question of identity of the accused could well override all other considerations, and the need for a hearing in this respect would be just as great if a waiver was made in the paroling state as if it was not. While the prisoner has no right to formal extradition proceedings, the proceedings having already been waived, due caution would seem to require that the prisoner be taken before a judge prior to delivery. 1958-59 Op. Att'y Gen. p. 252.

Applicability to parolees. — This section is not applicable to prisoners who are paroled to this state and who have signed a waiver of extradition as a condition of parole. 1958-59 Op. Att'y Gen. p. 253.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 123 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 40.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 10.

ALR. — Right to prove absence from demanding state or alibi on habeas corpus

in extradition proceedings, 51 A.L.R. 797; 61 A.L.R. 715.

Necessity and sufficiency of identification of accused as the person charged, to warrant extradition, 93 A.L.R.2d 912.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 A.L.R.3d 1443.

17-13-31. Duty of district attorney to answer and defend habeas corpus action.

The district attorney shall answer and defend any habeas corpus action brought under this article, which action contests the issuance, execution, or validity of a Governor's warrant of arrest, unless the Governor shall direct the Attorney General to answer and defend the habeas corpus action.

History. — Ga. L. 1979, p. 412, § 1.

Cross references. — Habeas corpus generally, T. 9, C. 14.

17-13-32. Confinement in jail of person being extradited to another state when necessary.

(a) The officer or persons executing the Governor's warrant of arrest or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of the jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

(b) The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning the prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of the jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, the officer or agent, however, being chargeable with the expense of keeping; provided, however, that the officer or agent shall produce and show to the keeper of the jail satisfactory written evidence of the fact that he is actually transporting the prisoner to the demanding state after a requisition by the executive authority of the demanding state. The prisoner shall not be entitled to demand a new requisition while in this state.

History. — Ga. L. 1951, p. 726, § 12.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 138.
C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.
U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 12.

17-13-33. Arrest of person charged with crime in another state under warrant based upon oath or affidavit of another person.

Whenever any person within this state shall be charged, on the oath of any credible person before any judge or magistrate of this state, with the commission of any crime in any other state and, except in cases arising under Code Section 17-13-25, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or with having broken the terms of his bail, probation, or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth, on the affidavit of any credible person in another state, that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime and, except in cases arising under Code Section 17-13-25, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or with having broken the terms of his bail, probation, or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer, commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate, or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit. A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History. — Ga. L. 1951, p. 726, § 13.

JUDICIAL DECISIONS

Probable cause may be based on affidavit from demanding state. — Arrest warrant may be issued by a judge or magistrate of this state based on a determination of probable cause to arrest for a crime committed in another state which may be made on the basis of affidavits originating in the demanding state in an informal proceeding. Batton v. Griffin, 240 Ga. 450, 241 S.E.2d 201 (1978).

Cited in Mitchell v. Dodd, 238 Ga. 638, 235 S.E.2d 15 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 31, 58.
C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 13.

17-13-34. Arrest without warrant of a person charged with a crime in another state.

The arrest of a person may be lawfully made by any peace officer or private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested, the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath, setting forth the ground for the arrest, as provided in Code Section 17-13-33; and thereafter the answer of the accused shall be heard as if he had been arrested on a warrant.

History. — Ga. L. 1951, p. 726, § 14; Ga. L. 1990, p. 8, § 17.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 17-13-34 is justified under the Fourth, Fifth and Fourteenth Amendments in that it is based upon a standard which comports with the constitutional standard of probable cause as set forth in Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Section provides grounds in addition to § 17-4-20 for warrantless arrest. — While under former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20), a lawful arrest without a warrant can be made by an officer only if the offense is committed in the officer's presence; if the offender is endeavoring to escape; or if for other cause there is likely to be a failure of justice for want of an officer to issue a warrant, the General Assembly by the enactment of Ga. L. 1951, p. 726, § 14 (see O.C.G.A. § 17-13-34) made provision for another instance in which an arrest without a warrant might be lawfully made. Fields v. State, 211 Ga. 335, 85 S.E.2d 753 (1955); Wheeler v. Stynchcombe, 234 Ga. 240, 215 S.E.2d 244 (1975).

Satisfaction of "all practicable speed" requirement. — Taking a defendant before a judge for a commitment hearing on Monday after defendant's Friday arrest satisfies the "all practicable speed" requirement. Wheeler v. Stynchcombe, 234 Ga. 240, 215 S.E.2d 244 (1975).

Officer need only have probable cause that out-of-state warrant was issued. — When an officer believes that an out-of-state warrant has been issued, and this belief is based on reliable information from out-of-state officials that the issuance of a warrant is imminent, this amounts to probable cause to arrest, which is the applicable standard for a warrantless arrest in Georgia, even if this belief is mistaken and does not meet the requirement of O.C.G.A. § 17-13-34 that the officer have "reasonable information." Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Inmate's challenge to an arrest via habeas corpus. — Trial court properly dismissed an inmate's petition for a writ of habeas corpus for failing to state a claim upon which relief could be granted based on a finding that such was prematurely filed in that no governor's warrant had been issued or served from the seeking state at the time the petition was filed and

the inmate had only been arrested for Georgia offenses; moreover, to the extent that the inmate might have been seeking to challenge an arrest without a warrant pursuant to O.C.G.A. § 17-13-34, insufficient facts were pled which supported such a claim. Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

Cited in Bearden v. State, 223 Ga. 381, 155 S.E.2d 5 (1967); Cota v. Benson, 239 Ga. 695, 238 S.E.2d 332 (1977); Batton v. Griffin, 240 Ga. 450, 241 S.E.2d 201 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Arrest not authorized until requisition issued. — Prior to the issuance of a requisition for extradition, an officer of this state is not authorized to make an arrest under a warrant issued by an inferior court of another state. 1952-53 Op. Att'y Gen. p. 362.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 58.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 14.

17-13-35. Commitment of person accused of crime in another state to county jail pending receipt of demand from other state generally.

If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under Code Section 17-13-25, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time, not exceeding 30 days and which time must be specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail, as provided in Code Section 17-13-36, or until he shall be legally discharged.

History. — Ga. L. 1951, p. 726, § 15.

JUDICIAL DECISIONS

Purpose. — Purpose of Ga. L. 1951, p. 726, §§ 15-17 (see O.C.G.A. §§ 17-13-35 - 17-13-37) of the extradition law is to prevent unreasonably lengthy periods of confinement of fugitives pending consummation of extradition proceedings by the demanding state. There is, however, no indication of any legislative intent to restrict the period within which the Governor of another state may issue a rendition warrant to the period within which the court which issues the fugitive warrant may commit the accused or require the accused to give bond. Stynchcombe v. Whitley, 240 Ga. 776, 242 S.E.2d 720 (1978).

Section limits confinement pending extradition only. — Ga. L. 1951, p. 726, §§ 15-17 (see O.C.G.A. §§ 17-13-35 - 17-13-37) only limit the time during which one arrested as a fugitive may be kept in jail or on bail in lieu thereof, pending the completion of extradition proceedings and the issuance of the Governor's arrest warrant. Stynchcombe v. Whitley, 240 Ga. 776, 242 S.E.2d 720 (1978).

Procedure on arrest without warrant. — If a person is arrested as a fugitive from justice without a warrant, the person must be carried, without delay, before the most convenient officer qualified to receive an affidavit and issue a warrant. Lavina v. State, 63 Ga. 513 (1879).

Cited in Bearden v. State, 223 Ga. 381, 155 S.E.2d 5 (1967); Mitchell v. Dodd, 238 Ga. 638, 235 S.E.2d 15 (1977); Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 59, 60.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 15.

17-13-36. Granting of bail.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the prisoner to bail by bond, with sufficient sureties, in such sum as he deems proper, conditioned for the prisoner's appearance before the judge or magistrate at a time specified in such bond and for the prisoner's surrender to be arrested upon the warrant of the Governor of this state.

History. — Ga. L. 1951, p. 726, § 16.

Cross references. — Prohibition against excessive bail, U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII.

JUDICIAL DECISIONS

Purpose. — Purpose of Ga. L. 1951, p. 726, §§ 15-17 (see O.C.G.A. §§ 17-13-35 - 17-13-37) of the extradition law is to prevent unreasonably lengthy periods of confinement of fugitives pending consummation of extradition proceedings by the demanding state. There is, however, no indication of any legislative intent to restrict the period within which the Governor of another state may issue a rendition warrant to the period within which the court which issues the fugitive warrant may commit the accused or require the accused to give bond. Stynchcombe v. Whitley, 240 Ga. 776, 242 S.E.2d 720 (1978).

Section limits confinement pending extradition only. — Ga. L. 1951, p. 726, §§ 15-17 (see O.C.G.A. §§ 17-13-35 - 17-13-37) only limit the time during which one arrested as a fugitive may be kept in jail or on bail in lieu thereof, pending the completion of extradition proceedings and the issuance of the Governor's arrest warrant. Stynchcombe v. Whitley, 240 Ga. 776, 242 S.E.2d 720 (1978).

Cited in Soviero v. State, 220 Ga. 119, 137 S.E.2d 471 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 61, 63, 115.

Am. Jur. Proof of Facts. — Excessive Bail, 18 POF2d 149

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 16.

ALR. — Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Right of extraditee to bail after issuance of governor's warrant and pending final disposition of habeas corpus claim, 13 A.L.R.5th 118.

Allowance of bail in international extradition proceedings, 60 A.L.R. Fed. 2d 203.

17-13-37. Procedure where accused not arrested within time specified in warrant.

If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days, or a judge or magistrate may again take bail for his appearance and surrender as provided for in Code Section 17-13-36, but within a period not to exceed 60 days after the date of such new bond.

History. — Ga. L. 1951, p. 726, § 17.

JUDICIAL DECISIONS

Purpose. — Purpose of Ga. L. 1951, p. 726, §§ 15-17 (see O.C.G.A. §§ 17-13-35 - 17-13-37) of the extradition law is to prevent unreasonably lengthy periods of confinement of fugitives pending consummation of extradition proceedings by the demanding state. There is, however, no indication of any legislative intent to restrict the period within which the Governor of another state may issue a rendition warrant to the period within which the court which issues the fugitive warrant may commit the accused or require the accused to give bond. Stynchcombe v. Whitley, 240 Ga. 776, 242 S.E.2d 720 (1978).

Section only limits confinement pending extradition. — Ga. L. 1951, p. 726, §§ 15-17 (see O.C.G.A. §§ 17-13-35 - 17-13-37) only limit the time during which one arrested as a fugitive may be kept in jail or on bail in lieu thereof, pending the completion of extradition proceedings and the issuance of the Governor's arrest warrant. Stynchcombe v. Whitley, 240 Ga. 776, 242 S.E.2d 720 (1978).

Cited in Bearden v. State, 223 Ga. 381, 155 S.E.2d 5 (1967); Ward v. Jarvis, 240 Ga. 668, 242 S.E.2d 134 (1978); Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 51, 57 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 17.

17-13-38. Forfeiture of bail bond.

If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge or magistrate, by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he is within the state. Recovery may be had on the bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

History. — Ga. L. 1951, p. 726, § 18.

JUDICIAL DECISIONS

Cited in Ace Bonding Co. v. State, 152 Ga. App. 477, 263 S.E.2d 256 (1979).

RESEARCH REFERENCES

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 18.

17-13-39. Surrender of persons under criminal prosecution or sentence in this state to demanding state.

The Governor may, in his discretion, surrender, upon demand of the executive authority of another state, any person found in this state, notwithstanding the fact that a criminal prosecution or charges under the laws of this state are pending against the person, that the person has already been convicted in this state and is serving a sentence in any jail or penal institution of this state or of any county or municipality thereof, or that the person is serving a suspended or probationary sentence. The Governor may condition the release of the prisoner to the demanding state upon such terms as he may stipulate, including the condition that the prisoner be returned to this state immediately after trial and before commencing the service of sentence, if any, in the demanding state. In no case shall surrender of the prisoner be construed as a complete relinquishment of jurisdiction by this state, but the prisoner shall forthwith be returned to the custody of this state at the expense of the demanding state immediately after trial in the demanding state or the completion of sentence therein, as the case may be, except where the sentence of death has been executed in the demanding state.

History. — Ga. L. 1951, p. 726, § 19; Ga. L. 1955, p. 587, § 2.

JUDICIAL DECISIONS

Cited in State v. Potts, 136 Ga. App. 1, 220 S.E.2d 10 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 35.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 18.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 19.

ALR. — Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.

Surrender of convict to authorities of other jurisdiction as precluding punishment or further punishment under original conviction, 147 A.L.R. 941.

17-13-40. Conduct of inquiry as to guilt or innocence of accused.

The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge or crime in legal form as provided for in this article shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime.

History. — Ga. L. 1951, p. 726, § 20.

JUDICIAL DECISIONS

This section applies to a habeas corpus proceeding. DeBusschere v. Rutledge, 229 Ga. 128, 189 S.E.2d 397 (1972).

Ga. L. 1951, p. 726, § 20 applies when the appellant has been ordered extradited to the demanding state by a habeas corpus judgment. Hollis v. State, 233 Ga. 206, 210 S.E.2d 694 (1974).

Powers of court on habeas corpus once extradition ordered. — Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide whether the extradition documents on the documents' face are in order; whether the petitioner has been charged with a crime in the demanding state; whether the petitioner is the person named in the request for extradition; and whether the petitioner is a fugitive. Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

Proceeding is summary and defenses should be raised in demanding state. — Once a habeas corpus court has found the extradition papers to be legally sufficient, a further inquiry into a petitioner's statutory and constitutional defenses violates the clear intention that an extradition proceeding be of a summary nature. Defenses that the statute of limitations has run on the offense for which the petitioner is being extradited, that the petitioner has been denied a speedy trial, and all other due process questions are issues to be properly decided by courts in the demanding state, not by courts in any asylum state. Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

Absence for demanding state at time crime committed. — Absence from the demanding state at the time of the commission of an alleged crime is no lon-

ger a defense which is cognizable in an extradition proceeding. Hutson v. Stoner, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

Guilt or innocence not proper subject for inquiry on habeas corpus. — Evidence offered by the plaintiff in a habeas corpus case to the effect that no crime was committed in the demanding state involves guilt or innocence, and if there is no issue of identity in the case, it being admitted in the application that the plaintiff is the person named in the papers, there is no reason for the trial judge to hear evidence of this nature. DeBusschere v. Rutledge, 229 Ga. 128, 189 S.E.2d 397 (1972).

Question of the guilt or innocence of an alleged fugitive from justice is not a proper subject matter of inquiry in a habeas corpus proceeding in which the alleged fugitive resists extradition. Straub v. Sanders, 231 Ga. 674, 203 S.E.2d 862 (1974).

Cited in McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953); Smithwick v. Olson, 229 Ga. 494, 192 S.E.2d 337 (1972); Waterman v. Deyton, 233 Ga. 243, 210 S.E.2d 765 (1974); Smith v. Hart, 243 Ga. 59, 252 S.E.2d 470 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 95, 121 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 40.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 20.

ALR. — Right to prove absence from demanding state or alibi on habeas corpus in extradition proceedings, 61 A.L.R. 715.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552; 40 A.L.R.2d 1151; 40 A.L.R.2d 1151.

17-13-41. Recall of warrant of arrest or issuance of another warrant by Governor.

The Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

History. — Ga. L. 1951, p. 726, § 21.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 116.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 21, 22, 95.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 21.

17-13-42. Demand for return of fugitives in other states by Governor of this state; issuance of warrant to person receiving fugitive.

Whenever the Governor of this state shall demand a person charged with a crime or with escaping from confinement or breaking the terms of his bail, probation, or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue

a warrant under the seal of the office of the Governor to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

History. — Ga. L. 1951, p. 726, § 22; Ga. L. 1983, p. 649, § 3.

OPINIONS OF THE ATTORNEY GENERAL

Payment of expenses of person who receives fugitive. — Under the provisions of former Code 1933, § 40-305 and Ga. L. 1951, p. 726, § 22 (see O.C.G.A. §§ 17-13-42 and 45-12-51), the Governor is required to appoint a person to act as agent of this state to receive a fugitive from justice from this state and return the fugitive to the authorities of the county from which one is a fugitive. When the Governor acts under these provisions, it necessarily follows that the person is authorized to pay the expenses, such as lodging at hotels and meals. 1952-53 Op. Att'y Gen. p. 97.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 31, 138.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 6, 13 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 22.

17-13-43. Application for issuance of demand.

(a) When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the Governor his written application, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place, and circumstance of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that, in the opinion of the prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

(b) When the return to this state is required of a person who has been convicted of a crime in this state and who has escaped from confinement or broken the terms of his bail, probation, or parole, the prosecuting attorney of the county in which the offense was committed, the State Board of Pardons and Paroles, or the warden of the institution or sheriff of the county from which escape was made shall present to the Governor a written application for a requisition for the return of such person. The application shall state the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation, or parole and

the state in which he is believed to be, including the location of the person therein at the time application is made.

(c) The application shall be verified by affidavit, executed in duplicate, and accompanied by two certified copies of the indictment returned, information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden, or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the Governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the Governor, to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition.

History. — Ga. L. 1951, p. 726, § 23; Ga. L. 1983, p. 649, § 4.

JUDICIAL DECISIONS

Application of Governor and indictment adequate to require extradition. — If an application of the Governor of Tennessee is accompanied by the indictment found against a person and that indictment substantially charges the person with having committed crimes in Tennessee, the application for extradition adequately describes the circumstances of the commission of the crimes charged so the trial court does not err in denying habeas relief to the person. Grubbs v. Stynchcombe, 251 Ga. 39, 302 S.E.2d 552 (1983).

Indictment from foreign jurisdiction sufficient to indicate circumstances of crime's committal. — Indictment from another state substantially charging the person demanded with having committed a crime under the law of the foreign state, as required by O.C.G.A. § 17-13-23, sufficiently describes the "circumstance of its committal" as required by the Uniform Criminal Extradition Act, O.C.G.A.§ 17-13-20 et seq. Grubbs v. Stynchcombe, 251 Ga. 39, 302 S.E.2d 552 (1983).

Issues on habeas corpus. — Issues of whether the person is a fugitive and whether there is a proper demand for extradition are proper subjects of judicial inquiry in a hearing on a writ of habeas corpus following arrest and detention on an executive warrant for extradition. DeBusschere v. Rutledge, 229 Ga. 128, 189 S.E.2d 397 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 67.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 19 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 23.

ALR. — Necessity and sufficiency of identification of accused as the person charged, to warrant extradition, 93 A.L.R.2d 912.

17-13-44. Payment of expenses.

When the punishment of the crime shall be the confinement of the person in a penal institution, the expenses shall be paid out of the state treasury on the certificate of the Governor and warrant of the state auditor; and in all other cases the expenses shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made and shall not exceed 8¢ per mile for all necessary travel in returning such prisoner.

History. — Ga. L. 1951, p. 726, § 24.

RESEARCH REFERENCES

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 24.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 24.

17-13-45. Immunity from service of process of persons brought into state in civil actions based on facts in criminal charge.

A person brought into this state by or after waiver of extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding; or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

History. — Ga. L. 1951, p. 726, § 25.

JUDICIAL DECISIONS

Purpose. — Purpose of Ga. L. 1951, p. 726, § 25 (see O.C.G.A. § 17-13-45) is to protect innocent nonresidents from service of civil process when brought into the jurisdiction by force under extradition proceedings. White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 150.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 49, 50.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 25.

17-13-46. Execution and filing of written waiver of extradition proceedings by accused; delivery of accused to demanding state.

(a) Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation, or parole, may waive the issuance and service of the warrant provided for in Code Sections 17-13-27 and 17-13-28 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before the waiver shall be executed or subscribed by the person it shall be the duty of the judge to inform the person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in Code Section 17-13-30.

(b) If and when the consent has been duly executed, it shall forthwith be forwarded to the office of the Governor of this state and filed therein. The judge shall direct the officer having the person in custody to deliver forthwith the person to the duly accredited agent or agents of the demanding state and shall deliver or cause to be delivered to the agent or agents a copy of the consent. Nothing in this Code section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state; nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights, or duties of the officers of the demanding state or of this state.

History. — Ga. L. 1951, p. 726, § 26; Ga. L. 1982, p. 3, § 17.

OPINIONS OF THE ATTORNEY GENERAL

Individual wanted on misdemeanor charge in foreign state may waive extradition to demanding state. 1958-59 Op. Att'y Gen. p. 251.

Return of parolee without formal extradition upon revocation of parole. — Prisoner paroled from another state and permitted to come to this state under supervision of parole officials of this state may be returned to that state without the necessity of formal extradition proceedings following service of a sentence in this state and revocation of the parole if the parole contained a condition that the prisoner would waive extradition in the event the prisoner's parole was ever revoked. 1958-59 Op. Att'y Gen. p. 252.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 53 et seq.

C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 40 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 25-A.

17-13-47. Effect of article as to right, power, or privilege of state to try demanded person.

Nothing in this article contained shall be deemed to constitute a waiver by this state of its right, power, or privilege to try a person demanded for extradition by another state for crimes committed within this state or of its right, power, or privilege to regain custody of the person by extradition proceedings or otherwise for the purpose of trial, sentence, or punishment for any crime committed within this state; nor shall any proceedings had under this article result in, or fail to result in, extradition, be deemed a waiver by this state of any of its rights, privileges, or jurisdiction in any way whatsoever.

History. — Ga. L. 1951, p. 726, § 27.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 53 et seq.
C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, § 40 et seq.
U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 25-B.

ALR. — Surrender of fugitive in extradition proceedings as waiver by asylum state of right to prosecute him for an offense previously committed, 93 A.L.R. 931.

17-13-48. Trial of person brought into state for other criminal prosecutions while in state.

After a person has been brought back to this state by, or after waiver of, extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History. — Ga. L. 1951, p. 726, § 28.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, § 143 et seq.
C.J.S. — 35 C.J.S. (Rev), Extradition and Detainers, §§ 49, 50.
U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 26.

ALR. — Extradition: mission or motive of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

17-13-49. Uniform interpretation and construction.

This article shall be so interpreted and construed as to effectuate the general purposes to make uniform the laws of those states which enact it.

History. — Ga. L. 1951, p. 726, § 29.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extradition, §§ 10, 11.

C.J.S. — 82 C.J.S. (Rev), Statutes, § 486 et seq.

U.L.A. — Uniform Criminal Extradition Act (U.L.A.) § 27.

CHAPTER 14

RESTITUTION AND DISTRIBUTION OF PROFITS TO VICTIMS OF CRIMES

Article 1

Restitution

Sec.
17-14-1. Declaration of public policy.
17-14-2. Definitions.
17-14-3. Requirement of restitution by offender as condition of relief generally.
17-14-4. Granting of parole prior to completion of one-third of sentence conditioned on restitution.
17-14-5. Restitution by juvenile delinquent; retention of jurisdiction to enforce order against juvenile after attainment of age 21; transfer of enforcement jurisdiction; parent's obligation for restitution.
17-14-6. Setoff of prior total or partial restitution made to victim; reduction of award from the Crime Victims Compensation Board by the amount of restitution; payment of restitution to governmental entities that have compensated the victim.
17-14-7. Right of offender to offer restitution plan to ordering authority; consideration and adoption of plan; hearing to determine restitution; burden of proof; liability among multiple offenders; payment for multiple victims; waiver of victim's rights.
17-14-8. Apportionment of payments for fines and restitution; payment to victims.
17-14-9. Amount of restitution.
17-14-10. Factors to be considered by ordering authority in determining nature and amount of restitution.
17-14-11. Effect of restitution order on civil actions against offender; setoff of restitution payments against civil judgments; admissibility of restitution orders or payments; determining setoff amount.
17-14-12. Modification of restitution order.
17-14-13. Manner of enforcement of restitution order generally; sanctions for failure to comply with order.
17-14-14. Restitution payments; wage assignments; review of compliance; interest.
17-14-15. Peonage not authorized by article; denial of benefits because of poverty prohibited.
17-14-16. Transmission of copies of restitution orders to the Department of Corrections or the Department of Juvenile Justice, and to the Department of Community Supervision.
17-14-17. Voidable transfers.
17-14-18. Payments to and by the Crime Victims Emergency Fund.
17-14-19. Effect of article on powers of courts.

Article 2

Distribution of Profits of Crimes

17-14-30. Definitions.
17-14-31. Contract regarding reenactment of crime; deposit of consideration in escrow; claim notification; notice of availability of escrow moneys; disposition of escrow moneys; actions taken to defeat purpose.
17-14-32. Penalties for violations of article.

Law reviews. — For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986).

Cross references. — Crime Victims' Bill of Rights, § 17-17-1 et seq.

RESEARCH REFERENCES

ALR. — Statutes providing for governmental compensation for victims of crime, 20 A.L.R.4th 63.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

Measure and elements of restitution to which victim is entitled under state criminal statute, 15 A.L.R.5th 391.

ARTICLE 1

RESTITUTION

Cross references. — Assessment of costs in criminal cases, Uniform Superior Court Rules, Rule 36.15.

Editor's notes. — By resolution (Ga. L. 1986, p. 1203), the General Assembly urged the judges of the superior courts to order restitution in cases involving child abuse or sexual abuse and provided for the preparation of a report regarding the use of such orders.

Law reviews. — For note discussing dischargeability in bankruptcy of criminal restitution obligations, see 37 Mercer L. Rev. 1625 (1986). For note, "United States v. Osman: Including Future Therapy Costs in Mandatory Restitution Awards is the Growing Trend Among Circuits, but is it Wise?," see 69 Mercer L. Rev. 969 (2018).

JUDICIAL DECISIONS

Constitutionality. — Former Code 1933, §§ 27-3008 - 27-3010 (see O.C.G.A. §§ 17-14-8 - 17-14-10) contemplated a hearing and specific written findings by the court in determining whether the court would order restitution and the amount thereof; thus, the law does not deny the defendant's due process rights to a hearing on the damage issue. Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).

Statutory provisions on restitution do not deprive a defendant of a jury trial on the question of damages contrary to Ga. Const. 1976, Art. VI, Sec. IV, Para. VII (see Ga. Const. 1983, Art. I, Sec. I, Para. XI) since this constitutional guarantee applies only to civil damage cases and does not apply to a penalty to be determined by the court in a criminal case. Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).

Application of article to offenses occurring before effective date of article does not constitute application of ex post facto law since article does not affect the substantive right of restitution but is merely a more detailed enactment regarding that subject. Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).

Purpose of restitution is not solely to restore the crime victim to the financial status enjoyed before the crime was committed. Other purposes include punishing and rehabilitating persons convicted of crimes and deterring others from criminal behavior. Accordingly, restitution is punishment when ordered as part of a criminal sentence. Harris v. State, 261 Ga. 859, 413 S.E.2d 439 (1992).

Order of restitution under § 42-8-35. — O.C.G.A. Art. 1, Ch. 14, T. 17 may be used to discern nature of order of restitution made under O.C.G.A. § 42-8-35. This can be done since under O.C.G.A. § 42-8-35 "restitution" is an authorized condition of probation and enactment of that article "is merely a more detailed enactment regarding restitution." Newton v. Fred Haley Poultry Farm, 15 Bankr. 708 (Bankr. N.D. Ga. 1981).

Avoiding restitution by declining relief. — Statutory scheme does not contain any provision for an unconditional

order to make restitution. Thus, the offender or inmate may avoid an order to make restitution by declining the relief upon which the restitution order is conditioned. Conklin v. Zant, 202 Ga. App. 214, 413 S.E.2d 536 (1991).

17-14-1. Declaration of public policy.

It is declared to be the policy of this state that restitution to their victims by those found guilty of crimes or adjudicated as having committed delinquent acts is a primary concern of the criminal justice system and the juvenile justice system.

History. — Code 1933, § 27-3001, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Written findings no longer required. — Under O.C.G.A. § 17-14-1 et seq., written findings are no longer required when ordering an offender to make restitution; as a result, Garrett v. State, 175 Ga. App. 400, 333 SE2d 432 (1985), and its progeny, are disapproved to the extent those cases were authority for any cases involving restitution orders issued on or after July 1, 2005, the effective date of the Crime Victims Restitution Act of 2005, O.C.G.A. § 17-14-1 et seq. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Restitution damages proper. — Under preponderance of evidence standard, the trial court did not abuse the court's discretion in concluding that the defendant caused the $5,306.28 in damages to a stolen truck since the defendant was found in possession of the truck, and therefore the defendant was responsible for all damages that the truck incurred; as a result, the trial court properly ordered the defendant to pay a judgment of restitution in the amount of $5,306.28. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Cited in Shelton v. State, 161 Ga. App. 524, 289 S.E.2d 768 (1982); Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987); Jackson v. State, 198 Ga. App. 261, 401 S.E.2d 289 (1990); Fuller v. State, 244 Ga. App. 618, 536 S.E.2d 296 (2000); In the Interest of D. D., 335 Ga. App. 676, 782 S.E.2d 728 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Agreement to pay restitution exceeding victim's damages. — Sentencing court may not require an offender to make restitution on those counts of a multi-count indictment which are dismissed pursuant to a negotiated plea agreement; however, if an offender voluntarily agrees to make restitution in a certain amount, even if such amount exceeds the victim's "damages," the sentencing court may incorporate that agreement into the court's restitution order. 1995 Op. Att'y Gen. No. 95-19.

Bail bondsman is entitled to restitution of the amount of the bond and costs upon the conviction of the accused of jumping bail pursuant to O.C.G.A. § 16-10-51. 1994 Op. Att'y Gen. No. U94-17.

RESEARCH REFERENCES

ALR. — Mandatory victims restitution act — constitutional issues, 20 A.L.R. Fed. 2d 239.

17-14-2. Definitions.

As used in this article, the term:

(1) "Conviction" means an adjudication of guilt of or a plea of guilty or nolo contendere to the commission of an offense against the laws of this state. Such term includes any such conviction or plea, notwithstanding the fact that sentence was imposed pursuant to Article 3 of Chapter 8 of Title 42. Such term also includes the adjudication or plea of a juvenile to the commission of an act which, if committed by an adult, would constitute a crime under the laws of this state.

(2) "Damages" means all special damages which a victim could recover against an offender in a civil action, including a wrongful death action, based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and suffering, mental anguish, or loss of consortium. Such special damages shall not be limited by any law which may cap economic damages. Special damages may include the reasonably determined costs of transportation to and from court proceedings related to the prosecution of the crime.

(3) "Offender" means any natural person, firm, partnership, association, public or private corporation, or other legal entity that has been sentenced for any crime or any juvenile who has been adjudged delinquent.

(4) "Ordering authority" means:

(A) A court of competent jurisdiction;

(B) The State Board of Pardons and Paroles;

(C) The Department of Corrections;

(D) The Department of Juvenile Justice;

(E) The Department of Community Supervision; or

(F) Any combination thereof, as is required by the context.

(5) "Parent" means a person who is the legal mother as defined in Code Section 15-11-2, the legal father as defined in Code Section 15-11-2, or the legal guardian. Such term shall not include a foster parent.

(6) "Relief" means any parole or other conditional release from incarceration; the awarding of earned time allowances; reduction in

security status; or placement in prison rehabilitation programs, including, but not limited to, those in which the offender receives monetary compensation.

(7) "Restitution" means any property, lump sum, or periodic payment ordered to be made by any offender or other person to any victim by any ordering authority. Where the victim is a public corporation or governmental entity or where the offender is a juvenile, restitution may also be in the form of services ordered to be performed by the offender.

(8) "Restitution order" means any order, decree, or judgment of an ordering authority which requires an offender to make restitution.

(9) "Victim" means any:

(A) Natural person or his or her personal representative or, if the victim is deceased, his or her estate; or

(B) Any firm, partnership, association, public or private corporation, or governmental entity

suffering damages caused by an offender's unlawful act; provided, however, that the term "victim" shall not include any person who is concerned in the commission of such unlawful act as defined in Code Section 16-2-20.

History. — Code 1933, § 27-3002, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2013, p. 294, § 4-19/HB 242; Ga. L. 2015, p. 422, § 5-35/HB 310.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Measure of damages for restitution. — In measuring the appropriate damages for restitution, the court must determine what type of civil action could be maintained by the victim and what the proper measure of damages would be in such a civil action. Garrett v. State, 175 Ga. App. 400, 333 S.E.2d 432 (1985), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Fees paid for special grand jurors, traverse jurors, and bailiffs could not properly be included in the sum which the defendant was ordered to pay a victim as restitution. Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888, cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1988).

Trial court erred in basing the court's determination of the measure of damages for purposes of restitution on the replacement cost of the items stolen rather than fair market value. Fewox v. State, 243 Ga. App. 651, 534 S.E.2d 121 (2000).

While the trial court was thorough in making the court's written findings as to the calculation of defendant's restitution award, it was difficult to ascertain whether the trial court improperly included amounts which would have been attributed to three counts of theft by receiving for which the defendant was acquitted, which was improper under O.C.G.A. § 17-14-2(2); thus, the matter was remanded for clarification. McMahon v. State, 273 Ga. App. 574, 615 S.E.2d 625 (2005).

As part of a probation order, the trial court did not err in awarding restitution for tools and equipment missing from a stolen truck despite the fact that the probationer was not charged with the theft of those items as restitution could be ordered to the extent that the victim suffered damages as the result of the theft and the theft of the vehicle caused the disappearance of the equipment. Tindol v. State, 284 Ga. App. 45, 643 S.E.2d 329 (2007).

Trial court's order on remand to include the required factual findings supporting the court's restitution judgment, after considering the defendant's financial condition and probable future earning capacity was upheld on appeal as the order: (1) did not include any amount arising out of the counts which the defendant was acquitted; (2) contained a finding that the award could exceed the total amount of money the defendant took wrongfully because the court was allowed to award all damages which a victim could recover against an offender in a civil action, pursuant to O.C.G.A. § 17-14-2; (3) considered the defendant's financial resources, assets, income, and financial obligations as required under O.C.G.A. § 17-14-10; and (4) considered that the defendant's criminal actions cause the victims the loss that the trial court awarded as restitution. McMahon v. State, 284 Ga. App. 192, 643 S.E.2d 236 (2007).

Under preponderance of evidence standard, the trial court did not abuse the court's discretion in concluding that the defendant caused the $5,306.28 in damages to a stolen truck since the defendant was found in possession of the truck, and therefore the defendant was responsible for all damages that the truck incurred; as a result, the trial court properly ordered the defendant to pay a judgment of restitution in the amount of $5,306.28. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Trial court did not err in ordering the defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to former O.C.G.A. § 24-9-66 (see O.C.G.A. § 24-7-701). Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

Order of restitution was vacated because the state failed to adduce sufficient evidence to support an amount of $500 in damages for the pistol the defendant stole; while the trial court accepted the replacement cost as the fair market value of the gun, the correct determination for the amount of restitution was the fair market value of the property rather than the replacement cost. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

Order of restitution was vacated because the state failed to adduce sufficient evidence to determine the fair market value of the coin collection the defendant

stole; the owner's opinion lacked foundation because there was no showing that the owner had some knowledge, experience, or familiarity with the value of the coins, and absent that foundation, the owner's opinion was nothing more than conjecture, an unsupported conclusion, or a guess. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

Reimbursement of medical expenses is not restitution. — There is no victim suffering damages caused by the defendant's habitual violator or DUI offenses since the county in this case is not a victim as anticipated by the statutory scheme and the medical expenses incurred by the defendant while in custody were not caused by the acts for which the defendant was sentenced; accordingly, the defendant's reimbursement to the county for the defendant's own medical expenses does not fall under the statutory meaning of restitution. Woods v. State, 204 Ga. App. 415, 419 S.E.2d 513 (1992).

Restitution not set by approximation. — Trial court erred in ordering the defendant juvenile to pay restitution pursuant to O.C.G.A. § 17-14-3 because the amount of restitution was set by approximation, rather than by a proper opinion of the value of the items damaged; O.C.G.A. § 17-14-9 does not permit a trial judge to set the amount of restitution by approximation but requires that the amount be based on proper opinion evidence of fair market value. In the Interest of R.H., 316 Ga. App. 317, 728 S.E.2d 911 (2012).

"Damages" includes interest. — As it is used in the statutory provisions relating to restitution, "damages" includes interest. Corbin v. State, 202 Ga. App. 464, 415 S.E.2d 14 (1992).

"Restitution order." — Sentence of both confinement and restitution was void due to illegality. Queen v. State, 210 Ga. App. 588, 436 S.E.2d 714 (1993).

Because the record made clear that the order extending probation effectively placed upon a juvenile the requirement to make restitution during an upcoming period, thus averting the lapse of the probation with the restitution condition unmet, the extension order constituted a restitution order as contemplated by O.C.G.A. § 17-14-2. In the Interest of C.S., 280 Ga. App. 781, 635 S.E.2d 176 (2006), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Appellate court vacated the order of restitution and remanded the case to the trial court for clarification as although the trial court ruled in the state's favor, the appellate court was unable to determine whether the trial court found as a matter of fact that the defendant had agreed to pay the full amount of restitution or whether the trial court concluded that it was authorized to award the full amount even if the defendant had not so agreed, which would constitute error. O'Brien v. State, 353 Ga. App. 425, 838 S.E.2d 96 (2020).

Necessity of complying with procedural requirements. — Because the record reflected that the trial court failed to take into consideration any state imposed charges in connection with the restitution payments which the court ordered, remand of the case for a new hearing on the issue of restitution was required. Jones v. State, 246 Ga. App. 857, 542 S.E.2d 584 (2000).

Written findings no longer required. — Under O.C.G.A. § 17-14-1 et seq., written findings are no longer required when ordering an offender to make restitution; as a result, Garrett v. State, 175 Ga. App. 400, 333 SE2d 432 (1985), and its progeny, are disapproved to the extent those causes were authority for any cases involving restitution orders issued on or after July 1, 2005, the effective date of the Crime Victims Restitution Act of 2005, O.C.G.A. § 17-14-1 et seq. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Restitution for items not charged as stolen not required. — Trial court was not authorized to order the defendant to make restitution as to items that the defendant was not charged with having stolen. The trial court was authorized to order the defendant to make restitution only to the victims who suffered "damages" as the result of the defendant's acts of theft. Bottoms v. State, 194 Ga. App. 862, 392 S.E.2d 59 (1990).

Restitution for crime which defendant was not charged or convicted. — When a defendant pled guilty in Georgia

to forgery after trying to cash a check stolen during a burglary in Tennessee, the restitution part of the sentence was illegal under O.C.G.A. § 17-14-2(2) because the state was seeking restitution for the burglary, for which the defendant had not been charged or convicted in Georgia. Furthermore, because the sentence was illegal, the defendant did not waive appeal of the sentence by entering into a negotiated plea. Smith v. State, 292 Ga. App. 689, 665 S.E.2d 399 (2008).

Sentence requiring defendant to pay restitution while incarcerated held illegal. — Because that part of a sentence requiring the defendant to pay restitution while incarcerated and pay specific and substantial amounts of restitution both before the commencement of the prison sentence and while on probation was illegal, that portion was vacated, and the defendant's acquiescence to the sentence, either through plea negotiations or a failure to object to the sentence, did not remove the illegality. Sumner v. State, 284 Ga. App. 308, 643 S.E.2d 831 (2007).

Rental reimbursement for rental of vehicle by victim of vehicle theft was properly included in the amount of restitution although in a suit for damages to a vehicle one cannot ordinarily recover an amount in excess of the fair market value of the vehicle before the vehicle was damaged. Sutton v. State, 190 Ga. App. 56, 378 S.E.2d 491 (1989).

Restitution not paid directly to victim. — Under O.C.G.A. § 17-14-2(9), the trial court could properly order the defendant to make restitution to a charitable fund instead of directly to the victim, as the fund incurred expenses as a result of the defendant's conduct. Adams v. State, 291 Ga. App. 681, 662 S.E.2d 782 (2008), overruled on other grounds, Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Standard of proof. — Sufficiency of evidence to support an order of restitution in a criminal case should be measured by the civil standard of preponderance of the evidence. Lawrenz v. State, 194 Ga. App. 724, 391 S.E.2d 703 (1990); Britt v. State, 232 Ga. App. 780, 503 S.E.2d 653 (1998).

Modification of restitution may be ordered by the trial court at any time. — Trial court erred in dismissing a defendant's motion to modify restitution until the time came for the defendant to pay. Under O.C.G.A. § 17-14-12, the ordering authority, in this case, the trial court pursuant to O.C.G.A. § 17-14-2, retained jurisdiction to modify the restitution order at any time before the expiration of the relief ordered. Wright v. State, 302 Ga. App. 136, 690 S.E.2d 259 (2010).

Restitution award to homeowners for contractor's false statement to county. — Trial court properly ordered that restitution was to be made directly to the homeowners, even if the homeowners technically were not the direct victims of the crime which the defendant, a contractor, committed of false statement and writing, concealment of facts, under O.C.G.A. § 16-10-20, in applying for a building permit because the homeowners suffered damages due to the lack of oversight of the defendant's work. The evidence at trial directly linked this lack of oversight to the defendant's misrepresentations on the building permit application, and demonstrated that if the defendant had submitted an application that accurately reflected the extent of the work to be performed for the homeowners, more safeguards would have been in place, which would have prevented the extent of the damage. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Restitution is limited by thefts during time period alleged in accusation. — Trial court erred in ordering restitution for $260,637 for thefts from defendant's employer over a 12-year period because the accusation covered only a two-year period during which $57,000 was taken; under O.C.G.A. §§ 17-14-2(2) and 17-14-10, restitution was limited to damages which the victim could recover in a civil action, based on the same act. Vaughn v. State, 324 Ga. App. 289, 750 S.E.2d 375 (2013), overruled on other grounds by In the Interest of N. T., 2020 Ga. App. LEXIS 289 (Ga. Ct. App. 2020).

Cited in Nash v. State, 179 Ga. App. 702, 347 S.E.2d 651 (1986); Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987); Patrick v. State, 184 Ga. App. 260, 361 S.E.2d 251 (1987); Jackson v. State, 198 Ga. App. 261, 401 S.E.2d 289 (1990); Burke v. State, 201 Ga. App. 50, 410

S.E.2d 164 (1991); Evans v. State, 204 Ga. App. 458, 419 S.E.2d 532 (1992); Anderson v. State, 226 Ga. App. 286, 486 S.E.2d 410 (1997); Jones v. State, 246 Ga. App. 857, 542 S.E.2d 584 (2000); McClure v. State, 295 Ga. App. 465, 673 S.E.2d 856 (2009); Zipperer v. State, 299 Ga. App. 792, 683 S.E.2d 865 (2009); Browning v. State, 303 Ga. App. 805, 695 S.E.2d 291 (2010); Elsasser v. State, 313 Ga. App. 661, 722 S.E.2d 327 (2011); Cox v. Mayan Lagoon Estates Ltd., 319 Ga. App. 101, 734 S.E.2d 883 (2012); Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013); Jackson v. State, 334 Ga. App. 340, 779 S.E.2d 402 (2015).

RESEARCH REFERENCES

ALR. — Persons or entities entitled to restitution as "victim" under state criminal restitution statute, 92 A.L.R.5th 35.

17-14-3. Requirement of restitution by offender as condition of relief generally.

(a) Subject to the provisions of Code Section 17-14-10, notwithstanding the provisions contained in Chapter 11 of Title 15, and in addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.

(b) If the offender is placed on probation, including probation imposed pursuant to Chapter 11 of Title 15 or Article 3 of Chapter 8 of Title 42, or sentence is suspended, deferred, or withheld, restitution ordered under this Code section shall be a condition of that probation, sentence, or order.

(c) If the offender is granted relief by the Department of Juvenile Justice, Department of Corrections, or the State Board of Pardons and Paroles, the terms of any court order requiring the offender to make restitution to a victim shall be a condition of such relief in addition to any other terms or conditions which may apply to such relief.

History. — Code 1933, § 27-3003, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2010, p. 214, § 5/HB 567.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Condition of probation. — Court-ordered restitution may be imposed as a reasonable condition of probation. Morrison v. State, 181 Ga. App. 440, 352 S.E.2d 622 (1987).

O.C.G.A. § 17-14-3 encompasses a trial court's imposition of restitution as a condition of an offender's probated sentence. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Trial court did not abuse the court's discretion in allowing the defendant to

pay the full amount of restitution over the course of the defendant's entire probated sentence because allowing the defendant to pay the significant amount of restitution over the course of the probation was a commonsense approach in view of the admittedly limited resources of the defendant. Elsasser v. State, 313 Ga. App. 661, 722 S.E.2d 327 (2011), cert. denied, No. S12C0949, 2012 Ga. LEXIS 555 (Ga. 2012).

Amount of restitution. — In a burglary case where a sawmill was stripped of copper wiring, there was a preponderance of evidence to support a restitution order when the defendant parked in the same location where burglars parked the previous day, went to a main power room where tools needed for pulling wire and not owned by the sawmill had been left, and had similar tools in the defendant's pickup truck; the amount of a restitution order was not supported by the evidence, however, because the correct determination of the amount of restitution was the fair market value of the property rather than the replacement cost, and witnesses for the state testified only as to replacement value. Hawthorne v. State, 285 Ga. App. 196, 648 S.E.2d 387 (2007).

Amount of restitution cannot be set by approximation. — Trial court erred in ordering the defendant juvenile to pay restitution pursuant to O.C.G.A. § 17-14-3 because the amount of restitution was set by approximation, rather than by a proper opinion of the value of the items damaged; O.C.G.A. § 17-14-9 does not permit a trial judge to set the amount of restitution by approximation but requires that the amount be based on proper opinion evidence of fair market value. In the Interest of R.H., 316 Ga. App. 317, 728 S.E.2d 911 (2012).

Victim not entitled to restitution for time missed to appear at restitution hearing. — Although the trial court did not err in entering an order requiring the defendant to pay the victim restitution for lost wages based on the work time the victim lost as a direct result of the defendant's criminal conduct towards the victim, which included the 15 days that the victim spent away from work meeting with lawyers, the bank, and law enforcement authorities, as well as the days the victim spent testifying at the criminal proceedings brought against the defendant, the trial court erred in requiring the defendant to compensate the victim for the day the victim took away from work to appear at the restitution hearing. Jackson v. State, 334 Ga. App. 340, 779 S.E.2d 402 (2015).

Necessity of complying with procedural requirements. — That portion of the defendant's sentence which imposed restitution as a condition of probation was reversed and remanded to the trial court with direction that a hearing on the issue of restitution be held at which O.C.G.A. § 17-14-9, regarding the amount, and the factors in O.C.G.A. § 17-14-10 were to be considered, and the trial court was further directed that the written finding required by O.C.G.A. § 17-14-8 be made. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Trial court's order on remand to include the required factual findings supporting the court's restitution judgment, after considering the defendant's financial condition and probable future earning capacity was upheld on appeal, as the order: (1) did not include any amount arising out of the counts which the defendant was acquitted; (2) contained a finding that the award could exceed the total amount of money the defendant took wrongfully because the court was allowed to award all damages which a victim could recover against an offender in a civil action, pursuant to O.C.G.A. § 17-14-2; (3) considered the defendant's financial resources, assets, income, and financial obligations as required under O.C.G.A. § 17-4-10; and (4) considered that the defendant's criminal actions caused the victim's the loss that the trial court awarded as restitution. McMahon v. State, 284 Ga. App. 192, 643 S.E.2d 236 (2007).

Finding of defendant's ability to pay. — Following the defendant's guilty plea to O.C.G.A. § 16-14-4(a) (RICO), an order of $725,000 restitution pursuant to O.C.G.A. § 17-14-3(a) was supported by evidence that the defendant had the capacity for gainful employment, notwithstanding the defendant's claim that the defendant was disabled; that the defen-

dant had possessed hundreds of thousands of dollars of the victims' money; and that the defendant had a venture in which the defendant claimed $4.8 million. Nelson v. State, 329 Ga. App. 300, 764 S.E.2d 883 (2014).

Avoiding restitution by declining relief. — Statutory scheme does not contain any provision for an unconditional order to make restitution. Thus, the offender or inmate may avoid an order to make restitution by declining the relief upon which the restitution order is conditioned. Conklin v. Zant, 202 Ga. App. 214, 413 S.E.2d 536 (1991).

Showing of wilfulness or inadequacy of alternative punishments required. — If payment of a fine or restitution is made a condition precedent to probation, a defendant's probation may not be revoked or withheld because of the defendant's failure to pay the fine or restitution without a showing of wilfulness on the defendant's part or inadequacy of alternative punishments. Day v. State, 188 Ga. App. 648, 374 S.E.2d 87 (1988), overruled on other grounds by Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018).

Sentence requiring defendant to pay restitution while incarcerated held illegal. — Because that part of a sentence requiring the defendant to pay restitution while incarcerated and pay specific and substantial amounts of restitution both before the commencement of the prison sentence and while on probation was illegal, that portion was vacated, and the defendant's acquiescence to the sentence, either through plea negotiations or a failure to object to the sentence, did not remove the illegality. Sumner v. State, 284 Ga. App. 308, 643 S.E.2d 831 (2007).

Multiple causation. — There can be more than one proximate cause of injury for a victim of criminal behavior and molestation by a prior family member did not as a matter of law preclude incurring costs against an individual who molested the victim in the victim's professional capacity. Dorsey v. State, 206 Ga. App. 709, 426 S.E.2d 224 (1992).

Tort limitations period held inapplicable. — Restitution in a sexual abuse case was not barred by the two-year statute of limitation applicable to tort actions since there is nothing in the statutory or case law on restitution to suggest that restitution cannot be awarded after the statute of limitation for an analogous civil action has run. Additionally, even though the amount of damages suffered by the victim, as one consideration setting the upper limit for a restitution amount, is ascertained by looking to the amount of damages available in an analogous civil action, restitution is not synonymous with a civil action and does not preclude a separate civil action. Dorsey v. State, 206 Ga. App. 709, 426 S.E.2d 224 (1992).

Lien not authorized. — Trial court erred in allowing that any restitution sums not paid in full during the term of the defendant's probation be subject to a lien because a court may order restitution only as a condition of any relief, such as probation, and when a defendant's probation is completed the court does not have the authority to continue restitution payments or impose a lien. Jones v. State, 246 Ga. App. 857, 542 S.E.2d 584 (2000).

Cited in Evans v. State, 204 Ga. App. 458, 419 S.E.2d 532 (1992); Hartsell v. State, 288 Ga. App. 552, 654 S.E.2d 662 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Authority to collect payments. — Collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (now Department of Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Payment of fines and restitution during parole. — State Board of Pardons and Paroles may, as a condition of parole, order parolees to commence court imposed payments such as fines and restitution while on parole. 1984 Op. Att'y Gen. No. 84-50.

Restitution required for unemployment fraud. — Employment Security Act, O.C.G.A. § 34-8-1 et seq., does not authorize the imposition of a criminal sentence for unemployment fraud that permits community service in lieu of restitution of overpaid benefits to the Department of Labor. 1993 Op. Att'y Gen. No. 93-15.

RESEARCH REFERENCES

ALR. — Mandatory victims restitution act — constitutional issues, 20 A.L.R. Fed. 2d 239.

17-14-4. Granting of parole prior to completion of one-third of sentence conditioned on restitution.

Notwithstanding any provision of Code Section 42-9-45 to the contrary, the State Board of Pardons and Paroles may grant parole prior to the completion of one-third of the sentence if restitution is ordered as a condition of the parole.

History. — Code 1933, § 27-3004, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

17-14-5. Restitution by juvenile delinquent; retention of jurisdiction to enforce order against juvenile after attainment of age 21; transfer of enforcement jurisdiction; parent's obligation for restitution.

(a) It is declared to be the policy of this state to recognize that restitution is consistent with the goal of rehabilitation of delinquent juveniles and to provide restitution in such cases.

(b) Notwithstanding any provision of Chapter 11 of Title 15, the juvenile courts shall order restitution in any case involving delinquent juveniles in the same manner as is authorized by this article for adult offenders.

(c) For purposes of ensuring compliance with the restitution order, the juvenile courts are authorized to retain jurisdiction over a juvenile subject to such restitution order until the juvenile reaches 21 years of age. If the juvenile court retains jurisdiction of such offender as provided in this Code section and the terms of the restitution order are not completed before the offender's twenty-first birthday, the juvenile court shall transfer the restitution order to the superior court.

(d) As an alternative to subsection (c) of this Code section, the juvenile courts are authorized to transfer to the superior courts, and the superior courts are authorized to accept, jurisdiction over enforcement

of restitution orders against juveniles who, since entry of the order, have attained 18 years of age.

(e) If the court determines that a juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile's parent or parents and an opportunity for the parent or parents to be heard, the court may order the parent or parents to pay any portion of the restitution ordered that is outstanding where the court or a jury finds by clear and convincing evidence that the parent or parents knew or should have known of the juvenile's propensity to commit such acts and the acts are due to the parent's or parents' negligence or reckless disregard for the juvenile's propensity to commit such acts. Upon the eighteenth birthday of the juvenile, the parental obligation to pay restitution shall be terminated.

(f) If the court orders a parent to pay restitution under subsection (e) of this Code section, the court shall take into account the considerations identified in Code Section 17-14-10. If the parent or parents are required to pay restitution under subsection (e) of this Code section, the court shall provide for payment to be made in specified installments and within a specified period of time.

History. — Code 1933, § 27-3005, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Cross references. — Disposition of delinquent or unruly child by order of juvenile court, §§ 15-11-35, 15-11-36.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Restitution properly ordered. — Since the amount of medical expenses of a juvenile assault victim was undisputed based on the uncontradicted testimony of the victim in a disposition hearing, there was no error in ordering restitution. C.P. v. State, 167 Ga. App. 374, 306 S.E.2d 688 (1983).

O.C.G.A. § 17-14-5(b) expressly authorized restitution as a condition of the probation of a delinquent juvenile, and the nature and amount of restitution ordered, $ 4,968 in property damage caused by the juvenile's tampering with a sprinkler head, was supported by a preponderance of the evidence. In re W. J. F., 302 Ga. App. 361, 691 S.E.2d 271 (2010).

Extension of probation. — Juvenile's argument on appeal that the juvenile court was not authorized to extend an order of probation for the purpose of payment of restitution, and in doing so, the court assumed a prosecutorial role, lacked merit given the language in O.C.G.A. § 15-11-70(b) and the state policy pronounced in O.C.G.A. § 17-14-5. In the Interest of C.S., 280 Ga. App. 781, 635 S.E.2d 176 (2006), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Cited in B.J.L. v. State, 173 Ga. App. 317, 326 S.E.2d 519 (1985).

RESEARCH REFERENCES

ALR. — Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

17-14-6. Setoff of prior total or partial restitution made to victim; reduction of award from the Crime Victims Compensation Board by the amount of restitution; payment of restitution to governmental entities that have compensated the victim.

(a) Where an offender has made total or partial restitution to a victim, the ordering authority shall set off any such amounts and reduce the amount payable to the victim.

(b) The ordering authority shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive full compensation for that loss from the offender as a result of a civil proceeding.

(c) Any amount paid to a victim or victim's estate under a restitution order shall reduce the amount payable to a victim or a victim's estate by an award from the Georgia Crime Victims Compensation Board made prior to or after a restitution order under this article.

(d) The ordering authority shall order restitution be paid to the Georgia Crime Victims Compensation Board, other governmental entities, or any individuals, partnerships, corporations, associations, or other legal entities acting on behalf of a governmental entity that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The ordering authority shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, a restitution order shall require that all restitution to a victim or victim's estate under the restitution order be made before any restitution to any other person or entity under that restitution order is made.

(e) In the event the ordering authority provides for a setoff or priority in terms of payment of restitution, the ordering authority shall state on the record with specificity the reasons for its action.

History. — Code 1933, § 27-3006, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2006, p. 72, § 17/SB 465.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Restitution order proper. — Because the defendant conceded to converting the funds of two victims when the defendant entered guilty pleas to two counts of theft by conversion under O.C.G.A. § 16-8-4, under O.C.G.A. § 17-14-7(b) the state was only required to establish the amounts taken from the victims that were expended on their behalf or were already repaid to the victims; the trial court's restitution order, which took those amounts into consideration, as required by O.C.G.A. § 17-14-6(a), was proper. Hartsell v. State, 288 Ga. App. 552, 654 S.E.2d 662 (2007).

Reduction not authorized by codefendant's payment when victims not made whole. — Defendant was not entitled to a reduction in the amount of restitution the defendant owed by the $5,300 the codefendant paid in restitution under O.C.G.A. § 17-14-6 because together the parties were only ordered to pay $30,000, and the evidence showed the defendants stole $43,000 from the victims. Polly v. State, 323 Ga. App. 893, 748 S.E.2d 696 (2013).

Restitution order improper after settlement. — Trial court erred in sentencing the defendant to pay restitution to the victim's estate under O.C.G.A. § 17-14-6(b). The estate dismissed the estate's civil claims against the defendant with prejudice after the parties settled. Taylor v. State, 295 Ga. App. 689, 673 S.E.2d 7, aff'd, 286 Ga. 328, 687 S.E.2d 409 (2009).

Restitution award not supported by evidence. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the court's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Cited in Barnes v. State, 239 Ga. App. 495, 521 S.E.2d 425 (1999).

17-14-7. Right of offender to offer restitution plan to ordering authority; consideration and adoption of plan; hearing to determine restitution; burden of proof; liability among multiple offenders; payment for multiple victims; waiver of victim's rights.

(a) Any offender may offer a restitution plan to the ordering authority. If a plan is offered, it shall be the duty of the ordering authority to consider the factors stated in Code Section 17-14-10 and to make the plan part of a restitution order if acceptable to the ordering authority.

(b) If the parties have not agreed on the amount of restitution prior to sentencing, the ordering authority shall set a date for a hearing to determine restitution. Any dispute as to the proper amount or type of restitution shall be resolved by the ordering authority by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the state. The burden of demonstrating the financial resources of the offender or person being ordered to pay restitution and the financial needs of his or her dependents shall be on the offender or person being ordered to pay restitution. The burden of demonstrating such other matters as the

ordering authority deems appropriate shall be upon the party designated by the ordering authority as justice requires.

(c) If the ordering authority finds that more than one offender has contributed to the loss of a victim, the court may make each offender liable for payment of the full amount of restitution or may apportion liability among the offenders to reflect the level of contribution to the victim's loss and economic circumstances of each offender.

(d) If the ordering authority finds that more than one victim has sustained a loss requiring restitution by an offender, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the state or any of its political subdivisions is a victim and thus is due restitution, the ordering authority shall ensure that any other victim receives full restitution before the state or a political subdivision receives restitution.

(e) A victim may waive his or her right to obtain restitution pursuant to this article. Any such waiver shall be made in writing and filed with the court or ordering authority having jurisdiction over the criminal case. Such waiver shall not affect any other rights or remedies that the victim may have against the offender under the laws of this state or the United States or any of the several states.

History. — Code 1933, § 27-3007, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2006, p. 72, § 17/SB 465.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Written findings no longer required. — Under O.C.G.A. § 17-14-1 et seq., written findings are no longer required when ordering an offender to make restitution; as a result, Garrett v. State, 175 Ga. App. 400, 333 SE2d 432 (1985), and its progeny, are disapproved to the extent those cases were authority for any cases involving restitution orders issued on or after July 1, 2005, the effective date of the Crime Victims Restitution Act of 2005, O.C.G.A. § 17-14-1 et seq. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Georgia law no longer requires written findings on restitution. Ezebuiro v. State, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Restitution order proper. — Because the defendant conceded to converting the funds of two victims when the defendant entered guilty pleas to two counts of theft by conversion under O.C.G.A. § 16-8-4, under O.C.G.A. § 17-14-7(b) the state was only required to establish the amounts taken from the victims that were expended on their behalf or were already repaid to the victims; the trial court's restitution order, which took those amounts into consideration, as required by O.C.G.A. § 17-14-6(a), was proper. Hartsell v. State, 288 Ga. App. 552, 654 S.E.2d 662 (2007).

Under a preponderance of the evidence standard, the trial court did not abuse the court's discretion in concluding that the defendant caused the $5,306.28 in dam-

ages to a stolen truck since the defendant was found in possession of the truck, and therefore the defendant was responsible for all damages that the truck incurred; as a result, the trial court properly ordered the defendant to pay a judgment of restitution in the amount of $5,306.28. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Trial court did not err in ordering the defendant to pay the victim restitution after the victim pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to former O.C.G.A. § 24-9-66 (see O.C.G.A. § 24-7-701). Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

Evidence was sufficient to sustain an award of $800 restitution under O.C.G.A. § 17-14-7(b) as a special condition of probation because in the course of the robbery with which the defendant was charged under O.C.G.A. § 16-8-40(a)(2), the defendant took $500 cash and $300 in money orders from the car of the victim. Ezebuiro v. State, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Co-defendant did not show that the trial court abused the court's discretion by ordering the defendant jointly and severally liable for restitution in the case because the amount of restitution ordered was within the limits allowed by law as it did not exceed the victim's damages, and in setting that amount, the trial court specifically considered the factors set forth in O.C.G.A. § 17-14-10. Hettrick v. State, 334 Ga. App. 115, 778 S.E.2d 369 (2015).

Trial court did not err in ordering restitution because the state met the state's burden of proving the victim's loss by presenting evidence of the amount the victim had paid the defendant and the value of the work the defendant had completed. Wilson v. State, 355 Ga. App. 73, 842 S.E.2d 521 (2020).

No enhancement of sentence by requiring restitution. — Because the trial court's determination of the restitution amount was authorized by O.C.G.A. § 17-14-7(b) and did not unlawfully enhance a defendant's sentence, the defendant did not have a substantive right to have the restitution hearing held within a certain time; the defendant waived the rights to be present and to confrontation by voluntarily choosing not to attend the hearing. Williams v. State, 311 Ga. App. 152, 715 S.E.2d 440 (2011), cert. denied, No. S11C1915, 2012 Ga. LEXIS 69 (Ga. 2012).

Trial court's award of restitution to the homeowners was supported by a preponderance of the evidence because the homeowners essentially suffered the entire loss of use of the homeowners' home, and the trial court determined that these damages flowed from the defendant's false statement which allowed the defendant, a contractor, to skip the requirements for structural engineering and architectural reports on the contractor's renovation of the owners' residence and to avoid county inspections, which would have avoided or detected problems as the problems arose. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Value of dog for restitution. — Trial court did not err in assessing the value of a dog the defendant killed at $3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Victim not entitled to restitution for time missed to appear at restitution hearing. — Although the trial court did not err in entering an order requiring the defendant to pay the victim restitution for lost wages based on the work time the victim lost as a direct result of the defendant's criminal conduct towards the victim, which included the 15 days that the victim spent away from work meeting

with lawyers, the bank, and law enforcement authorities, as well as the days the victim spent testifying at the criminal proceedings brought against the defendant, the trial court erred in requiring the defendant to compensate the victim for the day the victim took away from work to appear at the restitution hearing. Jackson v. State, 334 Ga. App. 340, 779 S.E.2d 402 (2015).

Waiver of right to restitution hearing. — Although the defendant had a right to a restitution hearing under O.C.G.A. § 17-14-7(b), the defendant waived that right by acquiescing in the trial court's restitution order in the expectation of receiving a more lenient sentence than that recommended by the state (which the defendant in fact did receive). Cameron v. State, 295 Ga. App. 670, 673 S.E.2d 59 (2009).

Defendant waived any error in the decision of the trial court to decide the question of restitution as a part of the defendant's sentencing hearing, rather than in a separate and distinct hearing, because the trial court gave the defendant and the defendant's attorney a choice of when they wanted to hold the sentencing hearing in the case, and they opted to proceed the same day as the jury announced the jury's verdict. Although the defendant's trial attorney indicated that the attorney was not expecting an award of restitution, the attorney did not object to that award, did not present or request to present evidence on the issue of restitution at the time, and did not request a separate hearing on the issue of restitution. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Waiver of error with respect to requirements of restitution hearing. — Defendant waived any error with respect to the statutory requirements of a restitution hearing under O.C.G.A. § 17-14-7(b) because the defendant was allowed to offer argument on the issue of restitution and did not object to the trial court proceeding to decide the issue of restitution at that time; nor did the defendant ask for a continuance, ask that a restitution hearing be set for a later date, or state that the defendant had evidence to present on the question of restitution. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Deciding restitution as part of sentencing hearing. — Defendant waived any error in the decision of the trial court to decide the question of restitution as a part of the sentencing hearing, rather than in a separate and distinct hearing, because the defendant did not object to the trial court proceeding to decide the issue of restitution at that time, nor did the defendant ask for a continuance, ask that a restitution hearing be set for a later date, or state that the defendant had evidence to present on the question of restitution. Ezebuiro v. State, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Defendant failed to present evidence of expenses. — Defendant, who pled guilty to theft by taking under O.C.G.A. § 16-8-2, could not argue that the trial court failed to consider the factors in O.C.G.A. § 17-14-10 in making a restitution order as the defendant did not meet the burden of proof under O.C.G.A. § 17-14-7 in establishing the defendant's expenses as the defendant only told the court that the defendant had to make monthly payments; the defendant made no response when asked if the defendant could make house payments and the like if half the defendant's monthly income was applied to the restitution order. Wimpey v. State, 297 Ga. App. 182, 676 S.E.2d 831 (2009).

Defendant failed to show lack of financial resources. — Defendant was not entitled to relief from the trial court's restitution order because the defendant presented no evidence to prove that the defendant lacked the financial resources to pay such an order. Tobias v. State, 319 Ga. App. 320, 735 S.E.2d 113 (2012).

Restitution inappropriate after state failed to prove value of vehicle. — Trial court erred in ordering the defendant to pay restitution after the defendant pled guilty to theft by receiving stolen property, a vehicle, because the state failed to prove the fair market value of a vehicle when no evidence was presented that the condition of the vehicle was considered in determining the value of the vehicle, which appeared to be based totally on the vehicle identification number; although an insurance company that was seeking to recover money from the defen-

dant was forced to value the vehicle before the vehicle was recovered, that did not prevent the state from introducing evidence, such as testimony from the victim or others with such knowledge, concerning the condition of the vehicle at the time of the theft. Browning v. State, 303 Ga. App. 805, 695 S.E.2d 291 (2010).

Apportionment of restitution award not required. — With respect to a trial court's order of restitution to a defendant under O.C.G.A. §§ 17-14-7 and 17-14-10, although the trial court was permitted to apportion liability between the defendant and another individual who was involved in the fake loan scheme, the court did not commit error by failing to do so as the evidence showed that the defendant was personally responsible for the greater amount of the total loss. Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Restitution order vacated because evidence of victim's damages inadequate. — With respect to a trial court's order of restitution to a defendant under O.C.G.A. § 17-14-10, the state failed to show the amount of restitution by a preponderance of the evidence pursuant to O.C.G.A. § 17-14-7 with respect to that portion of the award for "accounting/auditing/attorney fees," such that the order could not stand. Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Order of restitution was vacated because the state failed to adduce sufficient evidence to support an amount of $500 in damages for the pistol the defendant stole; while the trial court accepted the replacement cost as the fair market value of the gun, the correct determination for the amount of restitution was the fair market value of the property rather than the replacement cost. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

Order of restitution was vacated because the state failed to adduce sufficient evidence to determine the fair market value of the coin collection the defendant stole; the owner's opinion lacked foundation because there was no showing that the owner had some knowledge, experience, or familiarity with the value of the coins, and absent that foundation, the owner's opinion was nothing more than conjecture, an unsupported conclusion, or a guess. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

State failed to meet the state's burden of proof by presenting insufficient evidence as to the amount of restitution for the defendant's arson conviction as the state failed to present evidence of repair cost, save the victim's vague testimony that the victim could not afford to repair the victim's home, and there was likewise no indication that repair of the home would be an absurd undertaking. Overby v. State, 315 Ga. App. 735, 728 S.E.2d 278 (2012).

Restitution cannot be set by approximation. — Trial court erred in ordering the defendant juvenile to pay restitution pursuant to O.C.G.A. § 17-14-3 because the amount of restitution was set by approximation, rather than by a proper opinion of the value of the items damaged; O.C.G.A. § 17-14-9 does not permit a trial judge to set the amount of restitution by approximation but requires that the amount be based on proper opinion evidence of fair market value. In the Interest of R.H., 316 Ga. App. 317, 728 S.E.2d 911 (2012).

Restitution order vacated because evidence of victim's damages inadequate. — With respect to a trial court's order of restitution to a defendant under O.C.G.A. § 17-14-10, the state failed to show the amount of restitution by a preponderance of the evidence pursuant to O.C.G.A. § 17-14-7 with respect to that portion of the award for "accounting/auditing/attorney fees," such that the order could not stand. Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Absence of hearing and prior agreement vacated restitution. — There was no indication that the parties agreed on the amount of restitution prior to sentencing. The court simply announced the restitution order during sentencing without a hearing or any discussion whatsoever, and without any input from the defendant which violated O.C.G.A. § 17-14-7(b). Parker v. State, 320 Ga. App. 319, 741 S.E.2d 159 (2013).

Juvenile court erred by ordering the juvenile to pay restitution when no restitution hearing was held and there was no

evidence adduced at the adjudication and disposition hearings with regard to the amount of the victim's loss or the juvenile's ability to pay restitution; consequently, the case was remanded for a restitution hearing in accordance with the procedures set forth in O.C.G.A. § 17-14-1 et seq. In the Interest of D. D., 335 Ga. App. 676, 782 S.E.2d 728 (2016).

Cited in Nelson v. State, 329 Ga. App. 300, 764 S.E.2d 883 (2014).

17-14-8. Apportionment of payments for fines and restitution; payment to victims.

(a) In any case in which a court sentences an offender to pay restitution and a fine, if the court permits the offender to pay such restitution and fine in other than a lump sum, the clerk of any superior court of this state, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or other official who receives such partial payments shall apply not less than one-half of each payment to the restitution before paying any portion of such fine or any forfeitures, costs, fees, or surcharges provided for by law to any agency, department, commission, committee, authority, board, or bureau of state or local government.

(b) The clerk of any court of this state, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or other official who receives partial payments for restitution shall pay the restitution amount to the victim as provided in the restitution order not later than the last day of each month, provided that the amount exceeds $100.00. If the amount does not exceed $100.00, the clerk of any court of this state, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or other official may allow the amount of restitution to accumulate until such time as it exceeds $100.00 or until the end of the next calendar quarter, whichever occurs first.

History. — Code 1933, § 27-3008, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 422, § 5-36/HB 310.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Hearing. — Statutory purpose of the hearing and the entering of specific written findings is to allow the court to determine whether the court will order restitution and, if so, in what amount. Westmoreland v. State, 192 Ga. App. 173, 384 S.E.2d 249 (1989).

No due process violation. — Former Code 1933, §§ 27-3008 - 27-3010 (see O.C.G.A. §§ 17-14-8 - 17-14-10) contemplated a hearing and specific written findings by the court in determining whether the court will order restitution and the amount thereof; thus, the statutory provisions on restitution do not deny defendant's due process rights to a hearing on the damage issue. Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).

O.C.G.A. § 17-14-8 contemplates a hearing and specific written findings by the court in determining whether the court will order restitution. Patterson v. State, 161 Ga. App. 85, 289 S.E.2d 270 (1982); Taylor v. State, 182 Ga. App. 494, 356 S.E.2d 216 (1987); Britt v. State, 232 Ga. App. 780, 503 S.E.2d 653 (1998).

Presentence hearing required. — Sentence imposing restitution on a defendant cannot stand in the absence of a presentence hearing. Thompson v. State, 186 Ga. App. 471, 367 S.E.2d 320 (1988); Owens v. State, 187 Ga. App. 262, 369 S.E.2d 919 (1988); Radford v. State, 223 Ga. App. 312, 477 S.E.2d 428 (1996); Isaac v. State, 237 Ga. App. 723, 516 S.E.2d 575 (1999).

In a case of child molestation, the trial court erred in ordering restitution without holding a restitution hearing and that portion of the defendant's probationary sentence which imposed reimbursement for psychological counseling of the victims required vacating and remand for a hearing on the issue of restitution in accordance with O.C.G.A. § 17-14-8. Potts v. State, 207 Ga. App. 863, 429 S.E.2d 526 (1993).

Necessity of complying with procedural requirements. — That portion of the defendant's sentence which imposed restitution as a condition of probation was reversed and remanded to the trial court with direction that a hearing on the issue of restitution be held at which O.C.G.A. § 17-14-9, regarding the amount, and the factors in O.C.G.A. § 17-14-10 were to be considered, and the trial court was further directed that the written finding required by O.C.G.A. § 17-14-8 be made. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Remand proper when no written findings. — When the appeal's court is unable to discern from the designated record any written findings as required by O.C.G.A. § 17-14-8(a), the portion of the sentence imposing restitution will be vacated and remanded to the trial court for the preparation of written findings in compliance with that section. Howard v. State, 213 Ga. App. 542, 445 S.E.2d 532 (1994).

Written findings no longer required. — Under O.C.G.A. § 17-14-1 et seq., written findings are no longer required when ordering an offender to make restitution; as a result, Garrett v. State, 175 Ga. App. 400, 333 SE2d 432 (1985), and its progeny, are disapproved to extent those cases were authority for any cases involving restitution orders issued on or after July 1, 2005, the effective date of the Crime Victims Restitution Act of 2005, O.C.G.A. § 17-14-1 et seq. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Restitution damages proper. — Under the preponderance of the evidence standard, the trial court did not abuse the court's discretion in concluding that the defendant caused the $5,306.28 in damages to a stolen truck since the defendant was found in possession of the truck, and therefore the defendant was responsible for all damages that the truck incurred; as a result, the trial court properly ordered the defendant to pay a judgment of restitution in the amount of $5,306.28. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Effect on recidivist statute. — Although O.C.G.A. § 17-14-8 requires the trial court to consider fact of tender of restitution by criminal offender to a victim before imposing the sentence, the failure of the trial court to consider this fact

was not error since the sentence imposed was mandatory under the recidivist statute (O.C.G.A. § 17-10-7). Chappell v. State, 164 Ga. App. 77, 296 S.E.2d 629 (1982), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Amount vacated because conviction to which restitution order was attached was reversed. — Because the state failed to present sufficient evidence to support a finding that the defendant, a mortgage consultant, did not intend to perform the services paid for by a client, only that conviction, out of eight entered by the jury, and the restitution order attached to the conviction, had to be reversed. Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

Cited in Jarrett v. State, 161 Ga. App. 285, 287 S.E.2d 746 (1982); Bridges v. State, 208 Ga. App. 555, 431 S.E.2d 164 (1993); Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820 (2000); Miller v. State, 264 Ga. App. 801, 592 S.E.2d 450 (2003).

17-14-9. Amount of restitution.

The amount of restitution ordered shall not exceed the victim's damages.

History. — Code 1933, § 27-3009, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Restitution is not synonymous with civil damages. Morrison v. State, 181 Ga. App. 440, 352 S.E.2d 622 (1987).

Necessity of complying with procedural requirements. — That portion of the defendant's sentence which imposed restitution as a condition of probation was reversed and remanded to the trial court with direction that a hearing on the issue of restitution be held at which O.C.G.A. § 17-14-9 and the factors in O.C.G.A. § 17-14-10 were to be considered, and the trial court was further directed that the written finding required by O.C.G.A. § 17-14-8 be made. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Appellate court vacated the order of restitution and remanded the case to the trial court for clarification as although the trial court ruled in the state's favor, the appellate court was unable to determine whether the trial court found as a matter of fact that the defendant had agreed to pay the full amount of restitution or whether the trial court concluded that the court was authorized to award the full amount even if the defendant had not so agreed, which would constitute error. O'Brien v. State, 353 Ga. App. 425, 838 S.E.2d 96 (2020).

Specific findings of fact and maximum amount allowed. — Order for restitution failed to make specific findings of fact and amount awarded exceeded victim's damages. Revis v. State, 223 Ga. App. 470, 477 S.E.2d 880 (1996).

Fees paid for special grand jurors, traverse jurors, and bailiffs could not properly be included in the sum which the defendant was ordered to pay the defendant's victim as restitution. Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888, cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1988).

Measure of damages. — In measuring the appropriate damages for restitution, the court must determine what type of civil action could be maintained by the victim and what the proper measure of damages would be in such a civil action. Garrett v. State, 175 Ga. App. 400, 333 S.E.2d 432 (1985), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Trial court erred in ordering the defendant juvenile to pay restitution pursuant

to O.C.G.A. § 17-14-3 because the amount of restitution was set by approximation, rather than by a proper opinion of the value of the items damaged; O.C.G.A. § 17-14-9 does not permit a trial judge to set the amount of restitution by approximation but requires that the amount be based on proper opinion evidence of fair market value. In the Interest of R.H., 316 Ga. App. 317, 728 S.E.2d 911 (2012).

Restitution cannot be determined by approximation. — Evidence was insufficient to support the trial court's finding of the amount of restitution as to beer damaged or destroyed in a store since the storekeeper testified that the storekeeper could not "really give you the exact amount" of the fair market value of the beer and the amount of restitution was set by approximation rather than by a proper opinion of the value. Lovell v. State, 189 Ga. App. 311, 375 S.E.2d 658 (1988).

Amount of restitution ordered for the restoration of a stripped automobile was not supported by evidence since there was no evidence of reasonable hire, nor any evidence of the car's value either at the time of the car's theft, or after the car was stripped. Lomax v. State, 200 Ga. App. 233, 407 S.E.2d 462 (1991).

Evidence was insufficient as a matter of law to support restitution in the amount of $5,000 for a stolen car since no evidence was adduced concerning the value of the car at the time the car was stolen or after the car was returned in damaged condition. Burke v. State, 201 Ga. App. 50, 410 S.E.2d 164 (1991).

Because theft by receiving is analogous to the civil tort of conversion, the court may award the victim of this crime the value of the property at the date the property was converted plus the rental value of the vehicle from that date until the date of trial. In re C.B., 221 Ga. App. 102, 470 S.E.2d 493 (1996).

The court's order to make restitution based on a portion of the difference between the amount received by the victim from the insurer on a totaled car and the price of the victim's replacement vehicle, plus deductible, did not comply with the law. In re C.B., 221 Ga. App. 102, 470 S.E.2d 493 (1996).

Victim's testimony as to the estimated cost of repairs of the victim's truck and original purchase price of a damaged CD player did not establish the fair market value. Cardwell v. State, 225 Ga. App. 337, 484 S.E.2d 38 (1997).

An order of restitution in the amount of $5,982 based on an unsupported assertion that the defendant collected that amount in food stamps was reversed and remanded for determination of the amount in accordance with the rules of evidence. Britt v. State, 232 Ga. App. 780, 503 S.E.2d 653 (1998).

In a burglary case where a sawmill was stripped of copper wiring, there was a preponderance of evidence to support a restitution order when the defendant parked in the same location where burglars parked the previous day, went to a main power room where tools needed for pulling wire and not owned by the sawmill had been left, and had similar tools in the defendant's pickup truck; the amount of a restitution order was not supported by the evidence, however, because the correct determination of the amount of restitution was the fair market value of the property rather than the replacement cost, and witnesses for the state testified only as to replacement value. Hawthorne v. State, 285 Ga. App. 196, 648 S.E.2d 387 (2007).

Victim not entitled to restitution for time missed to appear at restitution hearing. — Although the trial court did not err in entering an order requiring the defendant to pay the victim restitution for lost wages based on the work time the victim lost as a direct result of the defendant's criminal conduct towards the victim, which included the 15 days that the victim spent away from work meeting with lawyers, the bank, and law enforcement authorities, as well as the days the victim spent testifying at the criminal proceedings brought against the defendant, the trial court erred in requiring the defendant to compensate the victim for the day the victim took away from work to appear at the restitution hearing. Jackson v. State, 334 Ga. App. 340, 779 S.E.2d 402 (2015).

Restitution order proper. — Co-defendant did not show that the trial court abused the court's discretion by ordering the defendant jointly and severally

liable for restitution in the case because the amount of restitution ordered was within the limits allowed by law as it did not exceed the victim's damages, and in setting that amount, the trial court specifically considered the factors set forth in O.C.G.A. § 17-14-10. Hettrick v. State, 334 Ga. App. 115, 778 S.E.2d 369 (2015).

Replacement cost not allowed. — Trial court erred in basing the court's determination of the measure of damages for purposes of restitution on the replacement cost of the items stolen rather than fair market value. Fewox v. State, 243 Ga. App. 651, 534 S.E.2d 121 (2000).

Proof of amount. — Trial court did not base the court's restitution amount for damage to a dresser on hearsay since the court considered, in addition to written repair estimates, the victim's testimony as owner, the victim's opinion as to both the cost of repair and the pre-damage fair market value, and photographs submitted. Barnes v. State, 239 Ga. App. 495, 521 S.E.2d 425 (1999).

Trial court did not err in considering the victim's personal knowledge as to the value of a damaged stove since the evidence demonstrated that the victim had the opportunity to formulate an opinion about the value. Barnes v. State, 239 Ga. App. 495, 521 S.E.2d 425 (1999).

Victim's testimony as to the actual cost paid to have a damaged floor repaired was not hearsay. Barnes v. State, 239 Ga. App. 495, 521 S.E.2d 425 (1999).

Restitution had to be equal or less than the victim's damages; determination of the damages had to be based upon fair market value which had to be determined exactly. Jackson v. State, 250 Ga. App. 617, 552 S.E.2d 546 (2001).

With regard to a restitution judgment entered against a defendant with regard to the defendant's conviction for theft by taking of copper wire, under the preponderance of the evidence standard, the trial court did not abuse the court's discretion in concluding that the fair market value of the stolen wire was $6,470 and in issuing a restitution order in that amount since the defendant failed to establish that the wire was merely scrap and the amount the defendant and the codefendant received from selling the stolen wire was irrelevant for purposes of the restitution order. McClure v. State, 295 Ga. App. 465, 673 S.E.2d 856 (2009).

Trial court erred in ordering the defendant to pay restitution after the defendant pled guilty to theft by receiving stolen property, a vehicle, because the state failed to prove the fair market value of a vehicle when no evidence was presented that the condition of the vehicle was considered in determining the value of the vehicle, which appeared to be based totally on the vehicle identification number; although an insurance company that was seeking to recover money from the defendant was forced to value the vehicle before the vehicle was recovered, that did not prevent the state from introducing evidence, such as testimony from the victim or others with such knowledge, concerning the condition of the vehicle at the time of the theft. Browning v. State, 303 Ga. App. 805, 695 S.E.2d 291 (2010).

Trial court did not err in ordering the defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to former O.C.G.A. § 24-9-66 (see O.C.G.A. § 24-7-701). Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

Trial court did not err in assessing the value of a dog the defendant killed at $3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Order of restitution was vacated because the state failed to adduce sufficient

evidence to support an amount of $500 in damages for the pistol the defendant stole; while the trial court accepted the replacement cost as the fair market value of the gun, the correct determination for the amount of restitution was the fair market value of the property rather than the replacement cost. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

Order of restitution was vacated because the state failed to adduce sufficient evidence to determine the fair market value of the coin collection the defendant stole; the owner's opinion lacked foundation because there was no showing that the owner had some knowledge, experience, or familiarity with the value of the coins, and absent that foundation, the owner's opinion was nothing more than conjecture, an unsupported conclusion, or a guess. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

In an action for burglary and theft by taking, the state presented sufficient evidence to support the amount of the restitution award including testimony from the victim and an estimate from a jeweler. Summers v. State, 355 Ga. App. 205, 843 S.E.2d 877 (June 30, 2020).

Amount not excessive. — Order requiring the defendant to pay $15,000 in restitution did not violate O.C.G.A. § 17-14-9. Since the victim originally owed a nursing facility over $17,000 before the amount was reduced because of Medicaid payments, and the defendant had converted at least $7,200 belonging to the victim, the trial court could have required the defendant to pay about $25,000 in restitution; the fact that some of these damages might be paid by third parties did not absolve the defendant of liability for making restitution. Adams v. State, 291 Ga. App. 681, 662 S.E.2d 782 (2008), overruled on other grounds, Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Effect of discharge in bankruptcy. — Offender is not absolved from paying for damages caused by the offender's actions merely because the victim filed bankruptcy. Crozier v. State, 233 Ga. App. 831, 506 S.E.2d 139 (1998).

Evidence was sufficient to authorize judgment of $4,750.00 in restitution for the taking of tools and motor vehicles. Hodges v. State, 201 Ga. App. 729, 411 S.E.2d 775, cert. denied, 201 Ga. App. 903, 411 S.E.2d 775 (1991).

Evidence was sufficient to support the amount of $112,124.50 as restitution to a county for losses suffered as the result of fraudulent conduct of defendant. Anderson v. State, 226 Ga. App. 286, 486 S.E.2d 410 (1997).

Amount of restitution ($63,000) assessed against a defendant was appropriate under O.C.G.A. § 17-14-9 because the master client list of the defendant's employer was offered to the defendant for $100,000, evidence was presented that the list was worth between $200,000 and $225,000, the list ultimately sold for $17,500, and the employer lost commissions in excess of $21,000; the trial court also properly considered the defendant's ability to pay and the factors contained in O.C.G.A. § 17-14-10. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

Court upheld a restitution order based on a surgeon's testimony that a recommended surgical procedure that cost $15,000 was not for cosmetic purposes but to allow the victim greater ease of movement, and based on evidence of the defendant's financial situation, the defendant's bachelor's and master's degrees, the defendant's employment, and the defendant's future earning potential as set forth in O.C.G.A. § 17-14-10. Regent v. State, 306 Ga. App. 616, 703 S.E.2d 81 (2010).

Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred, and even if others at the scene could have also kicked the victim, that did not negate the defendant's liability for damages caused by the defendant's role in the attack. Elsasser v. State, 313 Ga. App.

661, 722 S.E.2d 327 (2011), cert. denied, No. S12C0949, 2012 Ga. LEXIS 555 (Ga. 2012).

Hearing. — Former Code 1933, §§ 27-3008—27-3010 (see O.C.G.A. §§ 17-14-8—17-14-10) contemplated a hearing and specific written findings by the court in determining whether the court will order restitution and the amount thereof; thus, the law does not deny defendants due process rights to a hearing on the damage issue. Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).

Interest. — Restitution ordered under O.C.G.A. § 17-14-9 may rightfully include interest on the victim's damages. Patrick v. State, 184 Ga. App. 260, 361 S.E.2d 251 (1987).

As it is used in the statutory provisions relating to restitution, "damages" includes interest. Corbin v. State, 202 Ga. App. 464, 415 S.E.2d 14 (1992).

No restitution based on untried offense. — Since there was no accusation or evidence relating to a particular theft, the trial court could not order restitution for that theft as a condition of probation even if the court was aware of an untried charge relating to that theft. Robinson v. State, 169 Ga. App. 763, 315 S.E.2d 277 (1984).

If defendant acquiesced at trial, defendant could not complain on appeal. — If the defendant acquiesced at trial with the on-the-record statement of the state asserting that the defendant was "now in accord with" the state's asserted restitution figures, the effect of such acquiescence deprived the defendant of the right to complain on appeal of the amount of restitution ordered. Westmoreland v. State, 192 Ga. App. 173, 384 S.E.2d 249 (1989).

Standard of proof. — Sufficiency of the evidence to support an order of restitution in a criminal case should be measured by the civil standard of preponderance of the evidence. Lawrenz v. State, 194 Ga. App. 724, 391 S.E.2d 703 (1990); Britt v. State, 232 Ga. App. 780, 503 S.E.2d 653 (1998).

Restitution not based on coindictees. — Restitution award to be paid by the defendant upon conviction of theft by taking was limited to the amount of money the defendant was shown to have taken, not the total amount taken by the defendant and the defendant's coindictees. Rice v. State, 226 Ga. App. 770, 487 S.E.2d 517 (1997).

Payments to persons not named as victims in indictment. — In a prosecution for conversion of payments made by home-buyers' for real property improvements, the defendant was properly ordered to make payments directly to the subcontractors for work which the subcontractors performed, notwithstanding that the subcontractors were not named as victims in the indictment, since the home-buyers could have recovered such amounts in a civil action. Buchanan v. State, 248 Ga. App. 489, 546 S.E.2d 869 (2001).

Restitution not available for crime that did not cause damage. — Under O.C.G.A. §§ 17-14-2(2) and 17-14-9, restitution was not available for the defendant's conviction for leaving the scene of an accident in violation of O.C.G.A. § 40-6-270(a) because the damage to the other vehicle was solely attributable to the collision between the cars; the defendant's failure to stop after the collision neither caused nor contributed to the damage. Zipperer v. State, 299 Ga. App. 792, 683 S.E.2d 865 (2009).

Cited in Jarrett v. State, 161 Ga. App. 285, 287 S.E.2d 746 (1982); Patterson v. State, 161 Ga. App. 85, 289 S.E.2d 270 (1982); Sutton v. State, 190 Ga. App. 56, 378 S.E.2d 491 (1989); Howard v. State, 213 Ga. App. 542, 445 S.E.2d 532 (1994); Jones v. State, 246 Ga. App. 857, 542 S.E.2d 584 (2000); Beall v. State, 252 Ga. App. 138, 555 S.E.2d 788 (2001).

RESEARCH REFERENCES

ALR. — Measure and elements of restitution to which victim is entitled under state criminal statute — payment for installation of alarm or locks or change of locks due to burglary, attempted burglary, or felonious breaking and entering, 44 A.L.R.6th 301.

Propriety, measure, and elements of

restitution to which victim is entitled under state criminal statute — cruelty to, killing, or abandonment of, animals, 45 A.L.R.6th 435.

17-14-10. Factors to be considered by ordering authority in determining nature and amount of restitution.

(a) In determining the nature and amount of restitution, the ordering authority shall consider:

(1) The financial resources and other assets of the offender or person ordered to pay restitution including whether any of the assets are jointly controlled;

(2) The earnings and other income of the offender or person ordered to pay restitution;

(3) Any financial obligations of the offender or person ordered to pay restitution, including obligations to dependents;

(4) The amount of damages;

(5) The goal of restitution to the victim and the goal of rehabilitation of the offender;

(6) Any restitution previously made;

(7) The period of time during which the restitution order will be in effect; and

(8) Other factors which the ordering authority deems to be appropriate.

(b) If, subsequent to restitution being ordered pursuant to this article, a victim is convicted of a crime for which restitution is ordered, the ordering authority shall consider the previously ordered restitution as part of the financial resources of such victim.

History. — Code 1933, § 27-3010, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Ordering authority to make record. — O.C.G.A. § 17-14-10 requires the ordering authority to make a record regarding consideration of the enumerated factors. Woods v. State, 205 Ga. App. 500, 422 S.E.2d 670 (1992); Jones v. State, 224 Ga. App. 340, 480 S.E.2d 618 (1997); Cardwell v. State, 225 Ga. App. 337, 484 S.E.2d 38 (1997).

Defendant's case was remanded to the trial court for a hearing since the transcript did not disclose what, if any, consideration was made of the factors mandated by O.C.G.A. § 17-14-10. Williams v. State, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Restitution is not synonymous with civil damages. Morrison v. State, 181 Ga. App. 440, 352 S.E.2d 622 (1987).

Order that defendant pay defendant's court-appointed attorney as a condition of probation was not governed by O.C.G.A. § 17-14-10, but by O.C.G.A. § 17-12-10, providing for payment or reimbursement for legal assistance and, thus, no hearing was required. Miller v. State, 221 Ga. App. 718, 472 S.E.2d 697 (1996).

Hearing. — Former Code 1933, §§ 27-3008 — 27-3010 (see O.C.G.A. §§ 17-14-8 — 17-14-10) contemplated a hearing and specific written findings by the court in determining whether the court will order restitution and the amount thereof; thus, the statutory provisions on restitution do not deny defendants due process rights to a hearing on the damage issue. Cannon v. State, 246 Ga. 754, 272 S.E.2d 709 (1980).

In the absence of a post-trial presentence hearing wherein the factors enumerated in O.C.G.A. § 17-14-10 are considered by the trial court, a sentence imposing restitution cannot stand. Patterson v. State, 161 Ga. App. 85, 289 S.E.2d 270 (1982); Brown v. State, 214 Ga. App. 733, 449 S.E.2d 136 (1994).

Trial court erred in ordering the defendant to pay a specified sum as restitution without holding a hearing and making the specific findings required by statutory law; thus, that portion of the defendant's sentence based on defendant's conviction for theft of lost or mislaid property had to be reversed and remanded to the trial court so that the court could hold an appropriate hearing and make the required findings. Shannon v. State, 258 Ga. App. 689, 574 S.E.2d 889 (2002).

Joint and several liability. — Defendant's sole enumeration of error was that the trial court erred in the court's order by holding each defendant jointly and severally liable for the entire restitutionary amount; however, the defendant failed to show that the trial court's order of joint and several liability on the restitutionary amount was unreasonable or that the defendant had been harmed thereby. Morrison v. State, 181 Ga. App. 440, 352 S.E.2d 622 (1987).

Co-defendant did not show that the trial court abused the court's discretion by ordering the defendant jointly and severally liable for restitution in the case because the amount of restitution ordered was within the limits allowed by law as it did not exceed the victim's damages, and in setting that amount, the trial court specifically considered the factors set forth in O.C.G.A. § 17-14-10. Hettrick v. State, 334 Ga. App. 115, 778 S.E.2d 369 (2015).

Standard of proof. — Sufficiency of evidence to support an order of restitution in a criminal case should be measured by the civil standard of preponderance of the evidence. Lawrenz v. State, 194 Ga. App. 724, 391 S.E.2d 703 (1990).

Necessity of complying with procedural requirements. — That portion of defendant's sentence which imposed restitution as a condition of probation was reversed and remanded to the trial court with direction that a hearing on the issue of restitution be held at which O.C.G.A. § 17-14-9, regarding the amount, and the factors in O.C.G.A. § 17-14-10 were to be considered, and the trial court was further directed that the written finding required by O.C.G.A. § 17-14-8 be made. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

Since the trial court did not hold a restitution hearing and the only mention of restitution at the sentencing hearing was the restitution order itself, the case was remanded for a hearing and specific written findings. Fonseca v. State, 212 Ga. App. 463, 441 S.E.2d 912 (1994); Earl v. State, 214 Ga. App. 891, 449 S.E.2d 361 (1994); Thompson v. State, 214 Ga. App. 889, 449 S.E.2d 364 (1994).

Since the trial court failed to make written findings based on the factors in O.C.G.A. § 17-14-10, and there was no showing in the record that the court considered such factors, the restitution award was invalid, and a rehearing was required. Helmeci v. State, 230 Ga. App. 866, 498 S.E.2d 326 (1998).

In an adjudication proceeding, because: (1) the juvenile court erred in failing to include the statutorily-required findings of fact pursuant to O.C.G.A. § 17-14-10 in support of the restitution award; (2) the vast majority of the victim's testimony regarding damages was limited to the original price or the replacement costs of the items damaged or stolen; and (3) some

of the victim's testimony regarding repair quotes received constituted inadmissible hearsay, the restitution award was vacated and the case was remanded for a new hearing. In the Interest of R.V., 283 Ga. App. 355, 641 S.E.2d 591 (2007), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Evaluation of defendant's ability to pay restitution. — Following the defendant's guilty plea to O.C.G.A. § 16-14-4(a) (RICO), an order of $725,000 restitution pursuant to O.C.G.A. § 17-14-3(a) was supported by evidence that the defendant had the capacity for gainful employment, notwithstanding the defendant's claim that the defendant was disabled; that the defendant had possessed hundreds of thousands of dollars of the victims' money; and that the defendant had a venture in which the defendant claimed $4.8 million. Nelson v. State, 329 Ga. App. 300, 764 S.E.2d 883 (2014).

Specific findings required. — Restitution order that required a county probate judge who pled guilty to misfeasance in office to repay the county the sum of $54,000 was deficient in that the order did not contain the specific findings required by O.C.G.A. § 17-14-10; the trial court was directed to enter a new restitution order based on the required findings. Beall v. State, 252 Ga. App. 138, 555 S.E.2d 788 (2001), overruled on other grounds, 324 Ga. App. 289, 750 S.E.2d 375 (2013).

While a trial court noted in the court's restitution order that evidence had been presented at the restitution hearing concerning the defendant's health problems and ability to pay and while the trial court specifically stated that the court had considered the factors set forth in O.C.G.A. § 17-14-10, the case was remanded because the trial court failed to set forth the necessary written factual findings. McMahon v. State, 273 Ga. App. 574, 615 S.E.2d 625 (2005).

Despite the fact that O.C.G.A. § 15-11-70 allowed for a juvenile probation order to be extended if, among other things, a hearing was held prior to the expiration of the order upon motion of a party or on the court's own motion, the juvenile court erred in extending a juvenile's probation, imposing the condition that restitution be paid, without making the requisite findings set forth in O.C.G.A. § 17-14-10, such as the juvenile's financial condition. In the Interest of C.S., 280 Ga. App. 781, 635 S.E.2d 176 (2006), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Record did not disclose what the trial court found as fact or that the court considered the O.C.G.A. § 17-14-10 factors in imposing restitution upon the defendant; thus, a remand was required for a hearing on the matter. Newton v. State, 281 Ga. App. 549, 636 S.E.2d 728 (2006), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Probationer's ability to pay. — Because a probationer received a restitution hearing in which the trial court considered all the required factors in determining the probationer's ability to pay, and the court made findings based on the evidence presented, no error resulted in entering the restitution order despite the fact that the probationer only made $6,000 per year. Tindol v. State, 284 Ga. App. 45, 643 S.E.2d 329 (2007).

Trial court's order on remand to include the required factual findings supporting the court's restitution judgment, after considering the defendant's financial condition and probable future earning capacity, was upheld on appeal as the order: (1) did not include any amount arising out of the counts which the defendant was acquitted; (2) contained a finding that the award could exceed the total amount of money the defendant took wrongfully because the court was allowed to award all damages which a victim could recover against an offender in a civil action, pursuant to O.C.G.A. § 17-14-2; (3) considered the defendant's financial resources, assets, income, and financial obligations as required under O.C.G.A. § 17-14-10; and (4) considered that the defendant's criminal actions caused the victims the loss that the trial court awarded as restitution. McMahon v. State, 284 Ga. App. 192, 643 S.E.2d 236 (2007).

Written findings of fact required. — As the trial court failed to include written findings of fact pertaining to the various factors set forth in O.C.G.A. § 17-14-10 in

the court's order following a restitution hearing, the court's restitution order was deficient. Nobles v. State, 253 Ga. App. 814, 560 S.E.2d 724 (2002).

Restitution order was vacated on appeal because the trial court failed to provide written findings as to each factor enumerated in O.C.G.A. § 17-14-10; whether the defendant was entitled to a new restitution hearing, however, was an issue for the trial court to determine on remand. Steele v. State, 270 Ga. App. 488, 606 S.E.2d 664 (2004).

Written findings no longer required. — Under O.C.G.A. § 17-14-1 et seq., written findings are no longer required when ordering an offender to make restitution; as a result, Garrett v. State, 175 Ga. App. 400, 333 SE2d 432 (1985), and its progeny, are disapproved to extent they were authority for any cases involving restitution orders issued on or after July 1, 2005, the effective date of the Crime Victims Restitution Act of 2005, O.C.G.A. § 17-14-1 et seq. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Georgia law no longer requires written findings on restitution. Ezebuiro v. State, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Trial court's failure to enter written findings with respect to a restitution award was not reversible error; based on an amendment to the restitution statutes in 2005, a trial court is no longer required to make written findings of fact concerning the factors to be considered in determining the restitution amount as set forth in O.C.G.A. § 17-14-10. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

Specific findings of fact and maximum amount allowed. — Order for restitution failed to make specific findings of fact and amount awarded exceeded victim's damages. Revis v. State, 223 Ga. App. 470, 477 S.E.2d 880 (1996).

Defendant's silence when restitution order was given did not render the failure to make findings harmless or cut off the right to appeal such error. Fonseca v. State, 212 Ga. App. 463, 441 S.E.2d 912 (1994).

Failure of defendant to offer evidence regarding ability to pay. — Since the claimant failed to provide any evidence of the claimant's present financial condition or future earning capacity at a restitution hearing, the court had no affirmative duty to discover such evidence in considering the claimant's ability to pay; since the claimant had the opportunity to present evidence, yet still chose not to do so, the claimant's silence was deemed a waiver. Cheeks v. State, 218 Ga. App. 212, 460 S.E.2d 860 (1995).

Defendant, who pled guilty to theft by taking under O.C.G.A. § 16-8-2, could not argue that the trial court failed to consider the factors in O.C.G.A. § 17-14-10 in making a restitution order as the defendant did not meet the burden of proof under O.C.G.A. § 17-14-7 in establishing the defendant's expenses as the defendant only told the court that the defendant had to make monthly payments; the defendant made no response when asked if the defendant could make house payments and the like if half the defendant's monthly income was applied to the restitution order. Wimpey v. State, 297 Ga. App. 182, 676 S.E.2d 831 (2009).

Factors considered. — Amount of restitution ($63,000) assessed against a defendant was appropriate under O.C.G.A. § 17-14-9 because the master client list of the defendant's employer was offered to the defendant for $100,000, evidence was presented that the list was worth between $200,000 and $225,000, the list ultimately sold for $17,500, and the employer lost commissions in excess of $21,000; the trial court also properly considered the defendant's ability to pay and the factors contained in O.C.G.A. § 17-14-10. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

There was no error with respect to a trial court's order of restitution to a defendant upon the defendant's conviction as the trial court properly considered the defendant's current financial condition and future earning capacity, and all of the factors in O.C.G.A. § 17-14-10. Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Factors not considered. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Pro-

gram and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the state's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Victim not entitled to restitution for time missed to appear at restitution hearing. — Although the trial court did not err in entering an order requiring the defendant to pay the victim restitution for lost wages based on the work time the victim lost as a direct result of the defendant's criminal conduct towards the victim, which included the 15 days that the victim spent away from work meeting with lawyers, the bank, and law enforcement authorities, as well as the days the victim spent testifying at the criminal proceedings brought against the defendant, the trial court erred in requiring the defendant to compensate the victim for the day the victim took away from work to appear at the restitution hearing. Jackson v. State, 334 Ga. App. 340, 779 S.E.2d 402 (2015).

Juvenile properly ordered to pay restitution for hospital bill. — Since restitution was expressly authorized as a condition or limitation of the probation of delinquent or unruly juveniles, and as the nature and amount of restitution was supported by a preponderance of the evidence, there was no error in the trial court's order that the defendant pay restitution for the victim's hospital bill. In the Interest of N. T., 355 Ga. App. 205, 843 S.E.2d 877 (2020).

Restitution order proper. — Under a preponderance of the evidence standard, the trial court did not abuse the court's discretion in concluding that the defendant caused the $5,306.28 in damages to a stolen truck since the defendant was found in possession of the truck, and therefore the defendant was responsible for all damages that the truck incurred; as a result, the trial court properly ordered the defendant to pay a judgment of restitution in the amount of $5,306.28. McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Trial court did not err in ordering restitution because the state met the state's burden of proving the victim's loss by presenting evidence of the amount the victim had paid the defendant and the value of the work the defendant had completed. Wilson v. State, 355 Ga. App. 73, 842 S.E.2d 521 (2020).

Sentence reversed where failure to consider factors. — Because the record revealed that the trial court failed to consider factors (1) and (2), that portion of the court's sentence imposing restitution was reversed and remanded for a hearing in compliance with O.C.G.A. § 17-14-10. Slater v. State, 209 Ga. App. 723, 434 S.E.2d 547 (1993).

Failure of the trial court to consider the factors listed in O.C.G.A. § 17-14-10, particularly the defendant's financial condition at the time of resentencing, required vacation of the sentence and remand of the case. Pruitt v. State, 230 Ga. App. 334, 496 S.E.2d 324 (1998); Darden v. State, 233 Ga. App. 353, 504 S.E.2d 256 (1998).

If restitution was imposed pursuant to the entry of a nonnegotiated guilty plea, but there was no evidence in the record that the court considered the factors enumerated in the statute, the sentence would be reversed and the matter would be remanded. Zebley v. State, 234 Ga. App. 18, 505 S.E.2d 562 (1998).

Restitution order was vacated and the case remanded so that the trial court could conduct a hearing in compliance with the statute and enter written findings of fact relating to the factors set forth therein since the trial court held a restitution hearing, but the transcript did not disclose that the court considered each of those factors, and the trial court did not enter specific written findings. Williams v. State, 247 Ga. App. 783, 545 S.E.2d 343 (2001).

Restitution order vacated because evidence on victim's damages was insufficient. — Restitution order was vacated because evidence on the victim's damages was insufficient when the victim failed to give a fact-supported opinion as to the value of the damaged items and estimated the depreciated value of each

item based on numbers defendant "pulled out of [her] head." Gray v. State, 273 Ga. App. 747, 615 S.E.2d 834 (2005).

Restitution order was vacated as the trial court failed to address the O.C.G.A. § 17-14-10 factors, except for the amount of damages sustained by the victim. Gray v. State, 273 Ga. App. 747, 615 S.E.2d 834 (2005).

With respect to a trial court's order of restitution to a defendant under O.C.G.A. § 17-14-10, the state failed to show the amount of restitution by a preponderance of the evidence pursuant to O.C.G.A. § 17-14-7 with respect to that portion of the award for "accounting/auditing/attorney fees," such that the order could not stand. Turner v. State, 312 Ga. App. 799, 720 S.E.2d 264 (2011).

Fair market value not replacement costs. — Order of restitution was vacated because the state failed to adduce sufficient evidence to support an amount of $500 in damages for the pistol the defendant stole; while the trial court accepted the replacement cost as the fair market value of the gun, the correct determination for the amount of restitution was the fair market value of the property rather than the replacement cost. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

Order of restitution was vacated because the state failed to adduce sufficient evidence to determine the fair market value of the coin collection the defendant stole; the owner's opinion lacked foundation because there was no showing that the owner had some knowledge, experience, or familiarity with the value of the coins, and absent that foundation, the owner's opinion was nothing more than conjecture, an unsupported conclusion, or a guess. Austin v. State, 315 Ga. App. 713, 727 S.E.2d 535 (2012).

No evidence of victim's expenses. — Trial court erred in ordering restitution because there was no evidence of expenses or costs to the complaining victim for damages resulting from the alleged crimes; that portion of the sentence imposing restitution was vacated and the case remanded for a hearing in compliance with O.C.G.A. § 17-14-10. Wiggins v. State, 272 Ga. App. 414, 612 S.E.2d 598 (2005), aff'd in part and rev'd in part, 280 Ga. 268, 626 S.E.2d 118 (2006).

Restitution order upheld as supported by the evidence. — Court upheld a restitution order based on a surgeon's testimony that a recommended surgical procedure that cost $15,000 was not for cosmetic purposes but to allow the victim greater ease of movement, and based on evidence of the defendant's financial situation, the defendant's bachelor's and master's degrees, the defendant's employment, and the defendant's future earning potential as set forth in O.C.G.A. § 17-14-10. Regent v. State, 306 Ga. App. 616, 703 S.E.2d 81 (2010).

Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred. Elsasser v. State, 313 Ga. App. 661, 722 S.E.2d 327 (2011), cert. denied, No. S12C0949, 2012 Ga. LEXIS 555 (Ga. 2012).

Trial court's award of restitution to the homeowners was supported by a preponderance of the evidence because the homeowners essentially suffered the entire loss of use of the homeowners' home, and the trial court determined that these damages flowed from the defendant's false statement which allowed the defendant, a contractor, to skip the requirements for structural engineering and architectural reports on the contractor's renovation of the owners' residence and to avoid county inspections, which would have avoided or detected problems as the problems arose. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Trial court's order regarding restitution was not erroneous as the trial court considered all the factors laid out in O.C.G.A. § 17-14-10(a) and based the court's restitution award on competent evidence proving the amount granted by a preponder-

ance of the evidence. Graf v. State, 327 Ga. App. 598, 760 S.E.2d 613 (2014).

Restitution is limited by thefts during time period alleged in accusation. — Trial court erred in ordering restitution for $260,637 for thefts from the defendant's employer over a 12-year period because the accusation covered only a two-year period during which $57,000 was taken; under O.C.G.A. §§ 17-14-2(2) and 17-14-10, restitution was limited to damages which the victim could recover in a civil action based on the same act. Vaughn v. State, 324 Ga. App. 289, 750 S.E.2d 375 (2013), overruled on other grounds by In the Interest of N. T., 2020 Ga. App. LEXIS 289 (Ga. Ct. App. 2020).

Cited in Jarrett v. State, 161 Ga. App. 285, 287 S.E.2d 746 (1982); Gould v. State, 190 Ga. App. 611, 381 S.E.2d 442 (1989); Barrett v. State, 192 Ga. App. 705, 385 S.E.2d 785 (1989); Queen v. State, 210 Ga. App. 588, 436 S.E.2d 714 (1993); Howard v. State, 213 Ga. App. 542, 445 S.E.2d 532 (1994); Gaskin v. State, 221 Ga. App. 142, 470 S.E.2d 531 (1996); Anderson v. State, 226 Ga. App. 286, 486 S.E.2d 410 (1997); Hartsell v. State, 288 Ga. App. 552, 654 S.E.2d 662 (2007); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Disbursement of funds when victim cannot be located. — Restitution payments should not be returned to the probationer when the intended recipient cannot be located: instead, the funds should be retained for the benefit of the victim until the completion of the seven-year holding period, and at that point, the account should be reported and subsequently delivered to the State Revenue Commissioner in accordance with the laws concerning disposition of unclaimed property. 1987 Op. Att'y Gen. No. U87-17.

RESEARCH REFERENCES

ALR. — Measure and elements of restitution to which victim is entitled under state criminal statute — payment for installation of alarm or locks or change of locks due to burglary, attempted burglary, or felonious breaking and entering, 44 A.L.R.6th 301.

Propriety, measure, and elements of restitution to which victim is entitled under state criminal statute — cruelty to, killing, or abandonment of, animals, 45 A.L.R.6th 435.

17-14-11. Effect of restitution order on civil actions against offender; setoff of restitution payments against civil judgments; admissibility of restitution orders or payments; determining setoff amount.

An order for restitution shall not bar any civil action against the offender. However, any payments made by an offender to a victim under an order for restitution may be a setoff against any judgment awarded to the victim in a civil action based on the same facts for which restitution was ordered. The fact of restitution or a restitution order under this article shall not be placed before the jury on the issue of liability. If the amount of restitution made is in dispute and liability is established, the court shall order further appropriate proceedings to determine the amount of setoff.

History. — Code 1933, § 27-3011, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Restitution is not synonymous with civil damages. Morrison v. State, 181 Ga. App. 440, 352 S.E.2d 622 (1987).

Cited in Jones v. State, 246 Ga. App. 857, 542 S.E.2d 584 (2000); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

17-14-12. Modification of restitution order.

The ordering authority shall retain jurisdiction to modify a restitution order at any time before the expiration of the relief ordered.

History. — Code 1933, § 27-3012, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Modification may be ordered at any time. — Trial court erred in dismissing a defendant's motion to modify restitution until the time came for the defendant to pay. Under O.C.G.A. § 17-14-12, the ordering authority, in this case, the trial court pursuant to O.C.G.A. § 17-14-2, retained jurisdiction to modify the restitution order at any time before the expiration of the relief ordered. Wright v. State, 302 Ga. App. 136, 690 S.E.2d 259 (2010).

Cited in Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

17-14-13. Manner of enforcement of restitution order generally; sanctions for failure to comply with order.

(a) A restitution order shall be enforceable as is a civil judgment by execution as provided in Code Section 17-10-20.

(b) If an offender or other person ordered to pay restitution willfully refuses to comply with a restitution order, the order, in the discretion of the court, may be enforced by attachment for contempt, upon the application of the prosecuting attorney or the victim.

(c) Failure to comply with a restitution order may, in the discretion of the ordering authority, be grounds to revoke or cancel the relief at any time the restitution order is in effect. Where the relief is earned time allowances, the Department of Corrections may suspend the offender from earning earned time allowances for a specified period of time.

History. — Code 1933, § 27-3013, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 1982, p. 3, § 17; Ga. L. 1985, p. 231, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Order of restitution is debt within meaning of Bankruptcy Code. — Victim who is the subject of an order of restitution has a cause of action in the victim's own right for enforcement of the order. Therefore, an order of restitution is a debt within the ambit of 11 U.S.C. § 1328. Newton v. Fred Haley Poultry Farm, 15 Bankr. 708 (Bankr. N.D. Ga. 1981).

Before O.C.G.A. § 17-14-13 becomes operative, there must be a restitution order which is a condition of any relief ordered and the relief must have been accepted by the offender or inmate. Conklin v. Zant, 202 Ga. App. 214, 413 S.E.2d 536 (1991).

Cited in Cargill v. Zant, 207 Ga. App. 393, 427 S.E.2d 809 (1993); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Criminal conviction as prerequisite to restitution. — Valid orders of the court are enforceable under the general contempt authority, but restitution orders may only be entered upon a criminal conviction. 1987 Op. Att'y Gen. No. U87-8.

17-14-14. Restitution payments; wage assignments; review of compliance; interest.

(a) Payments pursuant to an order for restitution shall be made to the clerk of the court or to any other person, for the benefit of the victim or victims, as the ordering authority shall order.

(b) In each case in which payment of restitution is ordered as a condition of probation or parole, the ordering authority may require any employed offender to execute a wage assignment to pay the restitution.

(c) Until such time as the restitution has been paid or the sentence has been completed, the clerk of court or the community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42 assigned to the case, whoever is responsible for collecting restitution, shall review the case not less frequently than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered to be made within a specific period of time, the case shall be reviewed at the end of the specific period of time to determine if the restitution has been paid in full. The final review shall be conducted before the sentence or probationary or parole period expires. If it is determined at any review that restitution is not being paid as ordered, a written report of the violation shall be filed with the court on a form prescribed by the Council of Superior Court Clerks of Georgia.

(d) If the ordering authority permits the offender to pay restitution in other than a lump sum, the ordering authority may require the offender to pay interest on the amount of restitution due the victim or the victim's estate. Such interest shall be set at the same rate as is provided by Code Section 7-4-12 for judgments.

History. — Code 1933, § 27-3014, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 422, § 5-37/HB 310.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Disbursement of funds when victim cannot be located. — Restitution payments should not be returned to the probationer when the intended recipient cannot be located; instead, the funds should be retained for the benefit of the victim until the completion of the seven-year holding period, and at that point, the account should be reported and subsequently delivered to the State Revenue Commissioner in accordance with the laws of this state concerning disposition of unclaimed property. 1987 Op. Att'y Gen. No. U87-17.

Authority of probation supervisors to collect payments. — O.C.G.A. § 17-14-14 does not authorize the payment of noncourt ordered restitution to probation supervisors, who are specifically prohibited from collecting such payments under O.C.G.A. § 42-8-31. 1984 Op. Att'y Gen. No. 84-50.

Collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (now Department of Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

17-14-15. Peonage not authorized by article; denial of benefits because of poverty prohibited.

(a) Nothing in this article shall authorize peonage; and this article shall be construed and diligently administered to prevent peonage.

(b) No offender shall be denied any benefit, relief, or privilege to which he or she might otherwise be entitled or eligible solely because he or she is financially unable and cannot become financially able to make restitution.

History. — Code 1933, § 27-3016, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

JUDICIAL DECISIONS

Refusal of plea bargain upon inability to make restitution. — State's refusal to recommend acceptance of the plea bargain because the defendant could not make the agreed-upon initial restitution payment of $5,000, and the trial court's refusal to accept the plea, did not deny the defendant equal protection or violate O.C.G.A. § 17-14-15. Nash v. State, 179 Ga. App. 702, 347 S.E.2d 651 (1986).

Sentence requiring defendant to pay restitution while incarcerated held illegal. — Because that part of a sentence requiring the defendant to pay restitution while incarcerated and pay specific and substantial amounts of restitution both before the commencement of the prison sentence and while on probation was illegal, that portion was vacated, and the defendant's acquiescence to the sentence, either through plea negotiations or a failure to object to the sentence, did not remove the illegality. Sumner v. State, 284 Ga. App. 308, 643 S.E.2d 831 (2007).

17-14-16. Transmission of copies of restitution orders to the Department of Corrections or the Department of Juvenile Justice, and to the Department of Community Supervision.

If an offender who is ordered to pay restitution under this article is remanded to the jurisdiction of the Department of Corrections or the Department of Juvenile Justice, the court shall transmit a copy of the restitution order to such department and to the Department of Community Supervision when the order is issued.

History. — Code 1933, § 27-3015, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 422, § 5-38/HB 310.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

17-14-17. Voidable transfers.

(a) The state or the victim of a crime may institute an action against an offender pursuant to Article 4 of Chapter 2 of Title 18, the "Uniform Voidable Transactions Act," to set aside a transfer of real, personal, or other property made voluntarily by the offender on or after the date of the crime committed by the offender against the victim with the intent to:

(1) Conceal the crime or the fruits of the crime;

(2) Hinder, delay, or defraud any victim; or

(3) Avoid the payment of restitution.

(b) Any such action shall be filed within four years of the date the crime was committed.

History. — Code 1981, § 17-14-17, enacted by Ga. L. 1998, p. 549, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 996, § 4B-2/SB 65.

Editor's notes. — Ga. L. 1998, p. 549, § 2, not codified by the General Assembly, provided in part that this Code section is applicable to convictions entered on or after July 1, 1998.

Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

"(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: "Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised."

17-14-18. Payments to and by the Crime Victims Emergency Fund.

If a person or entity entitled to restitution cannot be located or refuses to claim such restitution within two years after the date on which he or she could have claimed such restitution, the restitution paid to such person or entity shall be deposited in the Crime Victims Emergency Fund created pursuant to Chapter 15 of Title 17 or its successor fund. However, a person or entity entitled to such restitution may claim such restitution any time within five years of the date on which he or she could have claimed such restitution by applying in writing to Georgia Crime Victims Compensation Board. Upon receipt of such application and verification that the person making the claim is in fact entitled to such restitution, the Georgia Crime Victims Compensation Board shall pay such restitution to the person or entity.

History. — Code 1981, § 17-14-18, enacted by Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

17-14-19. Effect of article on powers of courts.

This article shall not be construed to limit or abrogate any power of any court, agency, or board to place other conditions, limits, terms, rules, or regulations on any relief in the nature of suspension of sentence, probation, parole, pardon, or restoration of rights.

History. — Code 1981, § 17-14-19, enacted by Ga. L. 2005, p. 88, § 5/HB 172.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

ARTICLE 2

DISTRIBUTION OF PROFITS OF CRIMES

17-14-30. Definitions.

As used in this article, the term:

(1) "Board" means the Board of Corrections.

(2) "Convicted person" includes a person found not guilty by reason of insanity.

History. — Ga. L. 1979, p. 1262, § 1; Ga. L. 1985, p. 283, § 1.

Editor's notes. — Ga. L. 1979, p. 1262, § 2, not codified by the General Assembly, provides that this article in no way affects contracts in existence before April 17, 1979.

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 24 et seq.

C.J.S. — 25 C.J.S. (Rev), Damages, § 1 et seq.

ALR. — Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210.

17-14-31. Contract regarding reenactment of crime; deposit of consideration in escrow; claim notification; notice of availability of escrow moneys; disposition of escrow moneys; actions taken to defeat purpose.

(a)(1) Every person, firm, corporation, partnership, association, or other legal entity contracting with any person or with the representative or assignee of any person who has been accused or convicted of a crime in this state with respect to the reenactment of the crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind or with respect to the expression of the accused or convicted person's thoughts, feelings, opinions, or emotions regarding the crime shall submit a copy of the contract to the board and shall pay over to the board any moneys which would otherwise, by the terms of the contract, be owing to the accused or convicted person or to his representatives.

(2) The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by the accused or convicted person.

(3) Payments may be made pursuant to paragraph (2) of this subsection only if the accused person is eventually convicted or enters a plea of guilty of the crime and if the victim, within five years of the date of the establishment of the escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against the convicted or accused person or his representatives.

(4) It shall be the duty of the victim, the victim's attorney, or the victim's representative to notify the board within 30 days of the filing of any claim under this article.

(b) At least once every six months for five years from the date it receives such moneys, the board shall cause to have published a legal notice in newspapers of general circulation in the county in which the crime was committed and in counties contiguous to such county, advising victims of the crime that escrow moneys are available to satisfy money judgments pursuant to this Code section.

(c) Upon dismissal of charges or acquittal of any accused person, the board shall immediately pay over to the accused person the moneys in the escrow account established on behalf of the accused person.

(d) Upon a showing by any convicted person that five years have elapsed from the establishment of the escrow account and that no actions are pending against the convicted person pursuant to this Code section, the board shall immediately pay over any moneys in the escrow account to the person or his legal representatives.

(e) Whenever it is found that a person accused of a crime is unfit to proceed to trial as a result of insanity because the person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader to determine the disposition of the escrow account.

(f) Any excess which remains in the escrow account or is deposited into the account after all money judgments have been satisfied shall be paid over into the state treasury as compensation for the establishment, administration, and execution of this article.

(g) The board shall make payments from the escrow account to any person accused or convicted of crime, upon the order of a court of competent jurisdiction, after a showing by the person that the moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the proceedings against the person, including the appeals process.

(h) The board shall disburse payments from the escrow account on a pro rata basis of all claims filed, according to the amount of money in the escrow account as compared to the amount of each claim. The sums are not to be disbursed until all pending claims have been settled or reduced to judgment.

(i) Any action taken by a person who is accused or convicted of a crime or who enters a plea of guilty, whether by way of execution of a power of attorney, creation of corporate entities, or otherwise, to defeat the purpose of this Code section shall be null and void as against the public policy of this state.

History. — Ga. L. 1979, p. 1262, § 1.

Editor's notes. — Ga. L. 1979, p. 1262, § 2, not codified by the General Assembly, provides that this article in no way affects contracts in existence before April 17, 1979.

JUDICIAL DECISIONS

Rights of those who kill by accident or negligence not impaired. — Statutes that embody the public policy of Georgia of prohibiting wrongdoers from profiting from their crimes, O.C.G.A. §§ 17-14-31, 33-25-13, and 53-1-5, only prevent those who feloniously and intentionally kill, O.C.G.A. § 53-1-5(a), or those who commit murder or voluntary manslaughter, O.C.G.A. § 33-25-13, from sharing, respectively, in the decedent's estate or insurance policy proceeds; if a public policy may be gleaned from these statutes, it is a policy that prohibits those who commit murder or voluntary manslaughter from profiting from the victim's death, but these statutes do not impair the rights of those who kill by accident or negligence, who kill in self-defense or pursuant to any other legal justification, or who kill while legally insane because simply admitting to having committed a homicide does not make one a wrongdoer under Georgia law. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 851 et seq. 22 Am. Jur. 2d, Damages, § 24 et seq.

C.J.S. — 25 C.J.S. (Rev), Damages, § 1 et seq.

17-14-32. Penalties for violations of article.

(a) It shall be unlawful for any person, firm, corporation, partnership, association, or other legal entity to fail to comply with this article.

(b) Any person, firm, corporation, partnership, association, or other legal entity violating this article shall be guilty of a misdemeanor.

(c) Each day that a person, firm, corporation, partnership, association, or other legal entity continues in violation of this article shall constitute a separate offense.

History. — Ga. L. 1979, p. 1262, § 1.

Editor's notes. — Ga. L. 1979, p. 1262, § 2, not codified by the General Assembly, provides that this article in no way affects

contracts in existence before April 17, 1979.

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 851 et seq. 22 Am. Jur. 2d, Damages, § 24 et seq.

C.J.S. — 25 C.J.S. (Rev), Damages, § 1 et seq.

CHAPTER 15

VICTIM COMPENSATION

Sec.
17-15-1. Legislative intent.
17-15-2. Definitions.
17-15-3. Georgia Crime Victims Compensation Board; members; director of Criminal Justice Coordinating Council.
17-15-4. Powers of board.
17-15-5. Filing of claims; verification; contents.
17-15-6. Investigation; decision by director; review by board; report to claimant.
17-15-7. Persons eligible for awards.
17-15-8. Required findings; amount of award; rejection of claim; reductions; exemptions; effective date for awards; psychological counseling for relatives of deceased; memorials for victims of DUI homicide.
17-15-9. Georgia Crime Victims Emergency Fund created; administration; moneys; payments authorized.
17-15-10. Insufficient funds to pay authorized award.
17-15-11. False claims.
17-15-12. Effect of accepting award.
17-15-13. Debt to state created; payment as condition of probation or parole; payment into fund.
17-15-14. Funding to victim service providers for disseminating information.
17-15-15. Responsibility for cost of forensic medical examination.
17-15-16. Funding for costs of forensic interviews for persons less than 18 years of age or developmentally disabled.

Cross references. — Referral to victim assistance organizations of child suspected of being a victim of sexual exploitation or trafficking, § 15-11-130.1. Compensation of victims of violation of § 40-6-391, § 15-21-110 et seq. State Victim Services Commission, T. 35, C. 6.

Law reviews. — For article, "Disrupting Victim Exploitation," see 69 Mercer L. Rev. 805 (2018).

For note on the 1994 amendments of Code Sections 17-15-2 to 17-15-4, 17-15-6 to 17-15-8 and enactment of Code Section 17-15-14 of this chapter, see 11 Ga. St. U.L. Rev. 166 (1994).

RESEARCH REFERENCES

ALR. — Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

17-15-1. Legislative intent.

The General Assembly recognizes that many innocent persons suffer personal physical injury, serious mental or emotional trauma, severe financial hardship, or death as a result of criminal acts or attempted criminal acts. The General Assembly finds and determines that there is a need for assistance for such victims of crimes. Accordingly, it is the General Assembly's intent that under certain circumstances, aid, care, and assistance be provided by the state for such victims of crimes.

History. — Code 1981, § 17-15-1, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2009, p. 195, § 1/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.

17-15-2. Definitions.

As used in this chapter, the term:

(1) "Board" means the Criminal Justice Coordinating Council.

(2) "Claimant" means any person filing a claim pursuant to this chapter.

(3) "Crime" means:

(A) An act which is committed in this state; in a state which does not have a victims' compensation program, if the claimant is a resident of this state; or in a state which has compensated the claimant in an amount less than the claimant would be entitled to pursuant to this chapter, if the claimant is a resident of this state, and which constitutes:

(i) Hit and run in violation of Code Section 40-6-270;

(ii) Homicide by vehicle in violation of Code Section 40-6-393;

(iii) Serious injury by vehicle in violation of Code Section 40-6-394;

(iv) A violation of Code Section 16-5-46;

(v) A violation of Chapter 6 of Title 16;

(vi) A violation of Part 2 of Article 3 of Chapter 12 of Title 16;

(vii) A violation of Code Section 16-5-70;

(viii) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ix) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(x) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense;

(B) An act which constitutes international terrorism as defined in 18 U.S.C. Section 2331 against a resident of this state when such resident was outside the territorial boundaries of the United States when such act was committed; or

(C) An act of mass violence involving a resident of this state when such resident was outside the territorial boundaries of the United States when such act was committed.

(4) "Direct service provider" means a public or nonprofit entity which provides aid, care, and assistance.

(5) "Director" means the director of the Criminal Justice Coordinating Council.

(6) "Forensic medical examination" means an examination provided to a person pursuant to subsection (c) of Code Section 16-6-1 or subsection (c) of Code Section 16-6-2 by trained medical personnel in order to gather evidence. Such examination shall include, but shall not be limited to:

(A) An examination for physical trauma;

(B) A determination as to the nature and extent of the physical trauma;

(C) A patient interview;

(D) Collection and evaluation of the evidence collected; and

(E) Any additional testing deemed necessary by the examiner in order to collect evidence and provide treatment.

(7) "Fund" means the Georgia Crime Victims Emergency Fund.

(8) "Investigator" means an investigator of the board.

(9) "Serious mental or emotional trauma" means a nonphysical injury which has been documented by a licensed mental health professional and which meets the specifications promulgated by the board's rules and regulations relating to this type of trauma.

History. — Code 1981, § 17-15-2, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 1; Ga. L. 1997, p. 481, § 1; Ga. L. 2002, p. 843, § 2; Ga. L. 2009, p. 195, § 2/SB 172; Ga. L. 2011, p. 214, § 4/HB 503; Ga. L. 2011, p. 217, § 4/HB 200; Ga. L. 2012, p. 775, § 17/HB 942; Ga. L. 2014, p. 354, § 1/SB 187.

Editor's notes. — Ga. L. 2002, p. 843, § 1, not codified by the General Assembly, provides: "The General Assembly declares that this Act is enacted pursuant to the provisions of Article III, Section VI, Paragraph VI(f) of the Constitution of the State of Georgia."

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 110 (1997). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 124 (2002).

17-15-3. Georgia Crime Victims Compensation Board; members; director of Criminal Justice Coordinating Council.

(a) There is created the Georgia Crime Victims Compensation Board. The Criminal Justice Coordinating Council created under Chapter 6A

of Title 35 shall serve as the Georgia Crime Victims Compensation Board.

(b) The Governor shall appoint the director of the Criminal Justice Coordinating Council to carry out the provisions of this chapter.

History. — Code 1981, § 17-15-3, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 1; Ga. L. 1994, p. 1800, § 2; Ga. L. 2014, p. 354, § 1/SB 187.

17-15-4. Powers of board.

(a) The board shall have the following powers and duties:

(1) To promulgate suitable rules and regulations to carry out the provisions and purposes of this chapter;

(2) To request from the Attorney General, the Department of Public Safety, the Georgia Bureau of Investigation, district attorneys, solicitors-general, judges, county and municipal law enforcement agencies, and any other agency or department such assistance and data as will enable the board to determine the needs state wide for victim compensation and whether, and the extent to which, a claimant qualifies for an award. Any person, agency, or department listed in this paragraph is authorized to provide the board with the information requested upon receipt of a request from the board. Any provision of law providing for confidentiality of records shall not apply to a request of the board pursuant to this Code section; provided, however, that the board shall preserve the confidentiality of any such records received;

(3) To hear and determine all appeals of denied claims for awards filed with the board pursuant to this chapter and to reinvestigate or reopen cases as the board deems necessary, including circumstances when it appears a claim may be time barred;

(4) To apply for funds from, and to submit all necessary forms to, any federal agency participating in a cooperative program to compensate victims of crimes and to receive and administer federal funds for the purposes of this chapter;

(5) To render awards to victims of crimes or to those other persons entitled to receive awards in the manner authorized by this chapter. Victim compensation payments may be made directly to direct service providers who are not the recipients of local, state, federal, or private grant funds awarded for purposes of providing direct services to victims of crimes. A victim or claimant may be paid directly in the case of lost wages, loss of support, and instances where the victim or claimant has paid the direct service provider and is filing for reimbursement. In all cases where the victim has incurred

out-of-pocket expenses, such as lost wages or loss of support, or in cases where the victim or claimant has paid the direct service provider directly and is filing for reimbursement, the victim or claimant shall be paid first before any third party;

(6) To carry out programs designed to inform the public of the purposes of this chapter; and

(7) To render each year to the Governor and to the General Assembly a written report of its activities pursuant to this chapter.

(b) The board shall assist applicants with their claims for compensation through educational programs and administrative assistance.

History. — Code 1981, § 17-15-4, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1992, p. 2426, § 2; Ga. L. 1994, p. 1800, § 3; Ga. L. 1996, p. 748, § 16; Ga. L. 2014, p. 354, § 1/SB 187.

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30(b), not codified by the General Assembly, provides: "The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

17-15-5. Filing of claims; verification; contents.

(a) A claim may be filed by a person eligible to receive an award, as provided in Code Section 17-15-7, or, if such person is a minor, by his or her parent or guardian. In any case in which the person entitled to make a claim is mentally incompetent, the claim may be filed on his or her behalf by his or her guardian. In any case in which the person entitled to make a claim is deceased, the claim may be filed on his or her behalf by an individual authorized to administer his or her estate.

(b)(1) A claim shall be filed by a victim not later than three years after the occurrence of the crime upon which such claim is based or

not later than three years after the death of the victim; provided, however, that if such victim was a minor at the time of the commission of the crime, he or she shall have until three years after his or her eighteenth birthday to file such claim; and provided, further, that upon good cause shown, the board may extend the time for filing a claim.

(2) Claims shall be filed in the office of the board in person or by mail.

(c) The claim shall be verified and shall contain the following:

(1) A description of the date, nature, and circumstances of the crime;

(2) A complete financial statement, including, but not limited to, the cost of medical care or burial expense, the loss of wages or support the claimant has incurred or will incur, any other emergency expenses incurred by the claimant, and the extent to which the claimant has been or may be indemnified for these expenses from any source;

(3) When appropriate, a statement indicating the extent of a victim's disability resulting from the injury or serious mental or emotional trauma incurred;

(4) An authorization permitting the board to verify the contents of the application; and

(5) Such other information as the board may require.

History. — Code 1981, § 17-15-5, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1997, p. 481, § 2; Ga. L. 2005, p. 88, § 6/HB 172; Ga. L. 2009, p. 195, § 3/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.

Editor's notes. — Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 110 (1997).

17-15-6. Investigation; decision by director; review by board; report to claimant.

(a) A claim, once accepted for filing and completed, shall be assigned to an investigator. The investigator shall examine the papers filed in support of the claim and cause an investigation to be conducted into the validity of the claim. The investigation shall include, but shall not be limited to, an examination of law enforcement, court, and official records and reports concerning the crime and an examination of medical, psychiatric, counseling, financial, and hospital reports relating to the injury, serious mental or emotional trauma, or loss upon which the claim is based. All claims arising from the death of an individual as

a direct result of a crime shall be considered together by a single investigator.

(b) Claims shall be investigated and determined regardless of whether a perpetrator has been apprehended, prosecuted, or convicted of any crime based upon the same incident or whether the alleged perpetrator has been acquitted or found not guilty of the crime in question.

(c) The investigator conducting the investigation shall file with the director a written report setting forth a recommendation and the investigator's reason therefor. The director shall render a decision and furnish the claimant with a copy of the report if so requested. In cases where an investigative report is provided, information deemed confidential in nature shall be excluded.

(d) The claimant may, within 30 days after receipt of the report of the decision of the director, make an application in writing to the director for review of the decision.

(e) Upon receipt of an application for review pursuant to subsection (d) of this Code section, the director shall forward all relevant documents and information to the board. The board shall review the records and shall affirm or modify the decision of the director. If considered necessary by the board or if requested by the claimant, the board shall order a hearing prior to rendering a decision. At the hearing, any relevant evidence not legally privileged shall be admissible. The board shall render a decision within 90 days after completion of the investigation. If the director receives no application for review pursuant to subsection (d) of this Code section, the director's decision shall become final.

(f) The board, for purposes of this chapter, may subpoena witnesses, administer or cause to be administered oaths, and examine such parts of the books and records of the parties to proceedings as relate to questions in dispute.

(g) The director shall, within ten days after receipt of the board's final decision, make a report to the claimant, including a copy of the final decision and the reasons why the decision was made.

History. — Code 1981, § 17-15-6, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 4; Ga. L. 2009, p. 195, § 4/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.

17-15-7. Persons eligible for awards.

(a) Except as otherwise provided in this Code section, the following persons shall be eligible for awards pursuant to this chapter:

(1) A person who:

(A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;

(C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime;

(D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor servitude or sexual servitude as defined in Code Section 16-5-46; or

(E) Is a dependent spouse, parent, step-parent, child, or step-child of a person who is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(2) For purposes of an award under subsection (k) of Code Section 17-15-8, any member of the immediate family of a victim of homicide by vehicle caused by a violation of Code Section 40-6-391;

(3) Any person who goes to the aid of another and suffers physical injury, serious mental or emotional trauma, or death as a direct result of acting, not recklessly, to prevent the commission of a crime, to apprehend lawfully a person reasonably suspected of having committed a crime, or to aid the victim of a crime or any person who is injured, traumatized, or killed while aiding or attempting to aid a law enforcement officer in the prevention of a crime or apprehension of a criminal at the officer's request;

(4) Any person who is a victim of family violence as defined by Code Section 19-13-1 and anyone who is a victim as a result of a violation of Code Section 40-6-391; or

(5) Any person who is not a direct service provider and who assumes the cost of an eligible expense of a victim regardless of such person's relationship to the victim or whether such person is a dependent of the victim.

(b)(1) Victims may be legal residents or nonresidents of this state. A surviving spouse, parent, step-parent, child, or step-child who is legally dependent for his or her principal support upon a deceased victim shall be entitled to file a claim under this chapter if the deceased victim would have been so entitled, regardless of the residence or nationality of the surviving spouse, parent, step-parent, child, or step-child.

(2) Victims of crimes occurring within this state who are subject to federal jurisdiction shall be compensated on the same basis as resident victims of crimes.

(c) No award of any kind shall be made under this chapter to a victim injured while confined in any federal, state, county, or municipal jail, prison, or other correctional facility.

(d) No award of any kind shall be made under this chapter to a victim of a crime which occurred prior to July 1, 1989.

(e) A person who is criminally responsible for the crime upon which a claim is based or is an accomplice of such person shall not be eligible to receive an award with respect to such claim; provided, however, that such ineligibility shall not apply if the person is as defined in subparagraph (a)(1)(D) of this Code section.

(f) There shall be no denial of compensation to a claimant based on that victim's or claimant's familial relationship with the person who is criminally responsible for the crime.

(g) No award of any kind shall be made under this chapter to a victim of a crime for loss of property.

(h) A victim or claimant who has been convicted of a felony involving criminally injurious conduct and who is currently serving a sentence therefor shall not be considered eligible to receive an award under this chapter. For purposes of this subsection, "criminally injurious conduct" means a crime which occurs or is attempted in this state that results in physical injury, serious mental or emotional trauma, or death to a victim, which act is punishable by fine, imprisonment, or death. Such term shall not include acts arising out of the operation of motor vehicles, boats, or aircraft unless the acts were committed with the intent to inflict injury, trauma, or death or unless the acts committed were in violation of Code Section 40-6-391. For the purposes of this subsection, a person shall be deemed to have committed criminally injurious conduct notwithstanding that by reason of age, insanity, drunkenness, or other reason, he or she was legally incapable of committing a crime.

History. — Code 1981, § 17-15-7, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 3; Ga. L. 1994, p. 1800, § 5; Ga. L. 1997, p. 481, § 3; Ga. L. 2004, p. 709, § 3; Ga. L. 2009, p. 195, § 5/SB 172; Ga. L. 2011, p. 217, § 5/HB 200; Ga. L. 2014, p. 354, § 1/SB 187; Ga. L. 2015, p. 1029, § 1/SB 79.

Editor's notes. — Ga. L. 2004, p. 709, § 1, not codified by the General Assembly, provides that: "The General Assembly declares that this Act is enacted pursuant to the provisions of Article III, Section VI, Paragraph VI(f) of the Constitution."

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 110 (1997). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

17-15-8. Required findings; amount of award; rejection of claim; reductions; exemptions; effective date for awards; psychological counseling for relatives of deceased; memorials for victims of DUI homicide.

(a) No award may be made unless the board or director finds that:

(1) A crime was committed;

(2) The crime directly resulted in the victim's physical injury, serious mental or emotional trauma, or financial hardship as a result of the victim's physical injury, serious mental or emotional trauma, or the victim's death;

(3) Police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that the crime was promptly reported to the proper authorities. In no case may an award be made where the police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that such report was made more than 72 hours after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified and provided, further, that good cause shall be presumed if the person is eligible for awards pursuant to this chapter corresponding to subparagraph (a)(1)(D) of Code Section 17-15-7; and

(4) The applicant has pursued restitution rights against any person who committed the crime unless the board or director determines that such action would not be feasible.

(a.1) The board, upon finding that any claimant or award recipient has not fully cooperated with all law enforcement agencies, may deny, reduce, or withdraw any award.

(b) Any award made pursuant to this chapter shall be in an amount not exceeding actual expenses, including indebtedness reasonably incurred for medical expenses, loss of wages, funeral expenses, mental health counseling, or support for dependents of a deceased victim necessary as a direct result of the injury or hardship upon which the claim is based.

(c)(1) Notwithstanding any other provisions of this chapter, no award made under the provisions of this chapter shall exceed $1,000.00 in the aggregate; provided, however, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 1994, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $5,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board as a result of a crime

occurring on or after July 1, 1995, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $10,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 2002, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $25,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board for serious mental or emotional trauma, no award shall be made for a crime occurring before July 1, 2009.

(2) No award under this chapter for the following losses shall exceed the maximum amount authorized:

Category	Maximum Award
Lost wages	$ 10,000.00
Funeral expenses	6,000.00
Financial hardship or loss of support	10,000.00
Medical	15,000.00
Counseling	3,000.00
Crime scene sanitization	1,500.00

(d) In determining the amount of an award, the director and board shall determine whether because of his or her conduct the victim contributed to the infliction of his or her injury, serious mental or emotional trauma, or financial hardship, and the director and board may reduce the amount of the award or reject the claim altogether in accordance with such determination.

(e) The director and board may reject an application for an award when the claimant has failed to cooperate in the verification of the information contained in the application.

(f) Any award made pursuant to this chapter may be reduced by or set off by the amount of any payments received or to be received as a result of the injury, serious mental or emotional trauma:

(1) From or on behalf of the person who committed the crime; and

(2) From any other private or public source, including an award of workers' compensation pursuant to the laws of this state,

provided that private sources shall not include contributions received from family members or persons or private organizations making charitable donations to a claimant.

(g) No award made pursuant to this chapter shall be subject to garnishment, execution, or attachment other than for expenses resulting from the injury or serious mental or emotional trauma which is the basis for the claim.

(h) An award made pursuant to this chapter shall not constitute a payment which is treated as ordinary income under either the provisions of Chapter 7 of Title 48 or, to the extent lawful, under the United States Internal Revenue Code.

(i) Notwithstanding any other provisions of this chapter to the contrary, no awards from state funds shall be paid to a claimant for a crime which occurred prior to July 1, 1989.

(j) In any case where a crime results in death, the spouse, parents, step-parents, children, step-children, siblings, or step-siblings of such deceased victim may be considered eligible for an award for the cost of psychological counseling which is deemed necessary as a direct result of said criminal incident. The maximum award for said counseling expenses shall not exceed $3,000.00 for each claimant identified in this subsection.

(k)(1) In addition to any other award authorized by this Code section, in any case where a deceased was a victim of homicide by vehicle caused by a violation of Code Section 40-6-391 on any road which is part of the state highway system, upon request of the next of kin of the deceased, an award of compensation in the form of a memorial sign erected by the Department of Transportation as provided by this subsection shall be paid to an eligible claimant.

(2) The provisions of paragraph (4) of subsection (a) of this Code section shall not apply for purposes of eligibility for awards made under this subsection, and the value of any award paid to a claimant under this subsection shall not apply toward or be subject to any limitation on award amounts paid to any claimant under other provisions of this Code section.

(3) The Department of Transportation, upon receiving payment for the cost of materials and labor from the board, shall upon request of the next of kin of the deceased erect a sign memorializing the deceased on the right of way of such public highway at the location of the accident or as near thereto as safely and reasonably possible and shall maintain such sign for a period of five years from the date the sign is erected unless its earlier removal is requested in writing by the next of kin. Such sign shall be 24 inches wide by 36 inches high and depict a map of the State of Georgia, with a dark blue background and a black outline of the state boundaries. A border of white stars shall be placed on the inside of the state boundaries, and the sign shall contain the words "In Memory of (name), DUI Victim (date of accident)."

(4) In the event of multiple such claims arising out of a single motor vehicle accident, the names of all deceased victims for whom such claims are made and for whom a request has been made by the next of kin of the deceased may be placed on one such sign or, if necessary, on one such sign and a plaque beneath of the same color as the sign. In the event of multiple claims relating to the same deceased victim, no more than one such sign shall be paid for and erected for such victim.

History. — Code 1981, § 17-15-8, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, §§ 4, 5; Ga. L. 1994, p. 1800, § 6; Ga. L. 1995, p. 385, § 1; Ga. L. 1997, p. 481, § 4; Ga. L. 2002, p. 843, § 3; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, p. 709, § 4; Ga. L. 2009, p. 195, § 6/SB 172; Ga. L. 2011, p. 217, § 6/HB 200; Ga. L. 2014, p. 354, § 1/SB 187; Ga. L. 2014, p. 354, § 17/SB 340; Ga. L. 2015, p. 1029, § 2/SB 79.

Editor's notes. — Ga. L. 2002, p. 843, § 1, not codified by the General Assembly, provides: "The General Assembly declares that this Act is enacted pursuant to the provisions of Article III, Section VI, Paragraph VI(f) of the Constitution of the State of Georgia."

Ga. L. 2004, p. 709, § 1, not codified by the General Assembly, provides that: "The General Assembly declares that this Act is enacted pursuant to the provisions of Article III, Section VI, Paragraph VI(f) of the Constitution."

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 110 (1997). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 158 (1995). For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 124 (2002).

17-15-9. Georgia Crime Victims Emergency Fund created; administration; moneys; payments authorized.

(a) There is created a fund to be known as the Georgia Crime Victims Emergency Fund. The custodian of the fund shall be the board. The director shall administer the fund and may invest the resources of the fund in the same manner and fashion that an insurer authorized to issue contracts of life insurance is authorized to invest its resources. The board shall be specifically authorized to contract with any person or organization, public or private, to administer the fund, assume the powers of the director, and carry out the duties of the board relating to the fund.

(b)(1) The fund shall consist of all moneys received pursuant to Article 7 of Chapter 21 of Title 15 from the assessment of additional penalties in cases involving a violation of Code Section 40-6-391 or a violation of an ordinance of a political subdivision of this state which has adopted by reference Code Section 40-6-391 pursuant to Article 14 of Chapter 6 of Title 40.

(2) The funds placed in the fund shall also consist of all moneys appropriated by the General Assembly, if any, for the purpose of

compensating claimants under this chapter and money recovered on behalf of the state pursuant to this chapter by subrogation or other action, recovered by court order, received from the federal government, received from additional court costs, received from specific tax proceeds allocated to the fund, received from other assessments or fines, or received from any other public or private source pursuant to this chapter.

(c) All funds appropriated to or otherwise paid into the fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(d) The board shall be authorized, subject to the limitations contained in this chapter, to pay the appropriate compensation to the persons eligible for compensation under this chapter from the proceeds of the fund.

(e) After determining that an award should be paid and the method of payment, the board or director, within five days, shall be authorized to draw a warrant or warrants upon the fund to pay the amount of the award from such fund.

History. — Code 1981, § 17-15-10, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 1836, § 2; Ga. L. 1993, p. 91, § 17; Code 1981, § 17-15-9, as redesignated by Ga. L. 2014, p. 354, § 1/SB 187.

Editor's notes. — This Code section formerly pertained to payment where insufficient funds in Georgia Crime Victims Emergency Fund. The former Code section was based on Code 1981, § 17-15-9, enacted by Ga. L. 1988, p. 591, § 1, and was repealed by Ga. L. 2014, p. 354, § 1/SB 187, effective July 1, 2014.

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 298 (1992).

17-15-10. Insufficient funds to pay authorized award.

Notwithstanding any other provision of this chapter to the contrary, where an award under this chapter has been authorized but there are not sufficient funds in the fund to pay or continue paying the award, then the award or the remaining portion thereof shall not be paid unless and until sufficient funds become available from the fund, and at such time, awards which have not been paid shall begin to be paid in chronological order with the oldest award being paid first. In the event an award was to be paid in installments and some remaining installments have not been paid due to a lack of funds, then when funds due become available, that award shall be paid in full when its appropriate time for payment comes on the chronological list before any other postdated award shall be paid. Any award under this chapter is specifically not a claim against the state if it cannot be paid due to a lack of funds in the fund.

History. — Code 1981, § 17-15-10, enacted by Ga. L. 2014, p. 354, § 1/SB 187.

Editor's notes. — Ga. L. 2014, p. 354, § 1/SB 187, effective July 1, 2014, redesignated former Code Section 17-15-10 as present Code Section 17-15-9. Former Code Section 17-15-10 pertained to the creation of the Georgia Crime Victims Emergency Fund, administration, moneys, and payments authorized.

17-15-11. False claims.

Any person who asserts a false claim under the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as for a misdemeanor and shall further forfeit any benefit received and shall reimburse and repay the state for payments received or paid on his or her behalf pursuant to any of the provisions of this chapter.

History. — Code 1981, § 17-15-11, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2014, p. 354, § 1/SB 187.

RESEARCH REFERENCES

ALR. — When does statute of limitations begin to run in action under False Claims Act (31 USCS §§ 3729-3733), 139 A.L.R. Fed 645.

17-15-12. Effect of accepting award.

(a) Acceptance of an award made pursuant to this chapter shall subrogate the state, to the extent of such award, to any right or right of action occurring to the claimant to recover payments on account of losses resulting from the crime with respect to which the award is made. The board may waive subrogation when the claimant presents documentation and the board verifies that judgment, settlement, or other sources have not fully reimbursed the claimant for expenses compensable under this chapter.

(b) Acceptance of an award made pursuant to this chapter based on damages from a crime shall constitute an agreement on the part of the recipient reasonably to pursue any and all civil remedies arising from any right of action against the person or persons responsible for or committing the crime.

History. — Code 1981, § 17-15-12, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2008, p. 486, § 4/HB 1297; Ga. L. 2014, p. 354, § 1/SB 187.

17-15-13. Debt to state created; payment as condition of probation or parole; payment into fund.

(a) Any award or payment of benefits under this chapter shall create a debt due and owing to the state by any person found in a court of

competent jurisdiction of this state to have committed an act resulting in compensation being paid pursuant to this chapter.

(b) A court, when placing on probation any person who owes a debt to the state as a consequence of a crime, may set as a condition of probation the payment of the debt or a portion of the debt to the state. The court may also set the schedule or amounts of payments subject to modification based on change of circumstances.

(c) The State Board of Pardons and Paroles shall also have the right to make payment of the debt or a portion of the debt to the state a condition of parole.

(d) When a child is adjudicated for committing a delinquent act in a juvenile court proceeding involving a crime upon which a claim under this chapter can be made, the juvenile court in its discretion may order that the child pay the debt to the state as an adult would have to pay had an adult committed the crime. Any assessments so ordered may be made a condition of probation as provided in Code Section 15-11-601.

(e) Payments authorized or required under this Code section shall be paid into the fund. The board shall coordinate the development of policies and procedures for the State Board of Pardons and Paroles, the Department of Community Supervision, and the Administrative Office of the Courts to assure that restitution programs are administered in an effective manner to increase payments into the fund.

(f) In every case where an individual is serving under active probation supervision and paying a supervision fee, $9.00 per month shall be added to any supervision fee collected by any entity authorized to collect such fees and shall be paid into the fund. This subsection shall apply to probationers supervised by community supervision officers or private probation officers or probation officers pursuant to Article 6 of Chapter 8 of Title 42. The probation supervising entity shall collect and forward the $9.00 fee to the board by the end of each month.

History. — Code 1981, § 17-15-13, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1998, p. 840, § 1; Ga. L. 2000, p. 20, § 9; Ga. L. 2002, p. 843, § 4; Ga. L. 2013, p. 294, § 4-20/HB 242; Ga. L. 2014, p. 354, § 1/SB 187; Ga. L. 2015, p. 422, § 5-39/HB 310; Ga. L. 2016, p. 864, § 17/HB 737.

Editor's notes. — Ga. L. 2002, p. 843, § 1, not codified by the General Assembly, provides: "The General Assembly declares that this Act is enacted pursuant to the provisions of Article III, Section VI, Paragraph VI(f) of the Constitution of the State of Georgia."

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecu-

tions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 124 (2002).

JUDICIAL DECISIONS

Restitution award not supported by evidence. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the state's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-15-14. Funding to victim service providers for disseminating information.

The board shall be authorized to designate and expend not more than 10 percent of the moneys collected and paid into the fund pursuant to paragraph (1) of subsection (b) of Code Section 17-15-9 and Code Section 17-15-13 to provide funding to victim service providers for the purpose of disseminating materials regarding the availability of the compensation program provided in this chapter and public information purposes regarding the compensation program provided in this chapter.

History. — Code 1981, § 17-15-14, enacted by Ga. L. 1994, p. 1800, § 7; Ga. L. 2014, p. 354, § 1/SB 187.

17-15-15. Responsibility for cost of forensic medical examination.

When a forensic medical examination is conducted, the cost of such forensic medical examination shall be paid for by the fund in an amount not to exceed $1,000.00. The fund shall be responsible for payment of such cost notwithstanding whether the person receiving such forensic medical examination has health insurance or any other source of health care coverage.

History. — Code 1981, § 17-15-15, enacted by Ga. L. 2011, p. 214, § 5/HB 503; Ga. L. 2014, p. 354, § 1/SB 187.

17-15-16. Funding for costs of forensic interviews for persons less than 18 years of age or developmentally disabled.

(a) When a forensic interview is conducted and when funding is available, the cost of such interview for a person who is less than 18 years of age or developmentally disabled may be paid for by the fund in an amount to be determined by the board.

(b) The board shall develop standards, protocols, and guidelines related to reimbursement of forensic interview providers.

(c) The board shall establish an annual limit of:

(1) The amount that may be paid from the fund;

(2) The amount that may be reimbursed for each interview; and

(3) The limit on the number of interviews that will be reimbursable from the fund.

(d) Funding may be used only when:

(1) The results of the forensic interview will be for identification of the interviewee's needs, including social services, personal advocacy, case management, substance abuse treatment, and mental health services;

(2) The forensic interviews are conducted in the context of a multidisciplinary investigation and diagnostic team, or in a specialized setting such as a child advocacy center; and

(3) The interviewer is trained to conduct forensic interviews appropriate to the developmental age and abilities of children, or the developmental, cognitive, and physical or communication disabilities presented by adults.

History. — Code 1981, § 17-15-16, enacted by Ga. L. 2014, p. 354, § 1/SB 187.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2016, a semicolon was substituted for a colon at the end of subparagraph (c)(1).

CHAPTER 15A

COMPENSATION FOR CRIMINALLY INFLICTED PROPERTY DAMAGE

Sec.
17-15A-1. Legislative authority.
17-15A-2. "Graffiti" defined.
17-15A-3. Legislative findings.
17-15A-4. Removal of graffiti by inmates; no waiver of sovereign immunity; no fees to property owners.

Cross references. — Street gang terrorism and prevention, T. 16, C. 15.

RESEARCH REFERENCES

Am. Jur. Trials. — 14 Am. Jur. Trials, Juvenile Court Proceedings, § 76.
Am. Jur. 2d. — 66 Am. Jur. 2d., Restitution and Implied Contracts, § 1 et seq.
C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2472 et seq.

17-15A-1. Legislative authority.

The provisions of this chapter are enacted pursuant Article III, Section VI, Paragraph VI(f) of the Constitution and are in addition to those provisions for compensation of innocent victims of other crimes under Chapter 15 of this title.

History. — Code 1981, § 17-15A-1, enacted by Ga. L. 2003, p. 252, § 1.

17-15A-2. "Graffiti" defined.

As used in this chapter, the term "graffiti" means any inscriptions, words, figures, paintings, or other defacements that are written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed to any surface of real property or improvements thereon without prior authorization of the owner or occupant of the property by means of any aerosol paint container, broad-tipped marker, gum label, paint stick, graffiti stick, etching equipment, brush, or other device capable of scarring or leaving a visible mark on any surface.

History. — Code 1981, § 17-15A-2, enacted by Ga. L. 2003, p. 252, § 1.
Law reviews. — For article, "Practice Point: You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case Against a Major International Retailer," see 20 J. Intell. Prop. L. 75 (2012).

17-15A-3. Legislative findings.

The General Assembly finds and declares that:

(1) Criminal street gang activity is a serious and continuing public safety concern;

(2) Criminal trespass and criminal damage to property in the second degree caused by graffiti being placed unlawfully upon private property are crimes frequently associated with criminal street gang activity; and

(3) It is in the public interest, not only in the pursuit of justice but also as a means of combating such criminal street gang activity and of contributing to the general public welfare by improving the esthetics of public views, to compensate as provided in this chapter those private property owners who are the innocent victims of such criminal trespass or criminal damage to property in the second degree by using inmate labor to remove or obliterate graffiti unlawfully placed on private properties when such graffiti is visible from public roads or other public property.

History. — Code 1981, § 17-15A-3, enacted by Ga. L. 2003, p. 252, § 1.

17-15A-4. Removal of graffiti by inmates; no waiver of sovereign immunity; no fees to property owners.

(a) In order to provide a form of compensation by the state to innocent victims of criminal trespass in violation of Code Section 16-7-21 or criminal damage to property in the second degree in violation of Code Section 16-7-23, either of which crime involved the unlawful placement of graffiti upon private property by a person who was not the owner of such property, the Board of Corrections or any political subdivision of this state may authorize the use of labor by inmates from any penal institution or jail under its authority to remove or obliterate such unlawfully placed graffiti when such graffiti is visible from any public road or other public property. Any such authorization and related supervision of inmates shall be a discretionary function within the meaning of paragraph (2) of Code Section 50-21-24 for purposes of sovereign immunity, and the sovereign immunity of neither the state nor any political subdivision thereof is waived for any loss arising out of such authorization or related supervision of inmates. The Board of Corrections shall provide rules and regulations governing such use of labor by inmates from institutions under its jurisdiction.

(b) No graffiti removal program operated by any political subdivision of this state shall charge any fee to any property owner or operator for removal of graffiti from such property.

History. — Code 1981, § 17-15A-4, enacted by Ga. L. 2003, p. 252, § 1.

Cross references. — Use of inmate for private gain, § 42-1-5.

Administrative rules and regulations. — Graffiti removal program, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Institutional and Center Operations, Work Standards, Rule 125-3-5-.09.

CHAPTER 16

DISCOVERY

Article 1

Definitions; Felony Cases

Sec.
17-16-1. Definitions.
17-16-2. Applicability of article.
17-16-3. Copy of indictment or accusation and list of witnesses furnished.
17-16-4. Disclosure required by prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.
17-16-5. Alibi witnesses.
17-16-6. Failure to comply with discovery requirements.
17-16-7. Statements of witnesses.
17-16-8. Lists of names and information concerning witnesses.
17-16-9. Reimbursement for costs.
17-16-10. Material or information already furnished; who may be called as witness.

Article 2

Misdemeanor Cases

17-16-20. Applicability of article.
17-16-21. Right of the defendant to copy of indictment or accusation and list of witnesses.
17-16-22. Right of defendant to copy of statement given while in police custody; failure of prosecution to comply; evidence discovered after filing of request.
17-16-23. Right of defendant to copies of written scientific reports; failure to comply.

Cross references. — Bail for juveniles, § 15-11-507. Depositions for preservation of testimony in criminal proceedings, § 24-13-130 et seq.

Editor's notes. — Ga. L. 1994, p. 1895, § 13, not codified by the General Assembly, provides that this chapter applies to all cases docketed on or after January 1, 1995.

Law reviews. — For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000).

ARTICLE 1

DEFINITIONS; FELONY CASES

Law reviews. — For note on the 1994 amendments of Code Sections 17-16-1 to 17-16-9 and enactment of Code Sections 17-16-20 to 17-16-23 of this article, see 11 Ga. St. U.L. Rev. 137 (1994). For note on 1995 amendments and enactments of sections in this article, see 12 Ga. St. U.L. Rev. 144 (1995).

JUDICIAL DECISIONS

Constitutionality. — Because the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., provides for reciprocal discovery in criminal felony cases with any imbalance favoring the defendant, the law does not violate the due process clause of the United States or Georgia Constitutions. State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Pretrial discovery provisions of the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., do not implicate or infringe upon the confrontation clause which guarantees only the right to

confront and cross-examine those individuals called to testify against a defendant at trial. State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Reciprocal discovery provisions of the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., do not violate the right to effective representation of counsel by denying the defendant the benefit of counsel's judgment of whether and when to reveal aspects of the defendant's case to the state. State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Amended discovery procedure of O.C.G.A. § 17-16-1 et seq. is not an ex post facto law because the law affects purely procedural rights and duties. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

Amended discovery procedure of O.C.G.A. § 17-16-1 et seq. is not a bill of attainder, which refers to legislative imposition of punishment on specific persons or on a class of persons without any judicial proceeding. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

Amended discovery procedure of O.C.G.A. § 17-16-1 et seq. does not violate due process as it imposes reciprocal discovery upon the state; any difference in the scope of mitigating evidence and the scope of non-statutory aggravating evidence is too minimal to be of constitutional significance on the question of reciprocity of discovery. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

Failure to raise issue results in waiver. — Failure to request a continuance to cure any prejudice which may result from the state's failure to comply with the requirements of O.C.G.A. § 17-16-1 et seq. waives the right to assert error on appeal stemming from the state's alleged failure to comply with discovery statutes. Shelton v. State, 257 Ga. App. 890, 572 S.E.2d 401 (2002).

Binding effect of discovery procedure. — Amended discovery procedure under O.C.G.A. § 17-16-1 et seq. was binding upon a defendant who elected to participate in the procedure before the amendment. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

Prosecution has no obligation to locate defense witnesses. — Trial court did not err in denying the defendant's request for a continuance based on the state violating the state's discovery obligations and failing to disclose exculpatory evidence when the state failed to provide the defendant with the transporting officer's out-of-state address because the state, acting in the state's role as the prosecution, has no obligation to locate defense witnesses and the defendant failed to show that any alleged discovery violation caused the defendant harm. Lafavor v. State, 334 Ga. App. 125, 778 S.E.2d 377 (2015).

17-16-1. Definitions.

As used in this chapter, the term:

(1) "Possession, custody, or control of the state or prosecution" means an item which is within the possession, custody, or control of the prosecuting attorney or any law enforcement agency involved in the investigation of the case being prosecuted.

(2) "Statement of a witness" means:

(A) A written or recorded statement, or copies thereof, made by the witness that is signed or otherwise adopted or approved by the witness;

(B) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and is contained in a stenographic,

mechanical, electrical, or other recording or a transcription thereof; or

(C) A summary of the substance of a statement made by a witness contained in a memorandum, report, or other type of written document but does not include notes or summaries made by counsel.

(3) "Witness" does not include the defendant.

History. — Code 1981, § 17-16-1, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2.

Law reviews. — For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001). For article, "Death Penalty Law," see 53 Mercer L. Rev. 233 (2001). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

JUDICIAL DECISIONS

"Witness" does not include defendant. — Term "witness", as it is used in O.C.G.A. § 17-16-5(a), as defined by O.C.G.A. § 17-16-1(3), "does not include the defendant"; thus, the trial court's ruling requiring the defendant to give notice to the state of any alibi testimony the defendant might give at the trial on the defendant's own behalf was erroneous. Johnson v. State, 272 Ga. 468, 532 S.E.2d 377 (2000).

Failure to produce investigator's notes. — Trial court abused the court's discretion in imposing the extreme sanction of evidence exclusion for the state's failure to produce the investigator's notes because the record did not show that the investigator's informal notes, which the state could not produce, were subject to discovery under any of the provisions of Georgia's Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

Construction with § 17-16-5(a). — Defendant, whose evidence was the sole evidence in support of an alibi defense, was required to file an intention to offer the defense under O.C.G.A. § 17-16-5(a), even when the state was aware that the defendant claimed to be elsewhere on the day of the crime, and such did not affect the defendant's right to testify under the Sixth Amendment; moreover, it was irrelevant that the state was already aware that the defendant claimed to be elsewhere on the date of the crime because the statute provided no exception for such prior knowledge and because the mere claim to be elsewhere when confronted by authorities was a far cry from intending to present the legal defense of alibi. State v. Charbonneau, 281 Ga. 46, 635 S.E.2d 759 (2006).

No demand for witness list made. — Trial court did not abuse the court's discretion in ordering that the defendant provide a copy of a police department internal affairs report that the defendant received in discovery, and which involved an investigation into the defendant's arrest, to the state, as even though the state was not entitled to discovery of statements that defendant made because the reciprocal discovery statute did not include defendant as a "witness," the state sought the material for the pretrial statements that the officer who arrested the defendant made. Dorsey v. State, 261 Ga. App. 181, 582 S.E.2d 158 (2003).

If the defendant did not give the state a written discovery request pursuant to O.C.G.A. § 17-16-1 et seq., the state was not obligated under O.C.G.A. § 17-16-3 to furnish a list of witnesses on the state's own initiative; further, as defendant did not file a written demand for a list of witnesses, the state was not obligated to supply such a list. Anderson v. State, 265 Ga. App. 428, 594 S.E.2d 669 (2004).

Failure of state to produce oral statements. — Failure of the state to produce oral and unrecorded statements made by the murder defendant's brother to the police did not violate the state's duty under O.C.G.A. § 17-16-1 since there can be no possession, custody, or control of a witness' statement that has neither been recorded nor committed to writing. State v. Scales, 209 Vt. 425, 206 A.3d 1263 (2019).

There was no discovery violation because the state had no obligation to produce a statement made by a witness which had not been either recorded or committed to writing. Cox v. State, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

Because no notes were taken during pre-trial interviews with witnesses, the defendant failed to establish that O.C.G.A. §§ 17-16-1(1) and 17-16-7 had been violated by the state's failure to produce the written notes. Hunt v. State, 278 Ga. 479, 604 S.E.2d 144 (2004).

When a witness merely makes an oral statement, the obligation of O.C.G.A. § 17-16-7 to produce the statement is not triggered since there can be no "possession, custody, or control" thereof. Forehand v. State, 267 Ga. 254, 477 S.E.2d 560 (1996), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020); Baldwin v. State, 232 Ga. App. 335, 501 S.E.2d 548 (1998).

Although a witness for the prosecution testified regarding an oral statement which the defendant made to the witness immediately following the defendant's act of stabbing the victim, the testimony was not inadmissible on the basis of the state's failure to provide the defendant's statement as recounted by the witness to the police as the statement was not written or recorded and, therefore, the state was not obliged by O.C.G.A. § 17-16-1(2)(C) to provide the statement to the defense. Holmes v. State, 275 Ga. 853, 572 S.E.2d 569 (2002).

Oral additional recollections by caseworker properly admitted. — With regard to a defendant's convictions on two counts of cruelty to children, the trial court did not err by allowing a caseworker to testify to additional recollections the caseworker realized were not contained in the report that was prepared following an interview with the defendant as the information that the defendant asserted that the defendant should have received before trial did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker; therefore, the recollections did not constitute a "statement of a witness" under O.C.G.A. § 17-16-1(2), and the state was not obligated to produce the information prior to trial under O.C.G.A. § 17-16-7. Hinds v. State, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

Reference to statement not required. — Even though the state had only a reference in an arrest report to an oral statement from a witness, the trial court did not err in admitting the eyewitness identification testimony over the defendant's objection that O.C.G.A. § 17-16-7 had been violated. Thompson v. State, 240 Ga. App. 26, 521 S.E.2d 876 (1999).

No right to source code of breath test machine. — In a DUI case, the defendant was not entitled to discovery of the "source code" used to program a breath test machine. The defendant did not show that the code was in the possession, custody, or control of the state as required by O.C.G.A. §§ 17-16-1(1) and 17-16-23(b). Hills v. State, 291 Ga. App. 873, 663 S.E.2d 265 (2008).

Right to continuance based on failure to comply with discovery. — Trial court's denial of a continuance based on the prosecutor's failure to comply with the discovery statute was error entitling the defendant to a new trial. Livingston v. State, 266 Ga. 501, 467 S.E.2d 886 (1996).

Waiver of objections. — Defendants did not raise any issue at trial regarding discovery of tape recorded statements to arson investigator; thus, those arguments were waived and could not be brought up on appeal. Baker v. State, 230 Ga. App. 813, 498 S.E.2d 290 (1998).

Statement in the possession of an investigating officer is deemed to be in the possession of the state, whether or not the statement is in the state's file and the state is obliged to notify the defense of the statement's existence. However, the de-

fendant waived the right to object to testimony based on this statement by failing to object to the testimony during direct examination, or even earlier at the Jackson-Denno hearing. Smiley v. State, 260 Ga. App. 283, 581 S.E.2d 310 (2003).

Defendant's claim on appeal that the trial court erred by allowing a confidential informant who had conducted controlled buys to testify in the defendant's criminal trial was waived on appeal in the defendant's claim that the defendant had invoked reciprocal discovery under the Georgia Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq.; the trial court allowed the defendant's counsel an opportunity to interview the informant before the informant testified and the defendant's attorney did not thereafter seek a continuance in order to cure any prejudice. Brown v. State, 274 Ga. App. 302, 617 S.E.2d 227 (2005).

Trial court did not err in admitting statements the defendant's coconspirators made during the commission of a crime because the defendant did not allege or show bad faith under O.C.G.A. § 17-16-6 and did not request a continuance upon learning of the alleged discovery violation; the defendant proceeded under the reciprocal discovery provisions of O.C.G.A. § 17-16-1 et seq., and audiotapes of wiretap communications that transpired between a confidential informant and the coconspirators were not introduced at trial since the state relied upon U.S. Drug Enforcement Administration agents' testimony describing the communications. Kohler v. State, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Summary not provided to defense. — Summary of a witness's statement to the prosecutor was not required to be provided to defense counsel. Williams v. State, 226 Ga. App. 313, 485 S.E.2d 837 (1997).

Application of criminal discovery statute. — State was not required to provide a trial witness list or a custodial statement to the defendant who did not opt to have the criminal discovery statute applied to that defendant. Park v. State, 230 Ga. App. 274, 495 S.E.2d 886 (1998).

Statement of a witness recorded by the prosecutor two days prior to trial did not qualify for a work product exception to the hearsay rule as it was a statement within the meaning of O.C.G.A. § 17-16-1(2)(A) and did not merely constitute "notes or summaries made by counsel" within the meaning of O.C.G.A. § 17-16-1(2)(C). Bohannon v. State, 230 Ga. App. 829, 498 S.E.2d 316 (1998).

Because docketing of the defendant's case occurred before January 1, 1995, and the state refused to consent to the application of the criminal discovery statute as the state could have under O.C.G.A. § 17-16-2(d), the trial court did not err in finding that the criminal discovery statute was inapplicable. King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

When, in a murder prosecution, a state's witness testified that the witness took a photograph of the crime scene, which had not been disclosed to the defense, and the prosecutor denied any knowledge of such a photograph, the defendant was not entitled to a mistrial because: (1) the defendant did not seek a continuance or subpoena the witness; (2) no bad faith was shown; and (3) the photo, if the photo existed, would have added nothing to the rest of the evidence. Gabriel v. State, 280 Ga. 237, 626 S.E.2d 491 (2006).

Given that the discovery provisions applicable to misdemeanor prosecutions were not the same as those applicable to felony prosecutions and in a misdemeanor case, the elective, optional mutual discovery provisions of O.C.G.A. § 17-16-1 et seq. were not available, the book-in photographs introduced at the defendant's trial were not among the discoverable material in misdemeanor cases, which included a copy of the indictment or accusation, a witness list if requested, in-custody statements, and written scientific reports. Ford v. State, 285 Ga. App. 106, 645 S.E.2d 590 (2007).

"Notes and summaries" made by a mitigation specialist who is working at the direction of trial counsel in a death penalty case should be regarded as "notes or summaries made by counsel" within the meaning of the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1(2)(C);

therefore, a death penalty defendant's ability to employ a mitigation specialist to assist in an investigation is not unduly hampered by the criminal discovery procedure. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Trial court did not abuse the court's discretion finding no reciprocal discovery violation on the part of the state as to a witness interview because there was no evidence that a recording of the entire interview ever existed as the record showed that the state provided the defendant with a recording of a brief portion of the witness's interview and represented to the trial court that no other portion of that interview was recorded, apparently due to an equipment malfunction. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162 (2019).

No prejudice shown by defendant. — In a case charging child molestation, the prosecution was obligated to provide the defense with a copy of a child's pretrial statement to an officer, even though the statement was in the exclusive possession of the police. However, since the defendant did not seek to prevent introduction of the statement, and counsel was allowed to inspect the report, the defendant failed to show that the defendant was prejudiced by the trial court's failure to order the state to make the report available to the defendant for copying, and the state's discovery violation did not give rise to any reversible error. Wilkerson v. State, 266 Ga. App. 721, 598 S.E.2d 364 (2004).

No bad faith. — Theft by shoplifting conviction was upheld on appeal, despite the defendant's claim that the state violated the reciprocal discovery requirements of the Georgia Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., as the defendant conceded at trial that the state did not act in bad faith and failed to request a continuance, but instead, communicated a readiness for trial to both the court and the prosecutor. Brown v. State, 281 Ga. App. 557, 636 S.E.2d 717 (2006).

Testimony of defense witness barred. — Trial court did not err when the court prohibited the testimony of a defense witness due to the defendant's violation of the reciprocal discovery statute as there was evidence to support the trial court's findings of bad faith and prejudice. Grier v. State, 276 Ga. App. 655, 624 S.E.2d 149 (2005).

Counsel not ineffective for failing to engage in reciprocal discovery. — Defendant had not shown that counsel was ineffective for not engaging in reciprocal discovery under O.C.G.A. § 17-16-1. The defendant offered no evidence that counsel was unprepared or unaware of the salient evidence before trial and had not shown that the outcome would have been different had counsel opted into discovery. Anuforo v. State, 293 Ga. App. 1, 666 S.E.2d 50 (2008).

Cited in Kinney v. State, 223 Ga. App. 418, 477 S.E.2d 843 (1996); Revera v. State, 223 Ga. App. 450, 477 S.E.2d 849 (1996); Blackstock v. State, 270 Ga. 117, 506 S.E.2d 130 (1998); Baker v. State, 238 Ga. App. 285, 518 S.E.2d 455 (1999); Knowles v. State, 245 Ga. App. 523, 538 S.E.2d 175 (2000); Williams v. State, 261 Ga. App. 410, 582 S.E.2d 556 (2003); Jaheni v. State, 285 Ga. App. 266, 645 S.E.2d 735 (2007); Garrett v. State, 285 Ga. App. 282, 645 S.E.2d 718 (2007); Walker v. Johnson, 282 Ga. 168, 646 S.E.2d 44 (2007); Grayer v. State, 282 Ga. 224, 647 S.E.2d 264 (2007); Muhammad v. State, 282 Ga. 247, 647 S.E.2d 560 (2007); Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300 (2007); Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007); Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008); Theophile v. State, 295 Ga. App. 517, 672 S.E.2d 479 (2009); Wright v. State, 285 Ga. 428, 677 S.E.2d 82 (2009); Scott v. State, 298 Ga. App. 376, 680 S.E.2d 482 (2009); Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011); Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Authority to set and amend bonds. — Once the clerk of the superior court properly files an indictment or once a valid accusation is entered, the superior

court has exclusive jurisdiction over the case including all bond issues, unless the court invokes the court's authority to delegate jurisdiction to the magistrate court under former O.C.G.A. § 17-16-1(h) or O.C.G.A. § 15-1-9.1(e). 1997 Op. Att'y Gen. No. 97-19.

Discovery requests for criminal investigation records of the Georgia Bureau of Investigation should be coordinated with the prosecuting attorney who should be the primary source for determining the response. 1998 Op. Att'y Gen. No. 98-15.

RESEARCH REFERENCES

ALR. — Construction and application of U.S. Const. Art. I, § 10, cl. 1, and state constitutional provisions proscribing state bills of attainder, 63 A.L.R. 6th 1.

17-16-2. Applicability of article.

(a) This article shall apply to all criminal cases in which at least one felony offense is charged in the event that at or prior to arraignment, or at such time as the court permits, the defendant provides written notice to the prosecuting attorney that such defendant elects to have this article apply to the defendant's case. When one defendant in a multidefendant case demands discovery under this article, the provisions of this article shall apply to all defendants in the case, unless a severance is granted.

(b) Except as provided in subsection (c) of this Code section, this article shall not apply to juvenile court proceedings.

(c) This article shall be deemed to have been automatically invoked, without the written notice provided for in subsection (a) of this Code section, when a defendant has sought discovery pursuant to Chapter 11 of Title 9, the "Georgia Civil Practice Act," pursuant to Part 8 of Article 6 of Chapter 11 of Title 15, or pursuant to the Uniform Rules for the Juvenile Courts of Georgia where such discovery material is the same as the discovery material that may be provided under this article when a written notice is filed pursuant to subsection (a) of this Code section.

(d) Except as provided under Code Section 17-16-8, this article is not intended to authorize discovery or inspection of attorney work product.

(e) This article shall apply also to all criminal cases in which at least one felony offense is charged which was docketed, indicted, or in which an accusation was returned prior to January 1, 1995, if both the prosecuting attorney and the defendant agree in writing that the provisions of this article shall apply to the case.

(f) Except as provided in paragraph (3) of subsection (b) of Code Section 17-16-4, if a defendant has elected to have the provisions of this article apply, the provisions of this article shall also apply to sentencing hearings and the sentencing phase of a death penalty trial.

History. — Code 1981, § 17-16-2, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2; Ga. L. 2005, p. 20, § 12/HB 170; Ga. L. 2005, p. 474, § 1/HB 222; Ga. L. 2013, p. 294, § 4-21/HB 242.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, subsection (e) as enacted by Ga. L. 2005, p. 20, § 12, was redesignated as subsection (f).

Editor's notes. — Ga. L. 2005, p. 20, § 1/HB 170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB 170, not codified by the General Assembly, provides that the first 2005 amendment applies to all trials which commence on or after July 1, 2005.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

JUDICIAL DECISIONS

Construction with § 17-16-4(a). — If a defendant fails to provide written notice to the prosecuting attorney that the defendant elects to have subsection (a) of O.C.G.A. § 17-6-2 apply to the defendant's case, the discovery disclosure provisions of O.C.G.A. § 17-16-4(a) do not apply. Miller v. State, 235 Ga. App. 724, 510 S.E.2d 560 (1999), appeal dismissed, 264 Ga. App. 801, 592 S.E.2d 450 (2003); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000).

Construction with § 17-16-6. — If the defendant made no showing that the state improperly withheld evidence from the defendant or acted in bad faith so as to trigger the imposition of any of the sanctions authorized by O.C.G.A. § 17-16-6, the defendant failed to sustain the defendant's appellate burden of establishing how the defendant was harmed by the trial court's ruling regarding the defendant's failure to properly provide written notice to the prosecution under O.C.G.A. § 17-16-2(a). Miller v. State, 235 Ga. App. 724, 510 S.E.2d 560 (1999), appeal dismissed, 264 Ga. App. 801, 592 S.E.2d 450 (2003).

Continuance. — Trial court properly denied the defendant's motion for a continuance under the reciprocal discovery statute; the state learned of a new witness with a criminal history only three days before trial, defense counsel's daughter who was assisting defense counsel in court was available to interview the witness, the trial court stated that the defendant would have an opportunity to interview the witness, and the defendant did not show prejudice from the commencement of trial on the day in question. Dunagan v. State, 286 Ga. App. 668, 649 S.E.2d 765 (2007), reversed on other grounds, 283 Ga. 501, 661 S.E.2d 525 (2008).

Discovery in presentence hearings in both capital or noncapital cases is governed by O.C.G.A. § 17-10-2 and the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., does not apply. State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Presentence hearing discovery misconduct. — Trial court did not err in denying the defendant's motion for a new trial based on the defendant's trial counsel failing to object to the state failing to provide notice of the state's intent to use a prior conviction in aggravation of sentencing because the defendant could not show

that the outcome of sentencing would have been different. Soler v. State, 354 Ga. App. 93, 840 S.E.2d 169 (2020).

Application of criminal discovery statute. — Because docketing of the defendant's case occurred before January 1, 1995, and the state refused to consent to the application of the criminal discovery statute as the state could have under O.C.G.A. § 17-16-2(d), the trial court did not err in finding that the criminal discovery statute was inapplicable. King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002).

No written discovery request. — State's use of a witness that was not on the list provided to the defendant did not violate O.C.G.A. § 17-16-3; there was nothing in the record to show that the defendant gave the state a written discovery request pursuant to O.C.G.A. § 17-16-2 or made a written demand for a list of witnesses, and the witness was offered to rebut an assertion that the defendant made while testifying in the defendant's own defense; moreover, the trial court gave the defendant time to interview the witness and limited the scope of questioning. Rayo-Leon v. State, 281 Ga. App. 74, 635 S.E.2d 368 (2006).

Defendant electing not to participate in Criminal Procedure Discovery Act. — Defendant who chose not to participate in the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., was not entitled to discover all of the state's scientific reports, the state's scientific work product, or the witness list provided by Uniform Superior Court Rule 30.3. State v. Lucious, 271 Ga. 361, 518 S.E.2d 677 (1999).

Court of Appeals rejected the defendant's claimed discovery violation as the defendant could not complain that discovery materials were not made available to counsel before trial as the defendant failed to show an election to proceed under the reciprocal discovery statute and could not show what materials were withheld, or how the availability of the materials might have changed the outcome of the trial. Hall v. State, 282 Ga. App. 562, 639 S.E.2d 341 (2006).

Trial court did not err in denying the defendant's motion for continuance to gather more data or obtain an expert's opinion regarding DNA evidence, because the defendant had not opted in to reciprocal discovery under O.C.G.A. § 17-16-2, and thus, was not entitled to additional documents, nor the delay to obtain them. Simmons v. State, 291 Ga. 705, 733 S.E.2d 280 (2012).

Defendant's failure to give notice to the prosecuting attorney. — O.C.G.A. § 17-16-2(a) requires a defendant to provide written notice to the prosecuting attorney that such defendant elects to have the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., apply to the defendant's case. Although the state waited until the first day of trial to have the marijuana tested, in the absence of proof that the state's last-minute test of the suspected marijuana was designed to circumvent the discovery process, the defendant's conviction for marijuana possession stands. Davis v. State, 232 Ga. App. 320, 501 S.E.2d 836 (1998).

Failure to provide inspection of photograph. — With regard to the defendant's domestic violence convictions, the trial court did not err in denying the admission into evidence of a photograph detailing the defendant's injuries based on failing to provide inspection of the photograph because any error by the trial court in excluding the photograph was harmless since the photograph was cumulative of both the defendant's testimony that the wife scratched the defendant as well as the wife's testimony that the wife tried to scratch the defendant. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

Having chosen not to provide the written notice required, a defendant was not entitled to have the other provisions of the reciprocal discovery process applied to the defendant's case. Brown v. State, 274 Ga. 202, 552 S.E.2d 812 (2001).

Exclusion of evidence absent finding of bad faith held error. — In the absence of bad faith on the part of the state as well as prejudice to the defendant, the trial court erred in excluding from evidence a videotape and photographs of child pornographic images taken from the defendant's computer as a sanction for the state's failure to comply

with a court-ordered discovery deadline. State v. Jones, 283 Ga. App. 539, 642 S.E.2d 183 (2007).

Cited in Morgan v. State, 226 Ga. App. 624, 487 S.E.2d 420 (1997); Wright v. State, 226 Ga. App. 848, 487 S.E.2d 405 (1997); Johnson v. State, 272 Ga. 468, 532 S.E.2d 377 (2000); Bazemore v. State, 244 Ga. App. 460, 535 S.E.2d 830 (2000); Cockrell v. State, 281 Ga. 536, 640 S.E.2d 262 (2007); Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007); Grayer v. State, 282 Ga. 224, 647 S.E.2d 264 (2007); Fyfe v. State, 305 Ga. App. 322, 699 S.E.2d 546 (2010); State v. Thompson, 334 Ga. App. 692, 780 S.E.2d 67 (2015).

17-16-3. Copy of indictment or accusation and list of witnesses furnished.

Prior to arraignment, every person charged with a criminal offense shall be furnished with a copy of the indictment or accusation and a list of witnesses that may be supplemented pursuant to the other provisions of this article.

History. — Code 1981, § 17-16-3, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2.

Cross references. — Copy of indictment and list of witnesses to be furnished to defendant, Ga. Const. 1983, Art. I, Sec. I, Para. XIV. List of witnesses, Uniform Superior Court Rules, Rule 30.3. Motions, demurrers, special pleas, and similar items in criminal matters, Uniform Superior Court Rules, Rule 31. Pleadings by defendant, Uniform Superior Court Rules, Rule 33. Unified appeal, pre-trial proceedings, Uniform Superior Court Rules, Rule 34.3. Reply, Uniform State Court Rules, Rule 6.2. Filing and processing documents, Uniform State Court Rules, Rule 36.

Editor's notes. — Ga. L. 1983, p. 503, § 1, not codified by the General Assembly, provides: "It is the intent of this Act to implement certain changes imposed by Article I, Section I, Paragraph XIV of the Constitution of the State of Georgia."

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978). For note, "The Criminal Discovery Dilemma in Georgia," see 34 Mercer L. Rev. 1113 (1983).

JUDICIAL DECISIONS

Analysis

General Consideration
Demand and Waiver
Compliance with Demand
Newly Discovered Evidence

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 4997, former Code 1933, § 27-1403 and former Code Section 17-7-110, decided prior to its 1994 repeal by Ga. L. 1994, p. 1895, § 1, are included in the annotations for this Code section.

Purpose. — Purpose of the former provisions was to ensure that an accused was not confronted at trial with testimony against the accused from witnesses whom the accused had not had the opportunity to interview prior to trial. Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974); Hibbs v. State, 133 Ga. App. 407, 211 S.E.2d 24 (1974); State v. Warren, 133 Ga. App. 793,

213 S.E.2d 53 (1975); Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975); Hunnicutt v. State, 135 Ga. App. 774, 219 S.E.2d 22 (1975); Barrentine v. State, 136 Ga. App. 802, 222 S.E.2d 103 (1975); Herring v. State, 238 Ga. 288, 232 S.E.2d 826 (1977); Lingerfelt v. State, 238 Ga. 355, 233 S.E.2d 356 (1977); King v. State, 147 Ga. App. 38, 248 S.E.2d 4 (1978); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978); Williams v. State, 242 Ga. 757, 251 S.E.2d 254 (1978); Bisard v. State, 158 Ga. App. 62, 279 S.E.2d 310 (1981); Murphy v. State, 158 Ga. App. 278, 279 S.E.2d 728 (1981); Standridge v. State, 158 Ga. App. 482, 280 S.E.2d 850 (1981); Ellis v. State, 248 Ga. 414, 283 S.E.2d 870 (1981); Bryant v. State, 174 Ga. App. 522, 330 S.E.2d 743 (1985); Griffin v. State, 183 Ga. App. 386, 358 S.E.2d 917 (1987); Austin v. State, 199 Ga. App. 539, 405 S.E.2d 499 (1991), cert. denied, 199 Ga. App. 905, 405 S.E.2d 499 (1991) (decided under former Code 1933, § 27-1403 and former O.C.G.A. § 17-7-110).

Purpose of the former provisions requiring that the defendant be furnished on demand with a list of witnesses to be used against the defendant was to protect the defendant from being surprised by evidence which the defendant then had no chance to refute. Gibbons v. State, 136 Ga. App. 609, 222 S.E.2d 55 (1975), appeal dismissed, 237 Ga. 283, 227 S.E.2d 265 (1976); Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976); Anderson v. State, 141 Ga. App. 249, 233 S.E.2d 240 (1977) (decided under former Code 1933, § 27-1403).

Purpose of the former provision was to shield the defendant from the effect of testimony against which the defendant had no opportunity to defend. Upton v. State, 128 Ga. App. 547, 197 S.E.2d 478 (1973) (decided under former Code 1933, § 27-1403).

Requirement of disclosure of witnesses serves the dual purpose of defense discovery of witnesses prior to arraignment and the elimination of the element of surprise at trial. Butler v. State, 139 Ga. App. 92, 227 S.E.2d 889 (1976) (decided under former Code 1933, § 27-1403).

Demand for a list of witnesses prior to arraignment is for discovery; after arraignment it is to prevent surprise. Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979) (decided under former Code 1933, § 27-1403).

Transcending purpose of former O.C.G.A. § 17-7-110 was to insure that an accused was not confronted at trial with testimony against the accused from witnesses whom the accused had not had the opportunity to interview prior to trial. Chezem v. State, 199 Ga. App. 869, 406 S.E.2d 522 (1991) (decided under former O.C.G.A. § 17-7-110).

Protection afforded by former provision was against forcing a defendant to trial without adequate time to interview the state's witnesses. Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975) (decided under former Code 1933, § 27-1403).

Application of former § 17-7-110 was within the sound discretion of the trial court. — See Manning v. State, 207 Ga. App. 181, 427 S.E.2d 521 (1993) (decided under former O.C.G.A. § 17-7-110).

How purpose served generally. — Purpose of former provision was served by requiring that the defendant receive the names of the witnesses promptly upon demand and at a reasonable time before trial. Williams v. State, 242 Ga. 757, 251 S.E.2d 254 (1978), appeal dismissed, 287 Ga. 192; 695 S.E.2d 244 (Ga. 2010) (decided under former Code 1933, § 27-1403).

Right to list of witnesses generally. — Right guaranteed by former provision to be furnished, on demand, with a list of witnesses on whose testimony the charge against the accused is founded, is the right, on demand, to be furnished by the district attorney's office, prior to arraignment, with the list of witnesses who will testify for the state on the trial. Sutton v. State, 237 Ga. 423, 228 S.E.2d 820 (1976) (decided under former Code 1933, § 27-1403).

Authority for right to demand witness list. — Under Ga. Const. 1976, Art. I, Sec. I, Para. XI (see Ga. Const. 1983, Art. I, Sec. I, Para. XIV) and the former provisions, the accused shall be furnished on demand with a copy of the indictment and a list of witnesses who gave testimony

General Consideration (Cont'd)

before the grand jury. Martin v. State, 73 Ga. App. 573, 37 S.E.2d 411, cert. denied, 329 U.S. 760, 67 S. Ct. 115, 91 L. Ed. 655 (1946) (decided under former Code 1933, § 27-1403).

Requirement that defendant be given a list of witnesses is one of substance. — When the name of the witness is included on any list given to defense counsel a reasonable time before the trial, the statute is satisfied inasmuch as the defendant has had an opportunity to interview the witness before trial. A different result is not called for unless it has been made to appear on the record that a witness whose name appeared on an early list, but who was dropped from a later list, is offered at trial contrary to the prosecution's representation to the defense that the witness' testimony would not be offered during trial. Williams v. State, 242 Ga. 757, 251 S.E.2d 254 (1978), appeal dismissed, 287 Ga. 192, 695 S.E.2d 244 (2010) (decided under former Code 1933, § 27-1403).

Even though a witness's name was not on the state's witness list, the state's formal disclosure of the witness as the confidential informant six weeks prior to trial combined with: (i) the summary of the witness's testimony found in the search warrant affidavit given to the defendant; (ii) the defendant's admitted knowledge of the witness's identity prior to the formal disclosure; (iii) the defendant's own pretrial reference to the witness as a material witness; and (iv) the defendant's attempts to interview the witness prior to trial, fulfilled the purpose of the witness list rule. McLarty v. State, 238 Ga. App. 27, 516 S.E.2d 818 (1999).

Construction. — Former statute was traditionally not interpreted narrowly, but had been construed to accomplish the statutory purpose of giving actual, accurate, timely notice. Newman v. State, 237 Ga. 376, 228 S.E.2d 790 (1976); Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979) (decided under former Code 1933, § 27-1403).

Application of the former provision was within the sound discretion of the trial court. Campbell v. State, 149 Ga. App. 299, 254 S.E.2d 389, cert. denied, 444 U.S. 933, 100 S. Ct. 279, 62 L. Ed. 2d 191 (1979) (decided under former Code 1933, § 27-1403).

No right to witness list prior to preliminary hearing. — There is no right in an accused to have the list of witnesses who will testify on the trial prior to the preliminary hearing. Sutton v. State, 237 Ga. 423, 228 S.E.2d 820 (1976) (decided under former Code 1933, § 27-1403).

Section authorizes the sanction of exclusion of the witnesses' testimony. Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975) (decided under former Code 1933, § 27-1403).

Sanction of exclusion is not mandatory when the trial judge in the judge's discretion determines that the defendant can be protected by some other form of relief. Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975); Murphy v. State, 158 Ga. App. 278, 279 S.E.2d 728 (1981) (decided under former Code 1933, § 27-1403).

Since the purpose of former O.C.G.A. § 17-7-110 was satisfied by the trial court's effort to afford the defendant other forms of relief from the addition of a witness, besides excluding the witness' testimony altogether, there is no error in allowing this witness to testify. Gilbert v. State, 159 Ga. App. 326, 283 S.E.2d 361 (1981) (decided under former O.C.G.A. § 17-7-110).

No right to directed verdict of acquittal for noncompliance. — Noncompliance with the former provisions by the state did not entitle a defendant to a directed verdict of acquittal. Hunnicutt v. State, 135 Ga. App. 774, 219 S.E.2d 22 (1975); Maddox v. State, 145 Ga. App. 212, 243 S.E.2d 636 (1978); Haynes v. State, 245 Ga. 817, 268 S.E.2d 325 (1980) (decided under former Code 1933, § 27-1403).

No right to dismissal of the accusation. Maddox v. State, 145 Ga. App. 212, 243 S.E.2d 636 (1978) (decided under former Code 1933, § 27-1403).

Trial judge can use judicial discretion to determine if the defendant can be protected by some other form of appropriate relief, such as a motion for mistrial or

continuance. Minis v. State, 150 Ga. App. 671, 258 S.E.2d 308 (1979), overruled on other grounds, Boney v. Tims, 254 Ga. 664, 333 S.E.2d 592 (1985) (decided under former Code 1933, § 27-1403).

If the trial court offered to delay testimony of a witness omitted from the witness list for a day to permit defense counsel to interview the witness, and noted that defense counsel did not object prior to trial and indicated that defense counsel had interviewed the witness and needed neither a recess nor a continuance, the purpose of former O.C.G.A. § 17-7-110 was satisfied by the court's offer to provide relief other than exclusion of the witness's testimony. Simmons v. State, 249 Ga. 860, 295 S.E.2d 84 (1982) (decided under former O.C.G.A. § 17-7-110).

Testimony, over defendant's objection, of a witness who was not included on the list of witnesses was not error when the name of the witness was provided to the defendant on the pretrial docket approximately thirteen days prior to trial and when, in making the defendant's objection, the defendant did not request a continuance or seek to conduct an interview prior to the witness being called to testify. Dixon v. State, 214 Ga. App. 374, 448 S.E.2d 40 (1994) (decided under former O.C.G.A. § 17-7-110).

Trial judge may allow introduction of additional evidence even though the evidence is not strictly in rebuttal of presented defense evidence. Brady v. State, 206 Ga. App. 497, 426 S.E.2d 15 (1992) (decided under former O.C.G.A. § 17-7-110).

Available remedies include mistrial and continuance. Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975); Hunnicutt v. State, 135 Ga. App. 774, 219 S.E.2d 22 (1975); Haynes v. State, 245 Ga. 817, 268 S.E.2d 325 (1980) (decided under former Code 1933, § 27-1403).

Denial of motion for mistrial or continuance would present for review the question of abuse of the trial court's discretion. Davis v. State, 135 Ga. App. 203, 217 S.E.2d 343 (1975) (decided under former Code 1933, § 27-1403).

Doctrine of harmless error was applicable to former provisions. Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976) (decided under former Code 1933, § 27-1403).

Doctrine of harmless error was applicable to flaws in the prosecution's compliance with the former provisions. Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979) (decided under former Code 1933, § 27-1403).

Preserving claim of exclusion for appeal. — Contention that the testimony of a witness should have been excluded because the witness's name was not included in the list of witnesses furnished pursuant to former O.C.G.A. § 17-7-110 which was raised for the first time on appeal will not be considered. Jackson v. State, 186 Ga. App. 847, 368 S.E.2d 771 (1988) (decided under former O.C.G.A. § 17-7-110).

State's failure to call a witness on the state's list did not deny the defendant's Sixth Amendment rights because, under O.C.G.A. § 17-7-191, the defendant could have subpoenaed the witness if deemed necessary to the defendant for impeachment purposes. Johnson v. State, 232 Ga. App. 717, 503 S.E.2d 603 (1998) (decided under former O.C.G.A. § 17-7-110).

Cited in Dean v. State, 43 Ga. 218 (1871); Palmer v. State, 23 Ga. App. 84, 97 S.E. 460 (1918); Parr v. State, 117 Ga. App. 484, 160 S.E.2d 865 (1968); Spell v. State, 225 Ga. 705, 171 S.E.2d 285 (1969); Butler v. State, 226 Ga. 56, 172 S.E.2d 399 (1970); Mitchell v. State, 226 Ga. 450, 175 S.E.2d 545 (1970); Evans v. State, 227 Ga. 571, 181 S.E.2d 845 (1971); Butts v. State, 126 Ga. App. 512, 191 S.E.2d 329 (1972); Vinson v. State, 127 Ga. App. 607, 194 S.E.2d 583 (1972); Moye v. State, 129 Ga. App. 52, 198 S.E.2d 514 (1973); Brown v. State, 129 Ga. App. 713, 200 S.E.2d 924 (1973); Smith v. State, 130 Ga. App. 390, 203 S.E.2d 375 (1973); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); Harmon v. State, 133 Ga. App. 720, 213 S.E.2d 23 (1975); Kitchens v. State, 134 Ga. App. 81, 213 S.E.2d 180 (1975); Alexander v. State, 134 Ga. App. 201, 213 S.E.2d 560 (1975); Wells v. State, 134 Ga. App. 328, 214 S.E.2d 414 (1975); McGinty v. State, 134 Ga. App. 399, 214 S.E.2d 678 (1975); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975); Wilson v. State,

General Consideration (Cont'd)

235 Ga. 470, 219 S.E.2d 756 (1975); Bowen v. State, 136 Ga. App. 296, 221 S.E.2d 69 (1975); Stanley v. State, 136 Ga. App. 385, 221 S.E.2d 242 (1975); Jordan v. State, 235 Ga. 732, 222 S.E.2d 23 (1975); Baldwin v. State, 137 Ga. App. 32, 223 S.E.2d 10 (1975); Carter v. State, 137 Ga. App. 824, 225 S.E.2d 73 (1976); Gale v. State, 138 Ga. App. 261, 226 S.E.2d 264 (1976); Welch v. State, 237 Ga. 665, 229 S.E.2d 390 (1976); Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976); Williams v. State, 238 Ga. 298, 232 S.E.2d 535 (1977); Baker v. State, 143 Ga. App. 302, 238 S.E.2d 241 (1977); McDowell v. State, 239 Ga. 626, 238 S.E.2d 415 (1977); Soloman v. State, 143 Ga. App. 449, 238 S.E.2d 573 (1977); Lewis v. State, 239 Ga. 732, 238 S.E.2d 892 (1977); Maddox v. State, 239 Ga. 846, 239 S.E.2d 29 (1977); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977); Foster v. State, 145 Ga. App. 595, 244 S.E.2d 118 (1978); Wooten v. State, 145 Ga. App. 743, 245 S.E.2d 34 (1978); Leonard v. State, 146 Ga. App. 439, 246 S.E.2d 450 (1978); Tippins v. State, 146 Ga. App. 448, 246 S.E.2d 458 (1978); Young v. State, 146 Ga. App. 391, 246 S.E.2d 711 (1978); Brown v. State, 242 Ga. 536, 250 S.E.2d 438 (1978); Aldridge v. State, 153 Ga. App. 744, 266 S.E.2d 513 (1980); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980); Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981); Davis v. State, 159 Ga. App. 197, 283 S.E.2d 17 (1981); State v. Adamczyk, 162 Ga. App. 288, 290 S.E.2d 149 (1982); Smart v. State, 162 Ga. App. 161, 290 S.E.2d 491 (1982); Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360 (1982); House v. Balkcom, 562 F. Supp. 1111 (N.D. Ga. 1983); Bailey v. State, 169 Ga. App. 802, 315 S.E.2d 297 (1984); Craig v. State, 170 Ga. App. 6, 316 S.E.2d 18 (1984); Powell v. State, 171 Ga. App. 876, 321 S.E.2d 745 (1984); Blackston v. State, 172 Ga. App. 172, 322 S.E.2d 300 (1984); Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984); Buie v. State, 254 Ga. 167, 326 S.E.2d 458 (1985); Wilkerson v. State, 177 Ga. App. 469, 339 S.E.2d 747 (1986); Watson v. State, 178 Ga. App. 778, 344 S.E.2d 667 (1986); Daniel v. State, 180 Ga. App. 179, 348 S.E.2d 720 (1986); Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987); Baine v. State, 181 Ga. App. 856, 354 S.E.2d 177 (1987); Willis v. State, 183 Ga. App. 408, 359 S.E.2d 194 (1987); Anderson v. State, 258 Ga. 70, 365 S.E.2d 421 (1988); Holiday v. State, 258 Ga. 393, 369 S.E.2d 241 (1988); Lockleer v. State, 188 Ga. App. 271, 372 S.E.2d 663 (1988); Williams v. State, 191 Ga. App. 913, 383 S.E.2d 344 (1989); Reedman v. State, 193 Ga. App. 688, 388 S.E.2d 763 (1989); Tatum v. State, 195 Ga. App. 349, 393 S.E.2d 494 (1990); Kilgore v. State, 195 Ga. App. 884, 395 S.E.2d 337 (1990); McKeever v. State, 196 Ga. App. 91, 395 S.E.2d 368 (1990); Respress v. State, 196 Ga. App. 858, 397 S.E.2d 195 (1990); Sheriff v. State, 197 Ga. App. 143, 397 S.E.2d 732 (1990); Workman v. State, 198 Ga. App. 455, 402 S.E.2d 76 (1991); Carter v. State, 199 Ga. App. 843, 406 S.E.2d 238 (1991); Howard v. State, 200 Ga. App. 188, 407 S.E.2d 769 (1991); Rogers v. State, 261 Ga. 649, 409 S.E.2d 655 (1991); Wilcox v. State, 202 Ga. App. 491, 415 S.E.2d 23 (1992); Carroll v. State, 208 Ga. App. 316, 430 S.E.2d 649 (1993); White v. State, 208 Ga. App. 885, 432 S.E.2d 562 (1993); Grace v. State, 210 Ga. App. 718, 437 S.E.2d 485 (1993); Rosser v. State, 211 Ga. App. 402, 439 S.E.2d 72 (1993); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000); Garey v. State, 273 Ga. 133, 539 S.E.2d 123 (2000); Ricarte v. State, 249 Ga. App. 50, 547 S.E.2d 703 (2001).

Demand and Waiver

Requirement that demand be made. — It was imperative that demand be made before the former statute became operative. Coleman v. State, 124 Ga. App. 313, 183 S.E.2d 608 (1971) (decided under former Code 1933, § 27-1403).

If the defendant did not give the state a written discovery request pursuant to O.C.G.A. § 17-16-1 et seq., the state was not obligated under O.C.G.A. § 17-16-3 to furnish a list of witnesses on the state's own initiative; further, as the defendant did not file a written demand for a list of witnesses, the state was not obligated to

supply such a list. Anderson v. State, 265 Ga. App. 428, 594 S.E.2d 669 (2004).

State's use of a witness that was not on the list provided to the defendant did not violate O.C.G.A. § 17-16-3; there was nothing in the record to show that the defendant gave the state a written discovery request pursuant to O.C.G.A. § 17-16-2 or made a written demand for a list of witnesses, and the witness was offered to rebut an assertion that the defendant made while testifying in the defendant's own defense; moreover, the trial court gave the defendant time to interview the witness and limited the scope of questioning. Rayo-Leon v. State, 281 Ga. App. 74, 635 S.E.2d 368 (2006).

Demand for a list of witnesses must be timely. Smith v. State, 123 Ga. App. 269, 180 S.E.2d 556 (1971); Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200 (1974) (decided under former Code 1933, § 27-1403).

Demand must be made before arraignment. — It was imperative that a demand prior to arraignment be made before the former statute became operative. Bell v. State, 129 Ga. App. 783, 201 S.E.2d 340 (1973); Daniels v. State, 136 Ga. App. 854, 222 S.E.2d 673 (1975); Page v. State, 237 Ga. 20, 227 S.E.2d 8 (1976); Thomas v. State, 139 Ga. App. 467, 228 S.E.2d 604 (1976); Iler v. State, 139 Ga. App. 743, 229 S.E.2d 543 (1976); Bell v. State, 144 Ga. App. 692, 242 S.E.2d 345 (1978); Burns v. State, 147 Ga. App. 429, 249 S.E.2d 145 (1978) (decided under former Code 1933, § 27-1403).

In order to invoke the provisions of the former statute prohibiting the state from calling a witness when the defendant had not been furnished such name, it was necessary that a demand for a list of witnesses be made before arraignment. Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975) (decided under former Code 1933, § 27-1403).

To whom demand made. — Proper demand must be made upon the district attorney or an assistant district attorney. Coleman v. State, 124 Ga. App. 313, 183 S.E.2d 608 (1971) (decided under former Code 1933, § 27-1403).

Demand for a list of witnesses must be made to the solicitor or the solicitor's assistant (now district attorney or assistant to the district attorney). Smith v. State, 123 Ga. App. 269, 180 S.E.2d 556 (1971); Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200 (1974) (decided under former Code 1933, § 27-1403).

It is imperative that the accused make demand upon the district attorney or an assistant district attorney. Thomas v. State, 139 Ga. App. 467, 228 S.E.2d 604 (1976); Page v. State, 237 Ga. 20, 227 S.E.2d 8 (1976); Bell v. State, 144 Ga. App. 692, 242 S.E.2d 345 (1978); Burns v. State, 147 Ga. App. 429, 249 S.E.2d 145 (1978) (decided under former Code 1933, § 27-1403).

Request made on someone other than the district attorney or an assistant district attorney is not a proper demand. Beeks v. State, 225 Ga. 200, 167 S.E.2d 156 (1969); Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981) (decided under former Code 1933, § 27-1403).

Demand must be in writing and made to district attorney. — Demand for a list of witnesses must be in writing. Burns v. State, 147 Ga. App. 429, 249 S.E.2d 145 (1978) (decided under former Code 1933, § 27-1403); Sexton v. State, 189 Ga. App. 12, 374 S.E.2d 824 (1988) (decided under former O.C.G.A. § 17-7-110); Ronskowsky v. State, 190 Ga. App. 147, 378 S.E.2d 185 (1989).

Demand for a list of witnesses must be in writing and served upon the district attorney. Jackson v. State, 166 Ga. App. 252, 305 S.E.2d 4 (1983) (decided under former O.C.G.A. § 17-7-110).

If no demand for the list of witnesses appears in the record, it must be assumed that it was not in writing. Smith v. State, 123 Ga. App. 269, 180 S.E.2d 556 (1971) (decided under former Code 1933, § 27-1403).

Use of witnesses not listed is not error absent demand in record. — If there is nothing in the record showing to whom the demand alluded to by defense counsel was made, when the demand was made, from whom counsel received the list of witnesses, whose names appeared on the list, or the list itself, there is no error in overruling an objection to calling a witness not listed on the list of witnesses.

Demand and Waiver (Cont'd)

Coleman v. State, 124 Ga. App. 313, 183 S.E.2d 608 (1971) (decided under former Code 1933, § 27-1403).

Objection must be made at trial. — If the defendant did not object at trial to a witness's name not being included on the list of witnesses provided to defense counsel prior to trial, such an objection may not be raised for the first time on appeal. Head v. State, 203 Ga. App. 730, 417 S.E.2d 398 (1992) (decided under former O.C.G.A. § 17-7-110).

"On demand" cannot be construed to mean "instanter", and must therefore be taken to imply as soon as possible after the demand is made. Fishman v. State, 128 Ga. App. 505, 197 S.E.2d 467 (1973); Mitchell v. State, 134 Ga. App. 376, 214 S.E.2d 593 (1975) (decided under former Code 1933, § 27-1403).

For denial of continuance if demand for list solely for purposes of delay, see Hunnicutt v. State, 130 Ga. App. 630, 204 S.E.2d 310 (1974) (decided under former Code 1933, § 27-1403).

Demand for a list of witnesses may be waived. Smith v. State, 123 Ga. App. 269, 180 S.E.2d 556 (1971) (decided under former Code 1933, § 27-1403).

What constitutes a waiver. — If the indictment contains a plea of not guilty containing a waiver of arraignment, copy of indictment, and list of witnesses sworn before the grand jury, signed by the defendant's attorney, compliance with the demand for a list of witnesses was accordingly waived. Smith v. State, 123 Ga. App. 269, 180 S.E.2d 556 (1971) (decided under former Code 1933, § 27-1403).

Written waiver renders oral demand, when allowed, ineffective. Burns v. State, 147 Ga. App. 429, 249 S.E.2d 145 (1978) (decided under former Code 1933, § 27-1403).

If there is no demand for the list of witnesses, the accused has no rights by reason of not being furnished with the list. Fears v. State, 125 Ga. 739, 54 S.E. 667 (1906) (decided under former Penal Code 1895, § 945).

Waiver of grand jury list is not waiver of trial jury list. — Waiver of the list of witnesses appearing before the grand jury is not a waiver of the witnesses who would testify at the trial. Grainger v. State, 138 Ga. App. 753, 227 S.E.2d 483 (1976) (decided under former Code 1933, § 27-1403).

Failure to cross out printed waiver on indictment. — Demand for the list of witnesses may be waived by not crossing out the printed waiver on the indictment. Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200 (1974) (decided under former Code 1933, § 27-1403).

Complaining of noncompliance when list and arraignment waived. — If the defendant upon call of the defendant's case waived the list of witnesses and arraignment, the defendant cannot complain of the failure to comply with the requirement of this section that every person charged with an offense against the laws shall be furnished, on demand, prior to the person's arraignment, with a copy of the accusation and a list of the witnesses on whose testimony the charge against the accused is founded. Brooks v. State, 227 Ga. 339, 180 S.E.2d 721 (1971) (decided under former Code 1933, § 27-1403).

List not waived if demand made before arraignment. — Defendant does not waive the defendant's right to demand a list of witnesses the state may call if the demand is made prior to arraignment. The date of arraignment must be regarded as coincident with the date on which the accused was given an opportunity to plead in the case. Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974) (decided under former Code 1933, § 27-1403).

Compliance with Demand

List of witnesses must be furnished on demand. Hyatt v. State, 134 Ga. App. 703, 215 S.E.2d 698 (1975) (decided under former Code 1933, § 27-1403).

List must be complete within a reasonable time before trial so that the defense may be adequately prepared. Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83 (1976) (decided under former Code 1933, § 27-1403).

Failure to provide a list of state's witnesses until immediately before trial was empty compliance with this section and overruling the motion for contin-

uance was therefore reversible error. Fishman v. State, 128 Ga. App. 505, 197 S.E.2d 467 (1973) (decided under former Code 1933, § 27-1403).

Witnesses which state is required to list. — This section requires only that the state furnish a list of the witnesses on whose testimony the charge against the accused is founded. Campbell v. State, 149 Ga. App. 299, 254 S.E.2d 389, cert. denied, 444 U.S. 933, 100 S. Ct. 279, 62 L. Ed. 2d 191 (1979) (decided under former Code 1933, § 27-1403).

State need not call unnecessary witnesses. — There is no requirement that the state call more witnesses than the state needs to present the state's case. Griffin v. State, 133 Ga. App. 508, 211 S.E.2d 382 (1974) (decided under former Code 1933, § 27-1403).

When a defendant demands a list of those witnesses sworn before the grand jury the state should furnish such list but need not go further and furnish a list of any and all other witnesses who might be called at the trial. Johnson v. State, 121 Ga. App. 281, 173 S.E.2d 412 (1970) (decided under former Code 1933, § 27-1403).

Failure to include coindictee's name on witness list was not reversible error since the defendant was notified a month before trial that the state was dropping charges against the coindictee in exchange for the coindictee's testimony against the defendant. Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999).

Omitted witness not incompetent to testify if no testimony before grand jury. — This section did not render a witness not included on such list incompetent to testify when the latter is not one who testified before the grand jury. Inman v. State, 72 Ga. 269 (1884) (decided under former Code 1882, § 4997).

Care required in assembling first list of witnesses. — It is not necessary that the prosecution scrupulously comb the state's files to guarantee that the first list of witnesses given the accused is absolutely complete under the harsh penalty of not being allowed to use any witness who inadvertently is left off the list. Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974); Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83 (1976) (decided under former Code 1933, § 27-1403).

Prosecution may furnish supplemental lists, even though the witnesses' names contained therein are not newly discovered, provided that the complete list is available to the accused promptly after the accused's demand and at a reasonable time before trial. Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974) (decided under former Code 1933, § 27-1403).

Supplemental list must be provided within a reasonable period of time before trial. Fleming v. State, 236 Ga. 434, 224 S.E.2d 15 (1976) (decided under former Code 1933, § 27-1403).

If there was testimony of witnesses whose names were not included on the original list of witnesses furnished by the prosecution, such omission does not constitute an impermissible violation of this section, if the list was complete within a reasonable time before trial so that the defense can be adequately prepared. Wilson v. State, 151 Ga. App. 501, 260 S.E.2d 527 (1979) (decided under former Code 1933, § 27-1403).

What is reasonable time before trial. — This section required that the list of witnesses must be complete within a reasonable time before trial so that the defense may be adequately prepared. What constitutes a reasonable time before trial must depend upon the nature of the case, the number of the state's witnesses, the nature of the witnesses' testimony, and any other factor which may logically bear upon the question. Ellis v. State, 248 Ga. 414, 283 S.E.2d 870 (1981) (decided under former Code 1933, § 27-1403).

Furnishing name of witness after voir dire. — It was error to allow the testimony of a witness who was not named on the original witness list but, rather, included on an updated list given to the defendant after voir dire. Bentley v. State, 210 Ga. App. 862, 438 S.E.2d 110 (1993) (decided under former O.C.G.A. § 17-7-110).

Furnishing name of witness on day of voir dire. — Witness could testify as to a prior transaction even though the identity of the witness was not disclosed until

Compliance with Demand (Cont'd)

the day of voir dire. Dacus v. State, 213 Ga. App. 180, 444 S.E.2d 110 (1994) (decided under former O.C.G.A. § 17-7-110).

Furnishing list day before trial. — If a new and additional list of witnesses is furnished to defense counsel the day before the trial, and defense counsel states that counsel has not had time to interview the witnesses and determine exactly what the evidence is against the client, the court errs in refusing to grant a continuance for the term or at least a delay of trial for some time later in the term. Barrentine v. State, 136 Ga. App. 802, 222 S.E.2d 103 (1975) (decided under former Code 1933, § 27-1403).

Five days is sufficient notice. — Since the defendant was given oral notice of a prosecution witness five or six days before trial, this was sufficient time to locate the witness and check the witness's background. Logan v. State, 170 Ga. App. 809, 318 S.E.2d 516 (1984) (decided under former O.C.G.A. § 17-7-110).

Addresses and telephone numbers of witnesses. — Former Code 1933, § 27-1403 did not require that the addresses of all witnesses be furnished. Holsey v. State, 235 Ga. 270, 219 S.E.2d 374 (1975) (decided under former Code 1933, § 27-1403); Campbell v. State, 149 Ga. App. 299, 254 S.E.2d 389, cert. denied, 444 U.S. 933, 100 S. Ct. 279, 62 L. Ed. 2d 191 (1979) (decided under former Code 1933, § 27-1403).

List of witnesses meets the requirement of this section. Addresses and telephone numbers of witnesses need not be furnished. Roberts v. State, 243 Ga. 604, 255 S.E.2d 689 (1979) (decided under former Code 1933, § 27-1403).

This section required only that the state furnish a list of the witnesses on whose testimony the charge against the accused was founded. The section did not demand that the addresses of all such witnesses be furnished. Lewis v. State, 159 Ga. App. 135, 282 S.E.2d 750 (1981) (decided under former Code 1933, § 27-1403).

Addresses and telephone numbers of witnesses need not be furnished. The better practice, however, would dictate that the state furnish such addresses and telephone numbers along with the list of witnesses if such information is available. Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987); overruled on other grounds, Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007) (decided under former O.C.G.A. § 17-7-110).

When a witness's name was contained in the indictment, a defendant cannot validly contend that the defendant had been surprised or unable to interview the witness in question through lack of knowledge of such witness. Herring v. State, 238 Ga. 288, 232 S.E.2d 826 (1977); Garvin v. State, 144 Ga. App. 396, 240 S.E.2d 925 (1977); Redmond v. State, 252 Ga. 142, 312 S.E.2d 315 (1984) (decided under former Code 1933, § 27-1403).

Misspelling of witness's name. — Trial court did not err in permitting Johnny Hull to testify, although the state mistakenly identified the witness as "Johnny Hill" in response to the defendant's request for a witness list pursuant to former O.C.G.A. § 17-7-110, since the witness's address had also been provided to the defendant and the witness was identified sufficiently for counsel to have had an opportunity to interview the witness prior to trial. Duncan v. State, 205 Ga. App. 181, 421 S.E.2d 336 (1992) (decided under former O.C.G.A. § 17-7-110).

Witness listed as "Ms. [or Mrs.] Floyd" was identified sufficiently for counsel to have an opportunity to interview the witness prior to trial as although the witness' name had been "Josephine Dedmon" at the time of the crime, the witness' previous name had been "Josephine Floyd." Moody v. State, 258 Ga. 818, 375 S.E.2d 30 (1989) (decided under former O.C.G.A. § 17-7-110).

Failure to have a sheriff's name reported on the list of state's witnesses supplied upon demand to the accused when there is no injury shown comes within the harmless error rule. Caito v. State, 130 Ga. App. 831, 204 S.E.2d 765 (1974) (decided under former Code 1933, § 27-1403).

State may use witnesses not appearing on list when list not demanded. — If the defendant fails to de-

mand a list of witnesses, the state may use a witness whose name had not been furnished to the defendant. Prather v. State, 223 Ga. 721, 157 S.E.2d 734 (1967) (decided under former Code 1933, § 27-1403).

If no demand is made upon the solicitor general (now district attorney) for the names of witnesses to be used by the state until after arraignment and after the first witness had testified at trial, this section does not require the state to use only those witnesses shown on the indictment. Green v. State, 223 Ga. 611, 157 S.E.2d 257 (1967) (decided under former Code 1933, § 27-1403).

It is not error to permit a witness to testify whose name did not appear on a list of witnesses furnished to defendant if there was no demand for a list of witnesses filed prior to arraignment. Jackson v. State, 235 Ga. 857, 221 S.E.2d 605 (1976) (decided under former Code 1933, § 27-1403).

If there was no formal demand for a list of witnesses before arraignment and no motion for mistrial or for continuance, it is not error to allow a witness whose name is not on a witness list furnished the defense to testify. Grainger v. State, 138 Ga. App. 753, 227 S.E.2d 483 (1976) (decided under former Code 1933, § 27-1403).

Harm from noncompliance must be shown. — Defendant contended that the trial court erred by failing to dismiss the indictment because the defendant was not furnished with a complete copy of the indictment pursuant to former O.C.G.A. § 17-7-110 pointing out that: (1) Count 1 of the indictment was not attached to the copy which the defendant was furnished; and that (2) the names of the grand jurors who found the indictment did not appear on the defendant's copy of the indictment; however, there was no resultant harm to the defendant, since the defendant had not demonstrated that the defendant was surprised by Count 1 of the indictment and the defendant had not shown how the defendant was prejudiced by the absence of the names of the grand jurors. Byrd v. State, 182 Ga. App. 284, 355 S.E.2d 666 (1987) (decided under former O.C.G.A. § 17-7-110).

Failure of defendant to press rights. — If the defendant never sought to inquire whether the witness had arrived at the site of the trial, nor asked the court for an opportunity to interview the witness prior to the witness's testimony, the defendant failed to demonstrate that the defendant was denied access to the witness. Felker v. State, 252 Ga. 351, 314 S.E.2d 621, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984) (decided under former O.C.G.A. § 17-7-110).

Failure to include witness's name harmless error. — Prosecution's failure to include witness's name on written list of witnesses submitted to defense is harmless error since the defendant received oral notice and did not claim to be unfairly surprised. Logan v. State, 170 Ga. App. 809, 318 S.E.2d 516 (1984) (decided under former O.C.G.A. § 17-7-110).

Although the appellants contended that the trial court erred in allowing the state to call four witnesses whose names had not appeared on the list of witnesses provided by the state, including the forensic chemist from the State Crime Laboratory who had analyzed some cocaine, plus three chain-of-custody witnesses, the failure to list these witnesses resulted in no prejudice to either of the appellants. At the time of their arraignment, both appellants were presented with a copy of the crime lab report stating the results of the chemical analysis of the cocaine, and this report disclosed both the identity and the involvement not only of the crime lab expert but also of two of the three chain-of-custody witnesses. As for the third chain-of-custody witness, a file clerk at the police station who had logged the contraband into the evidence room, the trial court allowed the appellants an opportunity to interview the clerk before the clerk took the stand. Askew v. State, 192 Ga. App. 351, 385 S.E.2d 21 (1989) (decided under former O.C.G.A. § 17-7-110).

Compliance with Superior Ct. Rule 31.3 cured failure to list prior rape victim. — Because the defense was on notice as to the prior rape victim's identity through the prosecution's Notice of Similar Occurrence filed pursuant to Ga. Unif. Super. Ct. R. 31.3, no cognizable constitutional claim was presented by the prosecution's failure to include her name on the prosecution's list of witnesses pursuant to

Compliance with Demand (Cont'd)

former O.C.G.A. § 17-7-110 and Ga. Unif. Super. Ct. R. 30.3. McBride v. Sharpe, 25 F.3d 962 (11th Cir. 1994), cert. denied, 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 401 (1994) (decided under former O.C.G.A. § 17-7-110).

Multiple indictments. — Since the defendant was tried upon three indictments, since the defendant's objection was that the defendant was not supplied with a list of witnesses as to only one of the indictments, since there was no written demand for such a list under that indictment, and since the witnesses called as to that indictment were on a list supplied to the defendant as to the other indictments, the circumstances did not constitute reversible error. Moore v. State, 170 Ga. App. 709, 318 S.E.2d 181 (1984) (decided under former O.C.G.A. § 17-7-110).

Witness not on indictment, not before grand jury, nor in list demanded. — Witness whose name does not appear on the indictment at the time the case is called for trial, and who did not testify before the grand jury, and whose name was not furnished on demand by the prosecuting attorney to the defendant may nevertheless be sworn as a witness for the state in the trial of a case. Smith v. State, 74 Ga. App. 777, 41 S.E.2d 541, cert. denied, 332 U.S. 772, 68 S. Ct. 86, 92 L. Ed. 357 (1947) (decided under former Code 1933, § 27-1403).

When testimony of unlisted witness does not require reversal. — If, under the circumstances, the purposes of this section are met, or if the relief sought exceeds the relief sufficient to satisfy those purposes, or if the error is harmless, reversal is not required even though an unlisted witness is allowed to testify in contravention of that section. Huff v. State, 141 Ga. App. 66, 232 S.E.2d 403 (1977) (decided under former Code 1933, § 27-1403).

No mistrial if testimony of omitted witness is stricken. — Failure through inadvertence to give a defendant a correct list of witnesses, as when the name of one is omitted, is not cause for a mistrial of the case, especially if the testimony of the witness omitted is stricken from the record. Moore v. State, 25 Ga. App. 251, 102 S.E. 916, cert. denied, 25 Ga. App. 172 (1920) (decided under Penal Code 1910, § 970).

Defendant acknowledging actual notice of witnesses and never alleging prejudice. — Prosecution's failure to provide a written list is plainly harmless if defense counsel acknowledges actual notice of the witnesses eight days before trial, and never alleges prejudice of any kind whatever from the fact that the notification was oral and not written. Newman v. State, 237 Ga. 376, 228 S.E.2d 790 (1976) (decided under former Code 1933, § 27-1403).

Continuance warranted when record discloses neither notice nor lack of prejudice. — Since the state made no showing in the record that the appellant was otherwise put on notice as to the witnesses to be called or that the appellant could not have been prejudiced thereby, the late furnishing of the witness list warrants a continuance. Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 27-1403).

Failure to request continuance. — Trial court properly permitted a witness who was not listed to testify since, although the defendant's trial counsel was appointed only a week before, the defendant nevertheless was represented by other counsel at the time of arraignment and the defendant, in making an objection, did not request a continuance or otherwise seek an opportunity to conduct an interview prior to the witness being called to testify. Tyus v. State, 196 Ga. App. 857, 397 S.E.2d 194 (1990) (decided under former O.C.G.A. § 17-7-110).

Interview by defense of unlisted witness before witness testifies. — If counsel for the defendant is given the opportunity to and does interview the unlisted witness before the witness is allowed to testify, the purpose of this section is satisfied. Butler v. State, 139 Ga. App. 92, 227 S.E.2d 889 (1976) (decided under former Code 1933, § 27-1403).

If defense counsel is furnished, prior to trial, with the name of a witness, incorrectly spelled, as well as the witness's telephone number and address, and the

trial court recesses the trial to allow defense counsel the opportunity to interview the witness, but before the witness testifies, defense counsel makes no motion for continuance or other time-gaining procedure, the defendant shows no prejudice to the defendant's rights in that the purpose of this section was substantially satisfied. King v. State, 147 Ga. App. 38, 248 S.E.2d 4 (1978) (decided under former Code 1933, § 27-1403).

If defense counsel knows of the existence of a witness not on the state's list and is given the opportunity to talk to the witness prior to trial, the witness may be allowed to testify. Stansifer v. State, 166 Ga. App. 785, 305 S.E.2d 481 (1983), but see Hatcher v. State, 224 Ga. App. 747, 482 S.E.2d 443 (1997); Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998) (decided under former O.C.G.A. § 17-7-110).

When the trial court allows a defendant an opportunity to interview "unlisted" witnesses, the purpose of former O.C.G.A. § 17-7-110 was satisfied and the trial court properly allowed the witnesses to testify. White v. State, 253 Ga. 106, 317 S.E.2d 196 (1984); Boscaino v. State, 186 Ga. App. 133, 366 S.E.2d 789, cert. denied, 186 Ga. App. 917, 366 S.E.2d 789 (1988); Moss v. State, 196 Ga. App. 81, 395 S.E.2d 363 (1990); Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176 (1993) (decided under former O.C.G.A. § 17-7-110).

Trial court did not err in offering the defendant a reasonable time to interview an expert witness not included on the list of witnesses and to obtain an expert witness of the defendant's choice or in refusing to exclude the witness's testimony when the defendant refused the offer. Johnson v. State, 171 Ga. App. 91, 318 S.E.2d 799 (1984) (decided under former O.C.G.A. § 17-7-110).

Although the state failed to include the witness's name on the list of witnesses, the purpose of former O.C.G.A. § 17-7-110 was met since the trial court allowed counsel for the defendant to interview the witness before the witness was called to testify. Kickery v. State, 185 Ga. App. 274, 363 S.E.2d 805 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 805 (1988) (decided under former O.C.G.A. § 17-7-110).

State witness was properly allowed to testify even though the witness's name was not on the list of witnesses provided to the defendant since the witness had only become known to the prosecutor within the preceding 72 hours and defense counsel acknowledged that counsel interviewed the witness prior to trial. McIntosh v. State, 185 Ga. App. 612, 365 S.E.2d 454, cert. denied, 185 Ga. App. 910, 365 S.E.2d 454 (1988) (decided under former O.C.G.A. § 17-7-110).

Admission of testimony by a witness is admissible even though the witness's name does not appear on a list of witnesses furnished by the prosecution to the defense since: (1) the name of the witness appeared in an allegation in an indictment charging the defendant; (2) the defendant did not file a demand for a list of witnesses prior to an arraignment; (3) the prosecutor provided the name of the witness to the defendant in a notice of intent to present evidence of similar transactions; and (4) the defendant did not request a continuance or otherwise seek an opportunity to interview the witness prior to trial. State v. McBride, 258 Ga. 321, 368 S.E.2d 758 (1988); Ronskowsky v. State, 190 Ga. App. 147, 378 S.E.2d 185 (1989) (decided under former O.C.G.A. § 17-7-110).

Allowing the state to call two police officers whose names were not on the list of witnesses was not error since the names were contained in the state's file, which was made available to defendant's counsel and was examined by counsel prior to trial. Wade v. State, 198 Ga. App. 15, 400 S.E.2d 377 (1990) (decided under former O.C.G.A. § 17-7-110).

When the identity and involvement of a witness was otherwise disclosed to the defendant in discovery and was provided to the defendant by the state, the purpose of former O.C.G.A. § 17-7-110 was duly served and no error laid in permitting the state to call such a witness even though he or she was not listed as a witness in response to a demand pursuant to the statute. Gossett v. State, 199 Ga. App. 286, 404 S.E.2d 595, cert. denied, 199 Ga. App. 906, 404 S.E.2d 595 (1991) (decided under former O.C.G.A. § 17-7-110).

Trial court in the court's discretion may

Compliance with Demand (Cont'd)

allow an unlisted witness to testify upon giving the defense an opportunity to interview the witness prior to the time the witness testifies. Willis v. State, 202 Ga. App. 447, 414 S.E.2d 681 (1992) (decided under former O.C.G.A. § 17-7-110).

Unlisted coindictee may testify. — Coindictee, charged with committing the robbery with the defendant, may be allowed to testify even though the coindictee's name was not on the list of witnesses provided to the defendant. Wright v. State, 167 Ga. App. 445, 306 S.E.2d 428 (1983) (decided under former O.C.G.A. § 17-7-110).

If a coindictee testified as a state witness even though the coindictee's name was not included on the list of witnesses prepared by the state, information that the coindictee was available for interviews by defense counsel prior to trial and that the attorneys representing the defendants had met with the coindictee for approximately one hour reinforced a finding of lack of surprise on the part of the defendants at the coindictee's appearance at trial on behalf of the state. Graham v. State, 171 Ga. App. 242, 319 S.E.2d 484 (1984) (decided under former O.C.G.A. § 17-7-110).

Testimony by codefendant whose name was not furnished. — It was not error to permit a codefendant whose name appeared on the indictment to testify although the codefendant's name was not furnished to the defense as required by former O.C.G.A. § 17-7-110. Lawrence v. State, 174 Ga. App. 788, 331 S.E.2d 600 (1985) (decided under former O.C.G.A. § 17-7-110).

Calling unlisted witness in criminal trial in rebuttal is not error. Hearn v. State, 145 Ga. App. 469, 243 S.E.2d 728 (1978) (decided under former Code 1933, § 27-1403); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (decided under former Code 1933, § 27-1403).

It is not error to allow a witness to testify whose name was not on the list of witnesses if that witness is called in rebuttal. Savage v. State, 152 Ga. App. 392, 263 S.E.2d 218 (1979) (decided under former Code 1933, § 27-1403); Hudgins v. State, 153 Ga. App. 603, 266 S.E.2d 284 (1980) (decided under former Code 1933, § 27-1403); Rowell v. State, 176 Ga. App. 309, 335 S.E.2d 689 (1985) (decided under former O.C.G.A. § 17-7-110).

It is not error to allow the state to call a witness in rebuttal even though the witness's name did not appear on the list of witnesses furnished to the defendant. Gibby v. State, 166 Ga. App. 413, 304 S.E.2d 518 (1983) (decided under former O.C.G.A. § 17-7-110).

Calling an unlisted witness in rebuttal is not error and does not violate former O.C.G.A. § 17-7-110. Forney v. State, 255 Ga. 316, 338 S.E.2d 252 (1986); Crosby v. State, 188 Ga. App. 191, 372 S.E.2d 471 (1988); Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568 (1990); Cook v. State, 199 Ga. App. 523, 405 S.E.2d 341 (1991); Snider v. State, 200 Ga. App. 12, 406 S.E.2d 542 (1991); Leatherwood v. State, 212 Ga. App. 342, 441 S.E.2d 813 (1994) (decided under former O.C.G.A. § 17-7-110).

Only material which creates a reasonable doubt as to guilt must be disclosed under a general request for anything exculpatory. Radford v. State, 251 Ga. 50, 302 S.E.2d 555 (1983) (decided under former O.C.G.A. § 17-7-110).

Substitution of another witness. — Defendant was not unfairly surprised when the state substituted for a listed witness another department of public safety employee whose name had not been listed since the witness was qualified as a custodian of the records for the department and the primary purpose of the witness's testimony was merely to authenticate the defendant's driving records. Parks v. State, 180 Ga. App. 31, 348 S.E.2d 481 (1986) (decided under former O.C.G.A. § 17-7-110).

Opportunity for further cross-examination or more time if state witness left off list. — Although the name of a witness for the state was inadvertently left off the witness list, defense counsel's interview of the witness prior to the witness being called to the stand and the trial judge's offer to allow defense counsel to call the witness back and to have further extensive cross-examination or more time suffi-

ciently satisfied the purpose of former Code 1933, § 27-1403. Cates v. State, 245 Ga. 30, 262 S.E.2d 796 (1980) (decided under former Code 1933, § 27-1403).

Denial of motion for continuance when state's list of witnesses is amended. — If the prosecution amends the list of witnesses after voir dire of the witnesses had been completed and the defendant makes a motion that the substitute witness not be allowed to testify, or that the defense be granted a continuance in order to investigate the witness's proposed testimony and if the court gives the defense the opportunity to interrogate the witness prior to testifying, the court is not in error if the court overrules the defendant's motion for a continuance on the basis of the amended witness list. Legare v. State, 243 Ga. 744, 257 S.E.2d 247, cert. denied, 444 U.S. 984, 100 S. Ct. 491, 62 L. Ed. 2d 413 (1979) (decided under former Code 1933, § 27-1403).

Examining witness outside jury's presence. — Allowing a party an opportunity to examine the witnesses outside of the jury's presence is an inadequate means of curing the state's failure to comply with the defendant's demand for a list of witnesses. Brown v. State, 242 Ga. 536, 250 S.E.2d 438 (1978) (decided under former Code 1933, § 27-1403).

Testimony against defendant by codefendants. — If two codefendants change their plea to guilty upon the case being called for trial, and offer their testimony against the defendant, there is no prejudice in admitting their testimony even if their names were listed in the defendant's indictment. Anderson v. State, 141 Ga. App. 249, 233 S.E.2d 240 (1977) (decided under former Code 1933, § 27-1403).

Allowing a codefendant to testify although the codefendant's name was not on the original list of witnesses is not error since it could not be maintained that the defendant was surprised or unable to interview through lack of knowledge of the witness. Lingerfelt v. State, 238 Ga. 355, 233 S.E.2d 356 (1977) (decided under former Code 1933, § 27-1403).

If the defendant has notice that a designated witness will testify about certain records, and the true custodian of the records is subsequently substituted to give identical testimony, no harm results to the defendant merely because the name of the true custodian wasn't on the witness list. Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976) (decided under former Code 1933, § 27-1403).

Unlisted witness subpoenaed by defense. — Trial court did not err in admitting the testimony of an accomplice even though the state failed to list the accomplice as a witness because the defendant personally subpoenaed the accomplice as a witness and the accomplice testified the accomplice previously discussed the facts of the case with the defendant's counsel. Herndon v. State, 187 Ga. App. 77, 369 S.E.2d 264 (1988) (decided under former O.C.G.A. § 17-7-110).

Testimony of witness allowed. — See Conley v. State, 258 Ga. 339, 368 S.E.2d 502 (1988) (decided under former O.C.G.A. § 17-7-110).

Newly Discovered Evidence

Even if the witnesses' names were not newly discovered, the overriding purpose of this section was to assure the defendant that the defendant will not be confronted at trial with the testimony of witnesses the defendant had not had time to interview prior to trial. Fleming v. State, 236 Ga. 434, 224 S.E.2d 15 (1976) (decided under former Code 1933, § 27-1403).

Evidence which state had no knowledge the state would need when list furnished. — Requirement that the accused, on demand, be furnished with a list of the state's witnesses is mandatory and it is error to permit a witness whose name is not on the list furnished to testify unless the solicitor (now district attorney) or prosecuting attorney shall state in the prosecutor's place that the evidence sought to be presented is newly discovered evidence which the state was not aware of at the time of the state's furnishing the defendant with a list of the witnesses. Huffaker v. State, 119 Ga. App. 742, 168 S.E.2d 895 (1969) (decided under former Code 1933, § 27-1403).

If the state's attorney does not state precisely that the evidence of rebuttal witnesses is newly discovered, but the

Newly Discovered Evidence (Cont'd)

state's attorney does state that it is evidence which the state attorney had no knowledge that the state's attorney would need at the time the state attorney furnished the list of witnesses, this rebuttal evidence would come within the exception of former Code 1933, § 27-1403. Yeomans v. State, 229 Ga. 488, 192 S.E.2d 362 (1972) (decided under former Code 1933, § 27-1403).

Because the state had no prior knowledge that the testimony of a witness would be needed for rebuttal at the time such list was furnished constitutes an exception under this section. Dagenhart v. State, 234 Ga. 809, 218 S.E.2d 607 (1975); Gibbons v. State, 136 Ga. App. 609, 222 S.E.2d 55 (1975), appeal dismissed, 237 Ga. 283, 227 S.E.2d 265 (1976); Smith v. State, 141 Ga. App. 720, 234 S.E.2d 385 (1977) (decided under former Code 1933, § 27-1403).

That investigating officers may have known of the witnesses does not impute such knowledge to the prosecuting attorney and does not preclude such witnesses from being newly discovered evidence. Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83 (1976) (decided under former Code 1933, § 27-1403).

Location of witness on morning of trial constitutes newly discovered evidence. — If the solicitor (now district attorney) states that the evidence is newly discovered because the witness had not been located until 6:30 of the morning of the trial, this is sufficient to meet the requirements of this section exception to consent of the defendant. Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653 (1980) (decided under former Code 1933, § 27-1403); Berry v. State, 268 Ga. 437, 490 S.E.2d 389 (1997).

Witness's inability to testify does not make another's newly discovered evidence. — Fact that a witness previously called by the state for the purpose of establishing venue is unable to testify definitely in that regard does not make another's testimony as to venue such newly discovered evidence as would justify admission without the defendant's consent under former Code 1933, § 27-1403. Heard v. State, 135 Ga. App. 687, 218 S.E.2d 867 (1975) (decided under former Code 1933, § 27-1403).

Defense interview of newly discovered witnesses. — Allowing defense counsel to interview newly discovered witnesses is clearly permitted as an alternative to a further continuance. Lakes v. State, 244 Ga. 217, 259 S.E.2d 469 (1979) (decided under former Code 1933, § 27-1403).

If the trial court has allowed a defendant the opportunity to interview a recently discovered and unlisted witness prior to the testimony, the purpose of former O.C.G.A. § 17-7-110 has been satisfied. Jones v. State, 181 Ga. App. 651, 353 S.E.2d 593 (1987) (decided under former O.C.G.A. § 17-7-110).

No violation upon discovery of witness's other name, absent inability to interview. — There was no violation of the provisions of former O.C.G.A. § 17-7-110 requiring the state, on the defendant's demand, to provide a list of witnesses to be called at trial since the defendant's counsel discovered two days before trial that the witness on the list had another name, when it was established that the witness was also known by the other name, and that the defendant's counsel knew of the second name but made no showing that the defendant was unable to interview the witness in the remaining time and made no motion for a continuance in order to interview the witness. Gardner v. State, 172 Ga. App. 677, 324 S.E.2d 535 (1984) (decided under former O.C.G.A. § 17-7-110).

Serving witness list just prior to trial. — Because the defendant was served with a supplemental witness list five days prior to trial, the defendant had a reasonable time in which to interview the witness, and in view of other circumstances, the purpose of former O.C.G.A. § 17-7-110 was satisfied. Alvin v. State, 253 Ga. 740, 325 S.E.2d 143 (1985), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former O.C.G.A. § 17-7-110).

Evidence not known until morning of trial. — Although the trial court per-

mitted testimony from a state's witness whose name had not been provided to the defendants prior to trial in accordance with the defendant's demand for a list of such witnesses made pursuant to former O.C.G.A. § 17-7-110, but the state's attorney stated that this evidence had not become known to the state's attorney until the morning it was offered and since the trial court provided defense counsel an opportunity to interview the witness before the witness testified, there was no error. Daniel v. State, 180 Ga. App. 179, 348 S.E.2d 720 (1986).

Realization just before trial that bill of sale is a copy, not the original. — When the prosecuting attorney stated that the prosecutor had been assured by a witness that the bill of sale was the original document, but when the prosecutor obtained the document just before the trial the prosecutor realized the document was not the original but a copy, and thereupon called the seller to the stand to prove the transaction and this witness testified in effect only that the copy bill of sale correctly delineated the transfer, such evidence, while not exactly newly discovered, was sufficiently within the spirit of this section as not to require a reversal. Elrod v. State, 128 Ga. App. 250, 196 S.E.2d 360 (1973) (decided under former Code 1933, § 27-1403).

Sufficient showing of surprise. — When a witness, a microanalyst, testified that the state learned the witness had received items from another microanalyst and not from a police officer, at which point the defendant objected as to the chain of custody of items, under the circumstances there was sufficient showing of surprise to warrant the trial court's action in allowing other microanalyst to testify even though that microanalyst's name was not on the list of witnesses. Harvey v. State, 165 Ga. App. 7, 299 S.E.2d 61 (1983) (decided under former O.C.G.A. § 17-7-110).

Surprise witness not necessitating new trial. — Under the newly discovered evidence provision, the refusal of the trial court to grant a mistrial when the state produced a surprise witness about whom the jury had not been qualified, who was the son of the victim, who related that the defendant was the person who, on the night of the murder, had threatened to kill the witness's father for refusing to sell the defendant beer without the proper identification, was not error, where, when the son attended the first day of the trial and saw the defendants, the witness recognized the defendant as being the one who had made the threat, the witness revealed these facts to the state, the state decided to call the individual as a witness the next day, the defense was apprised of this fact, the trial court recessed to give the defendants two hours to interview this witness, and the trial did not commence until the next day, when this witness was vigorously cross-examined. Hughes v. State, 257 Ga. 200, 357 S.E.2d 80 (1987) (decided under former O.C.G.A. § 17-7-110).

Testimony of a witness was properly allowed even though the witness's name was not given to the defendants until four days after the trial began. The prosecutor stated that the prosecutor had discovered new evidence regarding the witness on the evening before the prosecutor furnished the witness's name to the defendants and the trial judge gave the defendants' attorney an opportunity to interview the witness. The fact that the witness would not cooperate with the attorney did not justify disallowing the witness's testimony. Hayes v. State, 261 Ga. 439, 405 S.E.2d 660 (1991) (decided under former O.C.G.A. § 17-7-110).

It was not error to allow the testimony of a witness whose name was not included on the state's list of witnesses since the prosecutor stated that the prosecutor had no need to call the witness until the defendant's cross-examination of the cashier of the convenience store made it appear that another videotape of the robbery existed. Lattimore v. State, 203 Ga. App. 259, 416 S.E.2d 829 (1992) (decided under former O.C.G.A. § 17-7-110).

Newly discovered rebuttal witness properly called. — The trial court did not err by permitting the state to call an unlisted out-of-state witness for rebuttal since the state had just learned of the witness's existence and had introduced the witness after the court had reconvened, originally in anticipation of the prosecution's medical examiner, but sub-

Newly Discovered Evidence (Cont'd)

sequently for the introduction of the unlisted witness, who, though in violation of the rule of sequestration, was properly called in light of the court's curative instructions thereto. Thomas v. State, 262 Ga. 754, 425 S.E.2d 872 (1993) (decided under former O.C.G.A. § 17-7-110).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 27-1403 and former Code Section 17-7-110, decided prior to its 1994 repeal by Ga. L. 1994, p. 1895, § 1, are included in the annotations for this Code section.

Section does not prohibit the addition of names to the list of witnesses, but does prohibit the witnesses from testifying, without the consent of the defendant, unless the witnesses' names appeared on the list given to the defendant. 1965-66 Op. Att'y Gen. No. 66-170 (decided under former Code 1933, § 27-1403).

Defendant in probate court is entitled to the discovery rights under O.C.G.A. §§ 17-7-110 [repealed] and 17-7-211 [repealed]. 1986 Op. Att'y Gen. No. U86-13 (decided under former O.C.G.A. § 17-7-110).

RESEARCH REFERENCES

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 382 et seq.

ALR. — Effect of unauthorized amendment of criminal information or indictment, 101 A.L.R. 1254.

Right of accused to bill of particulars, 5 A.L.R.2d 444.

Use of abbreviation in indictment or information, 92 A.L.R.3d 494.

17-16-4. Disclosure required by prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.

(a)(1) The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders, disclose to the defendant and make available for inspection, copying, or photographing any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the state or prosecution and that portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer or member of the prosecuting attorney's staff. The prosecuting attorney shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant, before or after arrest, in response to interrogation by any person then known by the defendant to be a law enforcement officer or member of the prosecuting attorney's staff if the state intends to use that statement at trial. The prosecuting attorney shall also disclose to the defendant the substance of any other relevant written or oral statement made by

the defendant while in custody, whether or not in response to interrogation. Statements of coconspirators that are attributable to the defendant and arguably admissible against the defendant at trial also shall be disclosed under this Code section. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of any similar such statement of any witness who was:

(A) At the time of the statement, so situated as an officer or employee as to have been legally able to bind the defendant in respect to conduct constituting the offense; or

(B) At the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been legally able to bind the defendant in respect to that alleged conduct in which the witness was involved.

(2) The prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, furnish to the defendant a copy of the defendant's Georgia Crime Information Center criminal history, if any, as is within the possession, custody, or control of the state or prosecution. Nothing in this Code section shall affect the provisions of Code Section 17-10-2.

(3)(A) Except as provided in subparagraph (B) of this paragraph, the prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, permit the defendant at a time agreed to by the parties or ordered by the court to inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial or were obtained from or belong to the defendant. Evidence that is within the possession, custody, or control of the Forensic Sciences Division of the Georgia Bureau of Investigation or other laboratory for the purpose of testing and analysis may be examined, tested, and analyzed at the facility where the evidence is being held pursuant to reasonable rules and regulations adopted by the Forensic Sciences Division of the Georgia Bureau of Investigation or the laboratory where the evidence is being held.

(B) With respect to any books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof which are within the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief

or rebuttal at the trial of any violation of Part 2 of Article 3 of Chapter 12 of Title 16, such evidence shall, no later than ten days prior to trial, or as otherwise ordered by the court, be allowed to be inspected by the defendant but shall not be allowed to be copied.

(4) The prosecuting attorney shall, no later than ten days prior to trial, or as otherwise ordered by the court, permit the defendant at a time agreed to by the parties or ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the state intends to introduce in evidence in its case-in-chief or in rebuttal the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the prosecuting attorney shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than ten days prior to trial. Nothing in this Code section shall require the disclosure of any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any victim or witness.

(5) The prosecuting attorney shall, no later than ten days prior to trial, or at such time as the court orders but in no event later than the beginning of the trial, provide the defendant with notice of any evidence in aggravation of punishment that the state intends to introduce in sentencing.

(b)(1) The defendant within ten days of timely compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, shall permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the defense's case-in-chief or rebuttal at the trial.

(2) The defendant shall within ten days of timely compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, permit the prosecuting attorney at a time agreed to by the parties or as ordered by the court to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the defendant intends to introduce in evidence in the defense's case-in-chief or rebuttal the results of the physical or mental examination or scientific test or experiment. If the report is

oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions no later than five days prior to trial. Nothing in this Code section shall require the disclosure of any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any defendant or witness.

(3)(A) The defendant shall, no later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, serve upon the prosecuting attorney all books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the presentence hearing.

(B) The defendant shall, no later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, serve upon the prosecuting attorney all reports of any physical or mental examinations and scientific tests or experiments, including a summary of the basis for the expert opinions rendered in the reports, or copies thereof, if the defendant intends to introduce in evidence in the presentence hearing the results of the physical or mental examination or scientific test or experiment. If the report is oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall serve opposing counsel with such portions.

(C) The defendant shall, no later than five days before the trial commences, serve upon the prosecuting attorney a list of witnesses that the defendant intends to call as a witness in the presentence hearing. No later than the announcement of the verdict of the jury or if the defendant has waived a jury trial at the time the verdict is published by the court, the defendant shall produce for the opposing party any statement of such witnesses that is in the possession, custody, or control of the defendants or the defendant's counsel that relates to the subject matter of the testimony of such witnesses unless such statement is protected from disclosure by the privilege contained in paragraph (5), (6), (7), or (8) of subsection (a) of Code Section 24-5-501.

(c) If prior to or during trial a party discovers additional evidence or material previously requested or ordered which is subject to discovery or inspection under this article, such party shall promptly notify the other party of the existence of the additional evidence or material and make this additional evidence or material available as provided in this article.

(d) Upon a sufficient showing that a discovery required by this article would create a substantial threat of physical or economic harm to a witness, the court may at any time order that the discovery or inspection be denied, restricted, or deferred or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court subject to further order of the court and to be made available to the appellate court in the event of an appeal.

(e) Discovery with respect to alibi witnesses shall be as provided for in Code Section 17-16-5.

History. — Code 1981, § 17-16-4, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2; Ga. L. 2003, p. 154, §§ 5, 6; Ga. L. 2005, p. 20, § 13/HB 170; Ga. L. 2008, p. 829, § 2/HB 1020; Ga. L. 2011, p. 99, § 34/HB 24.

Cross references. — Subpoenas for attendance of witnesses, § 24-13-20 et seq.

Editor's notes. — Ga. L. 2005, p. 20, § 1/HB 170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB 170, not codified by the General Assembly, provides that the 2005 amendment applies to all trials which commence on or after July 1, 2005.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For article, "Criminal Discovery: Disclosure of Police Internal Affairs Division Documents and Police Personnel Files," see 29 Ga. St. B.J. 34 (1992). For article, "Criminal Discovery: Disclosure of Police Internal Affairs Division Documents and Police Personnel Files," see 29 Ga. St. B.J. 34 (1992). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005); 58 Mercer L. Rev. 111 (2006). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978). For note, "The Criminal Discovery Dilemma in Georgia," see 34 Mercer L. Rev. 1113 (1983). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

JUDICIAL DECISIONS

Analysis

General Consideration
State's Duty to Comply
Time of Receipt of Statements
Time of Making Statement

Scientific Reports
Timely Request for Scientific Reports
Request by Defense for Scientific Reports
State's Duty to Comply with Request
Waiver

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 27-313, former Code Sections 17-7-210 and 17-7-211, decided prior to their repeal by Ga. L. 1994, p. 1895, § 1, are included in the annotations for this Code section.

Constitutionality. — Discovery requirements of O.C.G.A. § 17-16-4, relating to the presentence hearing, did not violate a defendant's right to effective assistance of counsel; counsel may freely investigate for mitigating evidence, knowing that the identity of any potentially harmful witness resulting from that investigation need only be produced to the state in reciprocal discovery should the defense decide to call that witness at the presentence hearing. Muhammad v. State, 282 Ga. 247, 647 S.E.2d 560 (2007).

Requirement of O.C.G.A. § 17-16-4, part of the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., that a defendant disclose any mitigating evidence the defendant intended to introduce in the presentence hearing did not violate the defendant's privilege against self-incrimination; statements of witnesses a defendant intends to call to testify are not personal to the defendant, and although the disclosure of the list of witnesses a defendant intends to call is personal to the defendant, a trial court can exercise the court's discretion to specify the time, place, and manner of making the discovery and to enter such orders as seem just under the circumstances when self-incrimination concerns arise, such as a protective order or a continuance pending the completion of the guilt/innocence phase of the trial. Muhammad v. State, 282 Ga. 247, 647 S.E.2d 560 (2007).

Defendant, who was charged with child pornography, did not suffer a due process violation due to the U.S. Attorney's office not responding to letters seeking assurance that the defendant's expert would not be prosecuted under federal pornography laws for examining the defendant's computer hard drive; the trial court ordered that the expert be provided with a copy of the defendant's computer hard drive, and the trial court's order requiring written assurances from United States Attorneys of nonprosecution of the expert for any potential violations of federal child pornography statutes exceeded the trial court's authority. The trial court's finding that O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional as applied to the defendant because the statute deprived the defendant of due process rights was not challenged by the state on appeal. Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

Since a trial court found that there was no bad faith on the part of the state based on the failure of an expert's report to address testing done on a second bullet hole in the victim's shirt, exclusion of the evidence was not a viable option so trial counsel's decision to pursue a mistrial instead was reasonable. Bales v. State, 277 Ga. 713, 594 S.E.2d 644 (2004).

Trial court did not abuse the court's discretion in denying the defendant's claim that the destruction of blood samples constituted a failure by the state to comply with the reciprocal discovery requirements pursuant to O.C.G.A. § 17-16-4 since the defendant failed to show that the state acted in bad faith. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

Protection of accused. — This section protected an accused from introduction at trial of incriminating or inculpatory statements made by the accused while in custody unless the accused has been furnished with written copies of these statements prior to trial. Wallin v. State, 248 Ga. 29, 279 S.E.2d 687 (1981) (decided under former Code 1933, § 27-313).

Former O.C.G.A. § 17-7-210 only applied to statements given by a defendant. The former statute did not apply to

General Consideration (Cont'd)

any comment which a witness may make with regard to the statement. Simpson v. State, 181 Ga. App. 558, 353 S.E.2d 55 (1987) (decided under former O.C.G.A. § 17-7-210).

Defendant had no standing to assert and rely on a codefendant's rights under former O.C.G.A. § 17-7-210 regarding the admission into evidence of a statement made by the codefendant. Rogers v. State, 211 Ga. App. 67, 438 S.E.2d 140 (1993) (decided under former O.C.G.A. § 17-7-210).

Applicability to victim's statements. — Defendant, charged with child molestation involving the defendant's stepdaughter, was not denied a right to a thorough and sifting cross-examination by the trial court's denial of the defendant's motion for production of the victim's statements. Defendant did not prove error by showing that the defendant actually asked for the statement as required by former O.C.G.A. § 17-7-210. Standridge v. State, 196 Ga. App. 697, 396 S.E.2d 804 (1990) (decided under former O.C.G.A. § 17-7-210).

Section not applicable to unindicted individual. — O.C.G.A. § 17-16-4 did not apply to authorize the grant of a request for a stay of grand jury proceedings until such time as the state provided the movant with copies of all statements from witnesses. Sauls v. State, 220 Ga. App. 115, 468 S.E.2d 771 (1996).

Application to felony cases. — O.C.G.A. § 17-16-4 applies to felony cases; in misdemeanor cases, the state is only obligated to comply with the discovery requirements set forth in O.C.G.A. § 17-16-20 et seq. Bowen v. State, 237 Ga. App. 597, 516 S.E.2d 311 (1999).

Discovery provisions applicable to misdemeanor prosecutions are not the same as those applicable to felony prosecutions, and discovery requirements applicable to misdemeanors did not require the state to produce the items that the defendant claimed should have been produced, including police reports, copies of 9-1-1 recordings, crime scene photographs, the victim's criminal history, witness statements, and repair records for the property the defendant damaged; the defendant admitted that the state provided the defendant with a copy of the accusation, as required by O.C.G.A. § 17-16-21, as well as the state's witness list and a copy of the defendant's criminal record so under the circumstances the state complied with the state's discovery obligations. Brooks v. State, 267 Ga. App. 663, 600 S.E.2d 737 (2004).

Purpose. — Intent of former O.C.G.A. § 17-7-210 is to preclude the state from ignoring the discovery rights of an accused and to provide a penalty if the state ignores the state's responsibility. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985); Dickey v. State, 179 Ga. App. 383, 346 S.E.2d 864 (1986) (decided under former O.C.G.A. § 17-7-210).

Purpose of former O.C.G.A. § 17-7-210 is to inform the defendant in writing of all relevant and material portions of the defendant's own statement that the state may rely upon to the defendant's disadvantage. Dickey v. State, 179 Ga. App. 383, 346 S.E.2d 864 (1986); Lands v. State, 189 Ga. App. 577, 376 S.E.2d 701 (1988) (decided under former O.C.G.A. § 17-7-210).

Purpose of O.C.G.A. § 17-16-4 is not to insist upon a technical requirement for its own sake, but to ensure sufficient notice to defend against charges. Arnold v. State, 236 Ga. App. 380, 511 S.E.2d 219, aff'd, 271 Ga. 780, 523 S.E.2d 14 (1999).

O.C.G.A. § 17-16-4 requires only that the state make a defendant's statements available for inspection, copying, or photographing, not that such statements be served upon the defendant. Guild v. State, 234 Ga. App. 862, 508 S.E.2d 231 (1998).

Written notice required. — If a defendant fails to provide written notice to the prosecuting attorney that the defendant elects to have O.C.G.A. § 17-16-2(a) apply to the defendant's case, the discovery disclosure provisions of subsection (a) of O.C.G.A. § 17-16-4 do not apply. Miller v. State, 235 Ga. App. 724, 510 S.E.2d 560 (1999), appeal dismissed, 264 Ga. App. 801, 592 S.E.2d 450 (2003); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000).

Because the state's written notice sufficiently notified the defendant of the state's

intent to seek a recidivist sentence under O.C.G.A. § 17-10-7 upon conviction of felony obstruction of an officer, and during plea negotiations the state again referenced the defendant's prior criminal history and reiterated the state would seek recidivist punishment, no error occurred in imposing the sentence based on lack of notice. Evans v. State, 290 Ga. App. 746, 660 S.E.2d 841 (2008).

Untimely disclosure. — Although the state did not provide the defendant with records showing the defendant previously threatened to kill the victim in a timely fashion, the defendant was not prejudiced as the defendant was aware that the state intended to present such evidence based on other documents provided earlier. Thompson v. State, 295 Ga. 96, 757 S.E.2d 846 (2014).

Presentence hearing discovery misconduct. — Trial court did not err in denying the defendant's motion for a new trial based on the defendant's trial counsel failing to object to the state failing to provide notice of the state's intent to use a prior conviction in aggravation of sentencing because the defendant could not show that the outcome of sentencing would have been different. Soler v. State, 354 Ga. App. 93, 840 S.E.2d 169 (2020).

Exclusion of evidence error when no bad faith shown. — In an aggravated assault case, because there was no showing that the defense's discovery violation in failing to produce jail medical records showing the defendant's injuries were in bad faith as required by O.C.G.A. § 17-16-6, the trial court erred in excluding the records, and the error was not harmless given the defendant's testimony that the shooting occurred during a physical confrontation with the defendant's boyfriend and the prosecutor's emphasis on the lack of evidence of the defendant's injuries. Phillips v. State, 347 Ga. App. 147, 817 S.E.2d 711 (2018).

Intent to use defendant's prior conviction at sentencing. — Because the trial court excluded the defendant's prior conviction based upon a belief that the court had no discretion based on the state's failure to give notice of the state's intent to use the prior conviction as required by O.C.G.A. § 17-16-4(a)(5), the trial court could consider the court's options under O.C.G.A. § 17-16-6 before re-sentencing. Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

Notice of intent sufficient for recidivist punishment. — Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7(c) because the prosecutor properly served under O.C.G.A. § 17-16-4(a)(5) the state's notice of intent to seek recidivist punishment and introduce evidence of the defendant's prior convictions on defense counsel on the first day of trial; any defects or untimeliness in the notice were waived as certified copies of the convictions were admitted without objection. Howard v. State, 297 Ga. App. 316, 677 S.E.2d 375 (2009).

State timely filed the state's notice of intent to use the defendant's prior convictions in aggravation of punishment pursuant to O.C.G.A. § 17-10-7(c) because the state provided the notice four days before trial; the state served and filed the state's notice of intent on March 20, 2008, and trial commenced on March 24. Shindorf v. State, 303 Ga. App. 553, 694 S.E.2d 177 (2010).

Trial counsel did not err in failing to object to the state's notice of the state's intent to seek recidivist sentencing under O.C.G.A. § 17-16-4(a)(5) because although the state did not give notice ten days before trial, the state did give the defendant notice before the beginning of the trial; trial counsel was aware of the defendant's criminal record, and the defendant made no showing that the prior convictions could have been rebutted or explained had counsel objected. Ross v. State, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

Because the evidence showed that the state notified the defendant of the state's continuing intention to use the defendant's prior convictions in aggravation of punishment at the second trial, and the defendant was aware of that intention, the defendant's motion for new trial on the ground that the state had failed to provide new written notices of recidivism to the defendant after the first trial was denied. Thomas v. State, 324 Ga. App. 898, 752 S.E.2d 67 (2013).

Defendant had sufficient notice of the

General Consideration (Cont'd)

state's decision to seek recidivist punishment when the state provided such notice several months before trial and attacked the defendant's Georgia Crime Information Center report. Barstad v. State, 329 Ga. App. 214, 764 S.E.2d 453 (2014).

Trial court did not err in finding that the state provided sufficient notice of the state's intent to seek recidivist punishment because the state first provided the defendant with notice of the state's intent to seek recidivist punishment in January 2014; and the amended notice from June 2016 was provided well before the February 10, 2017 hearing, at which the defendant ultimately pled guilty, and the state provided specific details regarding the defendant's previous three convictions that the state intended to use in aggravation of punishment, including the fact that those offenses were considered felonies in their respective jurisdictions and would similarly be considered felonies in Georgia. Nordahl v. State, 344 Ga. App. 686, 811 S.E.2d 465 (2018), aff'd, 306 Ga. 15, 829 S.E.2d 99 (2019).

Failure to obtain recidivist notice of accomplice. — Defendant's counsel was not ineffective for failing to obtain a copy of the recidivist notice filed against an accomplice because a recidivist notice indicated only possible sentences, and because the trial court ruled that no inquiry into such possible penalties was allowed in the accomplice's cross-examination, there was no likelihood of prejudice to the defendant as a result of counsel's failure to obtain the notice. Jackson v. State, 294 Ga. 34, 751 S.E.2d 63 (2013).

Trial court erred in admitting testimony. — Trial court erred in admitting in violation of subsection (c) of former O.C.G.A. § 17-7-210 the testimony of the arresting officer that the defendant had responded, when questioned about the key found in the defendant's pocket at the time of arrest, since no other evidence was presented to show how the officer knew the key fit the lock on the front door of the house. Because the statement at issue in this case could be interpreted as an admission of possession of the premises, the court was unable to say with reasonable certainty that no harm resulted from the state's failure to obey the statutory requirements. McKenny v. State, 204 Ga. App. 411, 419 S.E.2d 731 (1992) (decided under former O.C.G.A. § 17-7-210).

It was not error to admit defendant's statements into evidence since the defendant was not furnished a copy of the statement, as requested, prior to trial because the defendant's statements were neither incriminating or inculpatory. Furlow v. State, 172 Ga. App. 185, 322 S.E.2d 317 (1984); Holland v. State, 190 Ga. App. 169, 378 S.E.2d 513 (1989) (decided under former O.C.G.A. § 17-7-210).

Since the state timely provided the defendant with written copies of two tape-recorded statements the defendant gave to police and allowed the defendant's attorney to listen to the tapes before trial, the trial court did not err in admitting the statements into evidence. Gadson v. State, 264 Ga. 280, 444 S.E.2d 305 (1994) (decided under former O.C.G.A. § 17-7-210).

If the oral statement given to police by the defendant is not per se inculpatory or incriminating, the failure of the state to divulge the statement to the defendant prior to trial does not constitute reversible error. Dawson v. State, 203 Ga. App. 146, 416 S.E.2d 125, cert. denied, 203 Ga. App. 905, 416 S.E.2d 125 (1992) (decided under former O.C.G.A. § 17-7-210).

Defendant's statement properly admitted. — Defendant's statement that the defendant used but did not sell drugs was merely exculpatory or a mitigating statement not requiring additional disclosure by the state since the state had already disclosed the defendant's ownership of the seized drugs. Jackson v. State, 207 Ga. App. 190, 427 S.E.2d 566 (1993) (decided under former O.C.G.A. § 17-7-210).

Defendant voluntarily initiating issue of defendant's statements. — After the defendant introduced the issue of the defendant's statements in the defendant's direct testimony, cross-examination on that issue was allowed, even if the cross-examination included references to evidence the state could not introduce in the state's case-in-chief or rebuttal. Keller v. State, 208 Ga. App. 589, 431 S.E.2d 411 (1993) (decided under former O.C.G.A. § 17-7-210).

Pleading. — To constitute a request for discovery under former Code 1933, § 27-1302, a pleading must either make specific reference to that Code section or make it clear that written copies of the defendant's own statements are to be furnished to the defense at least ten days prior to trial. McCarty v. State, 249 Ga. 618, 292 S.E.2d 700 (1982) (decided under former Code 1933, § 27-1302). Satterfield v. State, 256 Ga. 593, 351 S.E.2d 625 (1987); Delay v. State, 213 Ga. App. 199, 444 S.E.2d 140 (1994).

Although the defendant's "motion for discovery" did not make reference to the applicable statute and did not make it clear that the statements sought by the defendant were to be furnished at least ten days prior to trial, the state could not complain on appeal that the motion was deficient after having treated the motion as a request. Ludy v. State, 177 Ga. App. 767, 341 S.E.2d 224 (1986) (decided under former §§ 17-7-210 and 17-7-211).

Specific written request required. — To constitute a valid demand for discovery under former O.C.G.A. § 17-7-210, a specific written request must be made. Carter v. State, 181 Ga. App. 117, 351 S.E.2d 516 (1986); Matthews v. State, 221 Ga. App. 129, 470 S.E.2d 518 (1996) (decided under former O.C.G.A. § 17-7-210).

Notice to produce under former O.C.G.A. § 24-10-26 (see O.C.G.A. § 24-13-27) cannot be used as a discovery tool to circumvent discovery reciprocity under the discovery act. Farmer v. State, 222 Ga. App. 506, 474 S.E.2d 711 (1996).

Defendant's request that the officers suspend the officers' consensual search of the defendant's car was not a statement covered by subsection (a) of former O.C.G.A. § 17-7-210 since the statement was not given by the defendant while in police custody and was, therefore, properly admitted into evidence. Merritt v. State, 165 Ga. App. 597, 302 S.E.2d 136 (1983) (decided under former O.C.G.A. § 17-7-210).

Statements of codefendant. — Defendant was not entitled, under former O.C.G.A. § 17-7-210, to statements made by a codefendant. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983) (decided under former O.C.G.A. § 17-7-210).

Racial epithets uttered by defendant after the defendant was detained by a store security guard for shoplifting were not incriminating or inculpatory statements that the state was required to furnish to the defendant under former O.C.G.A. § 17-7-210, even if the defendant's detention by the guard constituted "police custody" under the statute. Williamson v. State, 188 Ga. App. 307, 372 S.E.2d 685 (1988) (decided under former O.C.G.A. § 17-7-210).

Written waiver statement was not within the purview of former § 17-7-211. Dean v. State, 168 Ga. App. 172, 308 S.E.2d 434 (1983) (decided under former O.C.G.A. § 17-7-211).

Those parts of oral statements required to be furnished upon request under this section must be relevant, material, and of an inculpatory cast. Howell v. State, 163 Ga. App. 445, 295 S.E.2d 329 (1982) (decided under former Code 1933, § 27-1302).

Tape recordings of drug transaction. — Tape recording of a drug transaction was not discoverable pursuant to former O.C.G.A. § 24-10-26 (see now O.C.G.A. § 24-13-27) nor under former O.C.G.A. § 17-7-210, since the recording was not of any taped statement given by the defendant while in police custody, nor under former O.C.G.A. § 17-7-211 since the tape recording did not constitute a written scientific report. Weldon v. State, 204 Ga. App. 221, 419 S.E.2d 59 (1992) (decided under former O.C.G.A. §§ 17-7-210 and 17-7-211).

Section only applies to audio or video tape. — In a trial for driving under the influence of alcohol, there was no error in the trial court's ruling which allowed the playing of a video tape recording (without sound) of the defendant while the defendant was being given a breath test for alcohol following the defendant's arrest, although the defendant timely filed a motion for discovery of the defendant's in-custody statements pursuant to former O.C.G.A. § 17-7-210 and the state failed to respond to this request, since, for discovery purposes, only the audio portion of a video tape recording was subject to the provisions of that section as it was written. Looney v. State, 180 Ga. App. 693, 350

General Consideration (Cont'd)

S.E.2d 29 (1986); Orr v. State, 209 Ga. App. 832, 434 S.E.2d 723 (1993) (decided under former O.C.G.A. § 17-7-210).

Failure to prove tape existed of entire witness interview. — Trial court did not abuse the court's discretion finding no reciprocal discovery violation on the part of the state as to a witness interview because there was no evidence that a recording of the entire interview ever existed as the record showed that the state provided the defendant with a recording of a brief portion of the witness's interview and represented to the trial court that no other portion of that interview was recorded, apparently due to an equipment malfunction. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162 (2019).

Standardized form containing defendant's physical characteristics, recorded by police following the defendant's arrest, was a "written statement" within the meaning of subsection (a) of former O.C.G.A. § 17-7-210. Gilbert v. State, 193 Ga. App. 283, 388 S.E.2d 18 (1989) (decided under former O.C.G.A. § 17-7-210).

Accessibility to prosecutor's files. — Neither a generalized notice to produce statements seized from a defendant nor a demand for scientific reports would authorize the defendant to pursue at will the prosecutor's files to ascertain if there are any witness statements which might refer to the defendant or admissions made by the defendant to that witness. Griffin v. State, 168 Ga. App. 696, 310 S.E.2d 278 (1983) (decided under former O.C.G.A. § 17-7-211).

There is no Georgia procedure requiring the district attorney to open the district attorney's files to the accused, nor is the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the accused. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985) (decided under former O.C.G.A. § 17-7-210).

Accessibility to defendant's files. — Because the defendant, who agreed to discovery under O.C.G.A. § 17-16-2, was supplied by the police with a number of police reports, including the defendant's in-custody statement, the defendant was not prejudiced by the court's requirement that the defendant provide the materials to the state. McWhorter v. State, 229 Ga. App. 875, 495 S.E.2d 139 (1997).

Defense duty to comply. — Defense counsel was not required to provide the prosecution with a summary of an expert witness's opinion. Beck v. State, 250 Ga. App. 654, 551 S.E.2d 68 (2001).

Admission of statement not supplied to counsel was harmless error. — Admission of the defendant's statement concerning the defendant's telephone number, which statement was not supplied to counsel pursuant to a timely request, was harmless error since the statement was merely cumulative of other, properly admitted, statements concerning the defendant's residence address. Christopher v. State, 190 Ga. App. 393, 379 S.E.2d 205 (1989) (decided under former O.C.G.A. § 17-7-210).

Name of person to whom statement made. — Former § 17-7-210 did not require the state to inform a defendant of the name of the person to whom the defendant made a statement while in custody and a failure to do so does not render the statement inadmissible. Roman v. State, 185 Ga. App. 32, 363 S.E.2d 329 (1987) (decided under former O.C.G.A. § 17-7-210).

Inquiry into making or failure to make statement. — Although an inquiry as to why a certain statement was or was not made is not an impermissible comment on a defendant's right to remain silent, since the defendant in fact did not remain silent, a different situation may arise in a case where the defendant did not remain silent but the defendant's statement is nevertheless inadmissible for any purpose for failure of the state to produce under former O.C.G.A. § 17-7-210. In such a case, generally, an inquiry into the making of or failure to make a certain statement runs a grave risk of enticing or tempting the appellant to confess the appellant's own statement, thereby getting in the back door what the state could not get in through the front. The question of error will depend upon the circumstances of the case. Bryan v. State, 168 Ga. App. 711, 310 S.E.2d 533 (1983)

(decided under former O.C.G.A. § 17-7-210).

Excludable statement may enter record as response to question by defendant's counsel. — Sanction for the state's failure to comply with a timely request for discovery of a defendant's custodial statement(s) is the exclusion and suppression of the statement from the state's use in the state's case-in-chief or in rebuttal. But if the statement enters the record as a response to a question posed to the arresting officer by the defendant's counsel on cross-examination, the trial court does not err in denying a motion for mistrial on this ground. Henson v. State, 168 Ga. App. 210, 308 S.E.2d 555 (1983) (decided under former O.C.G.A. § 17-7-211).

Incriminating effect of statement. — No reversible error occurred when during the defendant's interrogation by police the defendant denied being present in the vicinity of the crime or knowing the victim, but testified differently at trial; consequently, the state could not have anticipated the possibly incriminating effect of the statement at issue at the time the state furnished the summary. Dawson v. State, 203 Ga. App. 146, 416 S.E.2d 125, cert. denied, 203 Ga. App. 905, 416 S.E.2d 125 (1992) (decided under former O.C.G.A. § 17-7-210).

Failure to deliver statement. — If the prosecution fails to deliver a statement made to investigating police officers prior to trial, the statement must be excluded or suppressed even though the prosecution was not fully aware of the statement. Ludy v. State, 177 Ga. App. 767, 341 S.E.2d 224 (1986) (decided under former O.C.G.A. § 17-7-210).

Mistrial properly denied. — Motion for mistrial, based on failure to comply with former O.C.G.A. § 17-7-210, was properly denied since the trial court correctly instructed the jury to disregard the offending portion of a witness' testimony concerning the statements made to the witness by the defendant while in custody. McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988) (decided under former O.C.G.A. § 17-7-210); Hanson v. State, 229 Ga. App. 205, 493 S.E.2d 605 (1997).

Sanction of prohibiting the introduction of evidence improperly withheld from the defense applies only if there has been a showing of prejudice to the defense and bad faith by the state. Guild v. State, 236 Ga. App. 444, 512 S.E.2d 343 (1999); Reece v. State, 250 Ga. App. 1, 550 S.E.2d 414 (2001).

As the state did not attempt to impeach the defendant with the defendant's custodial statement that was first disclosed during the charge conference, the defendant was not harmed by the state's belated disclosure of the statement and the trial court did not err in denying the defendant's motion for mistrial based on the state's untimely disclosure of the defendant's custodial statement. Burton v. State, 330 Ga. App. 503, 767 S.E.2d 510 (2014).

Trial court did not err in denying the defendant's motion for a mistrial based on the prosecutor's misconduct in failing to disclose the statement the defendant made to the first investigator until eliciting testimony about the statement from the first investigator at trial because the undisclosed statement that the defendant made to the first investigator was the same in substance as the defendant's longer, more detailed, and audio-recorded statement to the second investigator, which was properly disclosed to the defendant and was played for the jury at trial; and trial counsel admitted that the first investigator's testimony did not provide any information from the defendant that had not already been disclosed in discovery. Prince v. State, 295 Ga. 788, 764 S.E.2d 362 (2014).

No bad faith. — Theft by shoplifting conviction was upheld on appeal despite the defendant's claim that the state violated the reciprocal discovery requirements of the Georgia Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., as the defendant conceded at trial that the state did not act in bad faith, and failed to request a continuance, but instead, communicated a readiness for trial to both the court and the prosecutor. Brown v. State, 281 Ga. App. 557, 636 S.E.2d 717 (2006).

Prosecutor did not commit discovery misconduct by delaying service of the gang-related evidence that the prosecutor

General Consideration (Cont'd)

received on the Friday before trial for six hours because the defendant did not show that the prosecutor acted in bad faith or that the defense was demonstrably prejudiced, much less that any violation of O.C.G.A. § 17-16-4 rose to the level of a violation of constitutional due process. Cushenberry v. State, 300 Ga. 190, 794 S.E.2d 165 (2016).

Exclusion of evidence absent finding of bad faith held error. — In the absence of bad faith on the part of the state, as well as prejudice to the defendant, the trial court erred in excluding from evidence a videotape and photographs of child pornographic images taken from the defendant's computer as a sanction for the state's failure to comply with a court-ordered discovery deadline. State v. Jones, 283 Ga. App. 539, 642 S.E.2d 183 (2007).

Determining whether defendant's statement was improperly admitted. — When determining whether testimony concerning the defendant's inculpatory in-custody statement was improperly admitted, the appellate court must consider the statement in the context of the entire record. Christopher v. State, 190 Ga. App. 393, 379 S.E.2d 205 (1989) (decided under former O.C.G.A. § 17-7-210).

When reversal required. — Court of Appeals must reverse if the court is unable to say with reasonable certainty that no harm resulted from the state's failure to obey the requirements of former O.C.G.A. § 17-7-210. Ludy v. State, 177 Ga. App. 767, 341 S.E.2d 224 (1986) (decided under former O.C.G.A. § 17-7-210).

Failure to provide statement harmless error. — If the evidence of the defendant's guilt, exclusive of the custodial statement, is overwhelming, the state's failure to provide the defendant with a complete in-custody statement was harmless error. Dickey v. State, 179 Ga. App. 383, 346 S.E.2d 864 (1986); Cook v. State, 199 Ga. App. 14, 404 S.E.2d 128, cert. denied, 199 Ga. App. 905, 404 S.E.2d 128 (1991) (decided under former O.C.G.A. § 17-7-210).

Even if a discovery violation occurred in the defendant's criminal trial pursuant to O.C.G.A. § 17-16-4(a)(1), as the defendant failed to show any harm by the state's alleged failure to timely produce recordings of jail telephone conversations by a codefendant, there was no reversible error; the state did not seek to introduce evidence of the recordings and the defendant's counsel received copies during the trial. Taylor v. State, 296 Ga. App. 212, 674 S.E.2d 81 (2009).

Juror information. — State was not obliged to provide the defendant with the criminal histories of prospective jurors since: (1) such information could be disclosed only with the jurors' consent or fingerprints, under O.C.G.A. § 35-3-34(a)(1)(A); and (2) it was discoverable only if the state planned to use it in the state's case in chief or in rebuttal, and the sole use the state had for this information was to disqualify venire members. Williams v. State, 255 Ga. App. 177, 564 S.E.2d 759 (2002).

Indictment and guilty plea. — In introducing evidence that one of the defendant's parents was indicted for extortion and other offenses and pled guilty to obstruction and false statement, the state did not violate O.C.G.A. § 17-16-4(a)(3); the indictment and guilty plea were public records that were accessible to all, including the defendant. Gonzales v. State, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. 2008).

No ineffective assistance of counsel for failing to pursue fingerprint expert. — Defendant failed to show that the defendant's trial counsel's failure to obtain a continuance to challenge fingerprint evidence was the result of deficient performance because the defendant could not show prejudice resulting from the lack of opportunity for expert review of the fingerprint report when no expert testified at the motion for new trial hearing, and without that testimony, the court of appeals could not evaluate whether there was a reasonable probability that the outcome of the proceeding could have been different; the trial court noted in the new trial hearing that counsel's strategy was to contest the occurrence of any kidnapping offense and concede the lesser crimes, and further analyzing the finger-

print evidence was not material to the trial strategy. Thornton v. State, 305 Ga. App. 692, 700 S.E.2d 669 (2010).

Ineffective assistance of counsel for failing to challenge expert's testimony. — Defendant failed to show that the defendant was prejudiced by trial counsel's failure to seek the exclusion of an expert's testimony as a sanction for the state's violation of O.C.G.A. § 17-16-4 because the trial court did not abuse the court's discretion by excluding, as a remedy, any specific testimony about the three victims. Love v. State, 349 Ga. App. 741, 824 S.E.2d 745 (2019).

Ineffective assistance of counsel. — Counsel's own statement in a written motion for a continuance that, without the continuance, counsel's representation would be ineffective did not equate to a finding that counsel was ineffective at trial. Sims v. State, 278 Ga. 587, 604 S.E.2d 799 (2004).

When defense counsel did not provide the prosecutor with timely notice of the defendant's expert witness or timely provide a copy of the witness's report, as required by O.C.G.A. §§ 17-16-4(b)(2), 17-16-7, and 17-16-8(a), and the witness was excluded, the defendant did not receive ineffective assistance of counsel; while counsel was deficient, it was not shown that the defendant was prejudiced as another expert testified to essentially the same facts and conclusions as the excluded witness, and referred to the excluded witness's findings, so the excluded witness's testimony would have been cumulative, and it was not shown that the outcome of the defendant's trial would have differed had counsel's performance not been deficient. Mann v. State, 276 Ga. App. 720, 624 S.E.2d 208 (2005).

Because any error in the trial court's exclusion of the evidence of the male victim's prior convictions was harmless, the defendant's trial counsel could not have been found ineffective due to an alleged failure to comply with reciprocal discovery. Skaggs-Ferrell v. State, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Defense counsel was not ineffective for failing to object to the state's introduction of evidence in aggravation of punishment on the ground that the notice was untimely and that the state had failed to list specifically what convictions were to be introduced. By filing notice five days before trial, the state had given timely notice under O.C.G.A. § 17-16-4, and the state, counsel, and the trial court had discussed the prior convictions in detail at two pretrial hearings more than 60 days before trial. McClam v. State, 291 Ga. App. 697, 662 S.E.2d 790 (2008), cert. denied, No. S08C1635, 2008 Ga. LEXIS 798 (Ga. 2008).

Ineffective assistance of counsel not established by sequestration issue. — Trial counsel was not deficient in failing to properly invoke sequestration because the trial court did not abuse the court's discretion in allowing the state's expert to testify in rebuttal based in part on their review of the recorded testimony of the appellant's expert; accordingly, even if the appellant's counsel had invoked the rule of sequestration earlier in the trial, the court would not have abused the court's discretion in excepting the state's expert from the rule. Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

Cited in Hammitt v. State, 225 Ga. App. 21, 482 S.E.2d 437 (1997); Marshall v. State, 230 Ga. App. 116, 495 S.E.2d 585 (1998); Johnson v. State, 247 Ga. App. 660, 544 S.E.2d 496 (2001); Hill v. Duncan, 249 Ga. App. 342, 548 S.E.2d 83 (2001); Brown v. State, 268 Ga. App. 24, 601 S.E.2d 405 (2004); Ellis v. State, 279 Ga. App. 902, 633 S.E.2d 64 (2006); Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007); Brooks v. State, 286 Ga. App. 209, 648 S.E.2d 724 (2007); Beck v. State, 292 Ga. App. 472, 665 S.E.2d 701 (2008); Taylor v. State, 295 Ga. App. 689, 673 S.E.2d 7 (2009); Wright v. State, 285 Ga. 428, 677 S.E.2d 82 (2009); Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011); State v. Thompson, 334 Ga. App. 692, 780 S.E.2d 67 (2015).

State's Duty to Comply

Burden of compliance with requirements of this section was on the state. Tanner v. State, 160 Ga. App. 266, 287 S.E.2d 268 (1981) (decided under former Code 1933, § 27-1302).

Upon proper application by a defendant, the burden of compliance with the requirements of this section is on the

State's Duty to Comply (Cont'd)

state, otherwise the statute would be "'a toothless tiger,' 'a fish that cannot swim,' indeed, a law that it is not necessary to enforce." Garner v. State, 159 Ga. App. 244, 282 S.E.2d 909 (1981) (decided under former Code 1933, § 27-1302).

In order for statements to be discoverable there must be sufficient notice to the state that discovery is being sought. This consists of either a request by the defendant specifically referring to former O.C.G.A. § 17-7-210 or a request that statements must be furnished to the defendant ten days prior to trial. Huguley v. State, 253 Ga. 709, 324 S.E.2d 729 (1985) (decided under former O.C.G.A. § 17-7-210).

State excused from complying with notice period. — State was excused from complying with the ten day notice period in subsection (a) of former O.C.G.A. § 17-7-210 since the record clearly established that the statement in issue was made after the defendant's request was filed and only six days prior to trial. Rife v. State, 203 Ga. App. 353, 416 S.E.2d 864 (1992) (decided under former O.C.G.A. § 17-7-210).

Because the state did not gain possession of letters that were entered into evidence until after the beginning of the trial and because the letters were not relevant until the defendant testified, the state did not violate the criminal discovery statute by failing to give prior notice of the letters. Boykin v. State, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

Defendant was not denied effective assistance of counsel at a trial for rape and aggravated sodomy because there was no basis to request a continuance or disallowance of a colposcope printout, which showed the victim's anal bruising, based on the state's failure to produce the printout before trial because: (1) the defendant already had the assistant's examination report, which mentioned the picture; (2) the defendant's counsel was permitted to interview the assistant before the assistant's testimony; (3) the day of the trial was the first time that the prosecutor saw the picture; (4) there was no bad faith by the state; and (5) the printout was cumulative of other testimony. McMorris v. State, 263 Ga. App. 630, 588 S.E.2d 817 (2003).

General request for discovery directed to any and all evidence in the possession or control of the state which might be favorable to the defendant was insufficient to invoke the provisions of former O.C.G.A. § 17-7-210. Dinkins v. State, 202 Ga. App. 403, 414 S.E.2d 545 (1992) (decided under former O.C.G.A. § 17-7-210).

Verbatim account not required. — Even if the defendant's statement had been custodial, a "verbatim account" was not required since counsel was given a written summary of the statement prior to trial which included "all relevant and material portions of the defendant's statement." Johnson v. State, 177 Ga. App. 705, 340 S.E.2d 662 (1986) (decided under former O.C.G.A. § 17-7-210).

Inaccurate transcript deemed sufficiently complete. — Although a 24-page transcript of the defendant's pretrial statement originally furnished the defendant contained some inaccuracies (which were corrected in a supplemental transcript furnished the defendant during the trial) it was sufficiently complete to satisfy the requirements of former O.C.G.A. § 17-7-210. Todd v. State, 261 Ga. 766, 410 S.E.2d 725 (1991), cert. denied, 506 U.S. 838, 113 S. Ct. 117, 121 L. Ed. 2d 73, cert. denied, 506 U.S. 838, 113 S. Ct. 117, 121 L. Ed. 2d 73 (1992) (decided under former O.C.G.A. § 17-7-210).

Summary of defendant's in-custody statement which was furnished by the state prior to trial in response to the defendant's request for discovery made pursuant to former O.C.G.A. § 17-7-210 was sufficiently complete to satisfy the requirements of that statute. Myers v. State, 196 Ga. App. 104, 395 S.E.2d 372 (1990).

Service of defendant's statements not required. — Language of O.C.G.A. § 17-6-4(a)(1) requires only that the state make a defendant's statements available for inspection, copying, or photographing, not that such statements be served upon the defendant. Lawson v. State, 224 Ga. App. 645, 481 S.E.2d 856 (1997).

Harm to defendant. — Demand made pursuant to this section entitled the de-

fendant to a written statement of all relevant and material portions of any statement made by the defendant while in police custody, including spontaneous statements made at the time of arrest which were not reduced to writings, and since the court was unable to say with reasonable certainty that no harm resulted from the state's failure to provide such statements to the defendant, reversal of the defendant's conviction was required. Reed v. State, 163 Ga. App. 364, 295 S.E.2d 108 (1982) (decided under former Code 1933, § 27-1302).

Since the defendant made no showing that the defendant was prejudiced as a result of the state's failure to make a custodial statement available to the defendant prior to trial or that the state acted in bad faith in failing to list a witness, the trial court did not abuse the court's discretion in permitting the witness to testify. Jones v. State, 243 Ga. App. 351, 532 S.E.2d 120 (2000).

State did not violate O.C.G.A. § 17-16-1 when the state's witness began to testify about a police report as such was held to be newly-discovered evidence and the defendant made no showing of bad faith and prejudice. Williams v. State, 261 Ga. App. 410, 582 S.E.2d 556 (2003).

Trial court did not abuse the court's discretion in admitting two police-made videotapes of the pursuit of the stolen vehicle, even though the tape was not provided to the defense ten days prior to trial, as the tape was provided to the defendant prior to the defendant's trial and the defendant expressly stated that no further time was required to review the tapes or to interview the officers who made the tapes. McCullough v. State, 268 Ga. App. 445, 602 S.E.2d 181 (2004).

Defendant's trial counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to move for a mistrial after the prosecutor, in violation of O.C.G.A. § 17-16-4(a)(1), failed to notify the trial counsel of the defendant's oral admission made in custody and then elicited testimony from the officer to whom the admission was made indicating that the officer testified about the admission at a pretrial hearing when the officer, in fact, had not so testified; the state acted in bad faith as the prosecutor intentionally elicited testimony about the admission and knew about the admission long before trial, the defense counsel was prejudiced by the misconduct as, had the misconduct not occurred, the defense counsel would have understood the importance of obtaining the officer's pretrial testimony, and the defendant was prejudiced by counsel's failure as the admission was central to the state's case and was not cumulative of other evidence. Johnson v. State, 281 Ga. App. 455, 636 S.E.2d 178 (2006).

While the state did not deliver a copy of a DNA report to defense counsel until five days prior to trial, despite the ten-day requirement in O.C.G.A. § 17-16-4(a)(4), admission of the DNA evidence was not an abuse of discretion when the defendant did not articulate what prejudice the defendant suffered that would have been cured by having the report five days earlier. Leger v. State, 291 Ga. 584, 732 S.E.2d 53 (2012).

Murder defendant's claim that the defendant was prejudiced by being unable to prepare for the damaging evidence of a booking photograph showing the defendant wearing clothes that were later shown to have the deceased's blood on them was rejected because the photograph was cumulative of other evidence, including testimony regarding the defendant's clothing and the clothing itself. Carson v. State, 843 S.E.2d 421, No. S20A0288, 2020 Ga. LEXIS 348 (2020).

Pretrial statements excluded when section not complied with. — Former Code 1933, § 27-1302 and O.C.G.A. § 17-7-211 exclude from evidence any statements or scientific reports pertaining to a case if a defendant is not given copies of such at least ten days prior to trial after a proper request is made therefor. Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981).

Discovery of statement on morning of trial. — Since, prior to trial and pursuant to former O.C.G.A. § 17-7-210, the defendant requested copies of any custodial statements the defendant made which were in the state's possession, but the prosecutor only became aware of the defendant's statement at 11:30 the morning of the trial, sanctions for failing to

State's Duty to Comply (Cont'd)

supply the statement were not applicable since subsection (e) of that section exempted evidence discovered after the request was filed. Marlow v. State, 192 Ga. App. 670, 385 S.E.2d 759 (1989) (decided under former O.C.G.A. § 17-7-210).

Request made morning after obtaining evidence held timely. — State did not violate O.C.G.A. § 17-16-4(a)(4) when the state disclosed x-rays to the defense during the trial since the state disclosed the x-rays as soon as the state acquired the x-rays. Thompson v. State, 262 Ga. App. 17, 585 S.E.2d 125 (2003).

Statement not disclosed excluded even though prosecutor is unaware of statement. — Statement by the defendant to a police officer which was not turned over to defense counsel pursuant to pretrial discovery proceedings should have been excluded and suppressed at trial and was not admissible as newly discovered evidence merely because the prosecutor was unaware of the statement. Talley v. State, 251 Ga. 42, 302 S.E.2d 355 (1983) (decided under former O.C.G.A. § 17-7-210).

If prosecuting attorney and defense counsel discovered evidence at the same time, there was no violation of O.C.G.A. § 17-16-4. Crawley v. State, 240 Ga. App. 891, 525 S.E.2d 739 (1999).

If omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. Wallin v. State, 248 Ga. 29, 279 S.E.2d 687 (1981) (decided under former Code 1933, § 27-1302).

What is "material." — Constitution requires that, upon request by the defendant, the state disclose all favorable evidence which is material either to guilt or to punishment. Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. Wallin v. State, 248 Ga. 29, 279 S.E.2d 687 (1981) (decided under former Code 1933, § 27-1302).

Failure to disclose evidence may require reversal even if cumulative. — Prosecutor failed to reveal to defense that the alleged victim had given a nonverbal denial of one of the acts charged. In applying the four factors making up the standard of review for a Brady violation, and considering that the alleged victim was the only witness, the suppression of the evidence was a Brady violation which required reversal of the defendant's conviction. Brownlow v. Schofield, 277 Ga. 237, 587 S.E.2d 647 (2003).

Bullet recovered in related case. — Habeas petitioner alleged facts showing grounds for relief which could not reasonably have been raised in the petitioner's original habeas petition and which could not have been discovered by diligence, including a juror's misconduct in visiting the scene and the state's failure to disclose ballistic evidence, satisfying O.C.G.A. §§ 9-14-42(c)(4) and 9-14-51. Watkins v. Ballinger, 308 Ga. 387, 840 S.E.2d 378 (2020).

Statement which is neither inculpatory nor exculpatory. — Admission of a statement made by the defendant to the arresting officer which was not furnished to the defendant even though the defendant made a proper request was not error since the district attorney was not aware of the statement until the day of the officer's testimony, the statement was not directly inculpatory but was relevant only in rebuttal, and the statement in and of itself was neither inculpatory nor exculpatory. Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984) (decided under former O.C.G.A. § 17-7-210).

If during the testimony of one of the state's witnesses, the defendant moved for a mistrial arguing that the state had used a statement at trial that the state had not included in the summary produced in response to the defendant's request pursuant to former O.C.G.A. § 17-7-210, and the statement concerned the amount of money the defendant had in the defendant's possession at the time of the defendant's arrest, the trial court did not err in denying the defendant's motion for mistrial since the defendant's statement did

not tend to prove or disprove the defendant's guilt of the crime with which the defendant was charged. Dixson v. State, 191 Ga. App. 410, 382 S.E.2d 357 (1989) (decided under former O.C.G.A. § 17-7-210).

Duty of compliance if defendant asks for "anything exculpatory." — If a defendant asks for "anything exculpatory" such a request really gives the prosecutor no better notice than if no request is made. In such a case, the prosecutor will not have violated the prosecutor's constitutional duty of disclosure unless the prosecutor's omission is of sufficient significance to result in the denial of the defendant's right to a fair trial; the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. Wallin v. State, 248 Ga. 29, 279 S.E.2d 687 (1981) (decided under former Code 1933, § 27-1302).

Statements about education and other personal data about defendant would not be in any way inculpatory so as to be subject to the objection that the defendant was improperly served with all inculpatory statements upon the defendant's request. Hilburn v. State, 166 Ga. App. 357, 304 S.E.2d 480 (1983) (decided under former O.C.G.A. § 17-7-210).

Transcript of testimony already possessed by defendant. — Discovery request pursuant to subsection (a) of this section was substantially complied with since the district attorney failed to furnish a statement only because there was no substantial difference in the testimony of the witnesses to be used on the second trial than at the first trial, a transcript of which was in the defendant's possession. Tyson v. State, 165 Ga. App. 22, 299 S.E.2d 69 (1983) (decided under former Code 1933, § 27-1302).

Transcript of taped statement provided. — Defendant's in-custody statement was properly admitted since the state provided the defendant with a copy of the transcript of the defendant's taped statement well in advance of the trial and defense counsel was allowed to compare the tape to the transcript prior to the tape's being used at trial and pointed to no material changes or inconsistencies in the content of the statement. Sullivan v. State, 213 Ga. App. 308, 444 S.E.2d 392 (1994) (decided under former O.C.G.A. § 17-7-210).

Summary of felony-murder defendant's taped statement was adequate since, although the summary omitted the exact number of blows, the summary showed that the defendant hit the victim a number of times over an extended period of time. Johnson v. State, 261 Ga. 236, 404 S.E.2d 108 (1991) (decided under former O.C.G.A. § 17-7-210).

Denial of tape recordings if transcript supplied. — It was not error to refuse to require production of original tape recordings of the defendant's statements after defense counsel listened to the tapes and received a transcript of all the statements made by the defendant. Hardin v. State, 252 Ga. 99, 311 S.E.2d 462 (1984) (decided under former O.C.G.A. § 17-7-210).

Videotaped statements without sound. — State did not fail to comply with O.C.G.A. § 17-16-4(a)(1) in not producing videotaped interviews of a witness and a defendant until three days prior to trial in the defendant's prosecution for felony murder because due to an equipment malfunction both recordings were soundless; the defendant failed to show how the interviews had any exculpatory value. Vega v. State, 285 Ga. 32, 673 S.E.2d 223 (2009).

Police surveillance videotape was not subject to discovery since there was no motion to produce and the tape was not needed for use as evidence on the defendant's behalf and was only introduced on re-direct examination to rehabilitate the testimony of a witness. Deal v. State, 199 Ga. App. 184, 404 S.E.2d 343 (1991) (decided under former O.C.G.A. § 17-7-210).

Statements given while in police custody. — If the defendant was not in police custody but was only detained pursuant to a traffic stop at the time the defendant made the voluntary statements, the statements need not have been disclosed pursuant to former O.C.G.A. § 17-7-210 and the trial court committed

State's Duty to Comply (Cont'd)

no error in allowing the statement's admission. Conley v. State, 181 Ga. App. 375, 352 S.E.2d 394 (1986) (decided under former O.C.G.A. § 17-7-210).

Former § 17-7-210 applied only when the statement was given while in custody. Banther v. State, 182 Ga. App. 333, 355 S.E.2d 709 (1987) (decided under former O.C.G.A. § 17-7-210).

Since the defendant was not in police custody at the time the statements were made, the state's failure to produce the statements did not make the testimony inadmissible. Baker v. State, 193 Ga. App. 498, 388 S.E.2d 402 (1989) (decided under former O.C.G.A. § 17-7-210).

Former § 17-7-210 required the state to provide a defendant with copies of any statements given while in police custody. Inasmuch as the statement of which the appellant complains was not made while in police custody and the appellant can point to no other statements made while in police custody which the state failed to produce, the trial court did not err in denying the appellant's motion to suppress under that Code section or on the various assorted constitutional grounds asserted by the appellant relative to improper custodial interrogation. Mattarochia v. State, 200 Ga. App. 681, 409 S.E.2d 546 (1991) (decided under former O.C.G.A. § 17-7-210).

With regard to the defendant's convictions on one count of simple assault and two counts of battery resulting from a fight with a romantic friend (the victim), the trial court did not err by admitting testimony by an officer as to what the defendant said to the officer, when the state had failed to disclose the substance of the statement to the defendant until the first day of trial as, considering that the victim failed to answer the subpoena and to appear at trial, and the state being advised that the defendant was going to assert self-defense, the defendant did not show that the state acted in bad faith. Thompson v. State, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

Presence of sheriff during interview by caseworker. — Presence of a uniformed sheriff's deputy during the interview of the defendant by a caseworker of the Department of Family and Children Services did not require the conclusion that the defendant was in custody. Banther v. State, 182 Ga. App. 333, 355 S.E.2d 709 (1987) (decided under former O.C.G.A. § 17-7-210).

Statements from city clerk. — If the city clerk testified to statements elicited by the clerk when the defendant walked into the clerk's office to surrender, but the clerk testified to no statements given by the defendant "while in police custody," former O.C.G.A. § 17-7-210 did not apply. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987) (decided under former O.C.G.A. § 17-7-210).

Routine traffic stop is not custodial. — Under subsection (a) of former O.C.G.A. § 17-7-210, a defendant was entitled to a copy of any statement given by the defendant while in police custody. However, roadside questioning after a routine traffic stop does not constitute a custodial situation. Jones v. State, 196 Ga. App. 842, 397 S.E.2d 181 (1990) (decided under former O.C.G.A. § 17-7-210).

No duty to provide officers' handwritten notes. — Trial court did not err in determining that absent a showing by the defense that it was legally entitled to the discovery of handwritten notes by officers on some other basis, the state had no duty to provide the officers' notes under O.C.G.A. § 17-16-4. Brannon v. State, 298 Ga. 601, 783 S.E.2d 642 (2016).

Demand for oral statement similar to written statement executed by defendant. — Trial court did not err in admitting an oral statement made by a defendant to a police officer which had not been delivered to the defendant more than ten days prior to trial and which had been demanded by an appropriate motion for discovery since the written statement the defendant executed contained the same material elements as the oral statement, the minor discrepancies as did appear were subject to exposure on cross-examination, and the defendant made no showing of surprise as to the contents of the oral statement or prejudice from the admission of the oral statement. Rhodes v. State, 170 Ga. App. 473, 317

S.E.2d 285 (1984) (decided under former O.C.G.A. § 17-7-210).

Similar statement made to two detectives at different times. — Although the defendant was only given a copy of the summary of the defendant's statement to one detective and the similar statement the defendant gave to another detective was not mentioned, the purpose of former O.C.G.A. § 17-7-210 was satisfied as the defendant was clearly notified by the state of the substance of the statement the state anticipated using against the defendant. White v. State, 253 Ga. 106, 317 S.E.2d 196 (1984) (decided under former O.C.G.A. § 17-7-210).

Failure of the state to disclose pre-interview statements did not provide a basis for excluding a recorded statement that was provided to the defendant and found to be freely and voluntarily given. Smith v. State, 269 Ga. 72, 495 S.E.2d 280 (1998).

Filing of "Brady" motion failed to give state reasonable notice that the defendant sought discovery pursuant to the provisions of former Code 1933, § 27-1302. Williams v. State, 164 Ga. App. 148, 296 S.E.2d 739 (1982) (decided under former Code 1933, § 27-1302).

Request insufficient. — Request that "(a)ll written or recorded statements and all summaries or memoranda of any oral or written statements made by the named the defendant …" be produced "prior to … trial … at a time to be fixed by the court" was not sufficient to invoke the provisions of former Code 1933, § 27-1302. Tabb v. State, 250 Ga. 317, 297 S.E.2d 227 (1982) (decided under former Code 1933, § 27-1302).

Applicability to oral statements. — This section stated clearly that the defendant shall be entitled to a copy of any statement and if the defendant's statement was oral or partially oral, the prosecution shall furnish in writing all relevant and material portions of the defendant's statement. Ellison v. State, 158 Ga. App. 419, 280 S.E.2d 371 (1981), overruled on other grounds, Talley v. State, 251 Ga. 42, 302 S.E.2d 355 (1983) (decided under former Code 1933, § 27-1302).

Oral statements made by victims of abuse. — Victim's testimony that the defendant threatened to kill the victim's family if the victim told anyone about the defendant's molestation of the victim did not have to be revealed before trial because it was not a custodial statement of the defendant. Frazier v. State, 252 Ga. App. 627, 557 S.E.2d 12 (2001).

Trial court did not err in denying the defendant's motion for a mistrial based on the state's alleged failure to comply with the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., requirements as the plain terms of that law dictated that the defendant, who allegedly molested the defendant's daughter, was not entitled to the oral, unrecorded statement the daughter provided to a police investigator as the state was required to produce statements within the state's possession, custody, or control and the daughter's unrecorded, oral statement did not qualify. Downs v. State, 257 Ga. App. 696, 572 S.E.2d 54 (2002).

Newly discovered evidence of oral statements given by the defendant which were unintentionally omitted from a police report fall within the exception provided in subsection (e) of former O.C.G.A. § 17-7-210. Jenkins v. State, 167 Ga. App. 840, 308 S.E.2d 14 (1983) (decided under former O.C.G.A. § 17-7-210).

If evidence of in-custody statements was newly discovered and was revealed to defense counsel as soon as practicable after its discovery and defense counsel was then afforded an opportunity to question the witness outside the presence of the jury, the trial court's decision that the evidence was governed by subsection (e) of former O.C.G.A. § 17-7-210 was not erroneous. Broomall v. State, 260 Ga. 220, 391 S.E.2d 918 (1990) (decided under former O.C.G.A. § 17-7-210).

Late disclosure of newly discovered evidence. — Defendant's request for a mistrial after receiving new evidence five days before trial was properly denied as the state turned over the information as soon as the information was discovered, the defendant failed to request a continuance, and the evidence was part of the res gestae of the charged crime. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

No prejudice shown in denial of continuance. — Trial court did not abuse

State's Duty to Comply (Cont'd)

the court's discretion in denying the appellant's motion for a continuance based on the state untimely serving a portion of a witness's custodial interview three days prior to trial because the appellant's contention that proper cross-examination questioning was prevented was unsupported by the evidence and the appellant did not present the testimony of any potential witnesses or offer any other evidence to show that any prejudice resulted from the denial of the motion. Easley v. State, 352 Ga. App. 1, 833 S.E.2d 591 (2019).

Production within reasonable time. — If a request for a statement has been timely made, production of that statement one day before trial is not production within a reasonable time. Smith v. State, 181 Ga. App. 595, 353 S.E.2d 35 (1987) (decided under former O.C.G.A. § 17-7-210).

Since after a timely request by the defendant, the state failed to supply the defendant with a written copy of the defendant's in-custody confession at least ten days prior to trial, the defendant's motion in limine seeking to exclude the confession should have been granted. Livingston v. State, 222 Ga. App. 298, 474 S.E.2d 1 (1996).

It was reversible error for the state on the morning of the trial to provide defense counsel with notice regarding the introduction of the defendant's statement that contradicted counsel's planned defense. Baker v. State, 238 Ga. App. 285, 518 S.E.2d 455 (1999).

Rights of the accused to reasonable pretrial access to evidence are not subject to the vagaries of a police department "policy" not to develop evidentiary photographs until the day before trial. Thompson v. State, 240 Ga. App. 26, 521 S.E.2d 876 (1999).

Because it was apparent that the prosecutors acted in good faith by immediately mailing a copy of the report on a scientific test to the defendant once the prosecutors received the report themselves, absent any evidence of bad faith, the trial court did not err in denying the defendant's motion in limine to exclude evidence of the test. Berry v. State, 246 Ga. App. 9, 539 S.E.2d 516 (2000).

Trial court did not err in admitting the defendant's statement upon seeing the informant at the jail that the informant was the person "that busted him," even though the statement was supposed to be disclosed ten days prior to trial and was not disclosed to the defense until the trial was in progress as the statement was newly discovered evidence; the state disclosed the statement as soon as practicable after learning about the statement, and the defendant did not show that the state acted in bad faith regarding discovery and disclosure of the statement. Dixon v. State, 252 Ga. App. 385, 556 S.E.2d 480 (2001).

"Reasonable time" for making a request is to be determined by considering the facts and circumstances of each case. Smith v. State, 181 Ga. App. 595, 353 S.E.2d 35 (1987) (decided under former O.C.G.A. § 17-7-210).

Request made shortly after obtaining counsel held timely. — Because it was impossible for the defendant to submit a timely request in accordance with former O.C.G.A. § 17-7-210 because the defendant had no representation by counsel until a week before trial, the defendant's request six days before trial was within a reasonable time even though made within ten days of trial. Pealor v. State, 165 Ga. App. 387, 299 S.E.2d 904 (1983) (decided under former O.C.G.A. § 17-7-210).

Defendant's request for a statement, filed within five days of retaining defense counsel but less than ten days prior to trial, was a reasonable time in which to make the request. Smith v. State, 181 Ga. App. 595, 353 S.E.2d 35 (1987) (decided under former O.C.G.A. § 17-7-210).

Defendant notified of substance of statement. — Purpose of former O.C.G.A. § 17-7-210 was satisfied when, even though there was no direct reference by the state that the defendant made an oral statement to a police officer and that the state intended to rely solely on the oral statement, the defendant was fully notified by the state of the substance of the oral statement the state indeed did use in the trial of the case. Lewis v. State,

183 Ga. App. 41, 357 S.E.2d 862 (1987).

Statements not used by state. — Penalty for failure of the prosecution to serve a defendant timely with a copy of inculpatory in custody statements is the exclusion and suppression of the statements from use in the prosecution's case-in-chief or in rebuttal, but if the state made no attempt to use the indicated statements as a result of cross-examination of an officer by defense counsel, although a police officer testified as to the defendant's age and education, the obvious purpose of former O.C.G.A. § 17-7-210 was satisfied. Hilburn v. State, 166 Ga. App. 357, 304 S.E.2d 480 (1983) (decided under former O.C.G.A. § 17-7-210).

Upon failure of the prosecution to comply with the defendant's timely written request for a copy of written or oral statement given by the defendant while in police custody, the statement is not used by the prosecution at all and the trial court gives the jury corrective instructions to disregard any question on this matter, the trial court need not grant a mistrial. Lee v. State, 166 Ga. App. 644, 305 S.E.2d 175 (1983) (decided under former O.C.G.A. § 17-7-210).

Photographs. — State was not required to take the initiative and "furnish" the defense with copies of photographs; the state's obligation was fulfilled by making the photographs available to the defense to inspect and copy. McSears v. State, 226 Ga. App. 90, 485 S.E.2d 589 (1997).

If the state failed to produce photographs ten days before trial, but the defendant rejected the trial court's offer of a continuance, and if the photographs were merely cumulative of other evidence, there was no prejudice to the defendant shown and no abuse of discretion in admitting the photographs. Brown v. State, 236 Ga. App. 478, 512 S.E.2d 369 (1999).

Trial court did not abuse the court's discretion in reopening the evidence and allowing the state to introduce photographs as rebuttal evidence since the evidence did not become relevant until the defendant's defense was presented. Potter v. State, 272 Ga. 430, 530 S.E.2d 725 (2000).

State's failure to produce the photographs of the victim ten days before trial was not a violation of O.C.G.A. § 17-16-4(a)(3) and the trial court did not err in admitting the photographs because the defendant did not present any evidence of bad faith on the part of the state and the photographs were no more than cumulative of the testimony of the victim to the effect that the defendant had beaten the victim in the head with a stick as well as the testimony of the other witnesses for the state. Davis v. State, 257 Ga. App. 500, 571 S.E.2d 497 (2002).

When the prosecution did not provide the defendant a photograph of the victim's injuries in pre-trial discovery, it was not error to admit the photograph at trial because, under O.C.G.A. § 17-16-4(a)(3), the prosecution was only required to allow the defendant to inspect and copy the photograph, and the defendant chose not to take advantage of an offer to inspect the photograph. Banks v. State, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

With regard to the defendant's domestic violence convictions, the trial court did not err in denying the admission into evidence of a photograph detailing the defendant's injuries based on failing to provide inspection of the photograph because any error by the trial court in excluding the photograph was harmless since the photograph was cumulative of both the defendant's testimony that the wife scratched the defendant as well as the wife's testimony that the wife tried to scratch the defendant. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

If the testimony to which defendant objected merely was cumulative of testimony to which the defendant did not object concerning other oral and written in-custody statements and was not significantly different in substance from the defendant's other oral and written statements, there was no error in the denial of the motion for mistrial. Gay v. State, 199 Ga. App. 80, 403 S.E.2d 895 (1991) (decided under former O.C.G.A. § 17-7-210).

State's failure to supply written copies of the defendants' video taped statements was not reversible error since the statements on the videotape were merely cumulative of other previously rendered tes-

State's Duty to Comply (Cont'd)

timony to which the defendants interposed no objection. Bowe v. State, 201 Ga. App. 127, 410 S.E.2d 765 (1991), overruled on other grounds, Watts v. State, 274 Ga. 373, 552 S.E.2d 823 (2001), overruled on other grounds, Watts v. State, 261 Ga. App. 230, 582 S.E.2d 186 (2003) (decided under former O.C.G.A. § 17-7-210).

Reversal not required unless error contributed to verdict. — Admission of a defendant's statement in violation of subsection (c) of former O.C.G.A. § 17-7-210 did not require reversal unless it was highly probable that the error contributed to the verdict. Davis v. State, 198 Ga. App. 375, 401 S.E.2d 581 (1991) (decided under former O.C.G.A. § 17-7-210).

Ineffective assistance of counsel for failing to challenge sufficiency of notice. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the sufficiency of the state's notice of intent to seek punishment as a recidivist because there was no evidence in the record that the state failed to provide a copy of the criminal history report, nor was there any evidence that the defendant and counsel were unaware of the specific felony convictions listed in the criminal history record. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

Miranda-waiver form. — State-withheld signed Miranda-waiver form which could not be construed as incriminating did not fall within the ambit of former O.C.G.A. § 17-7-210 and thus did not need to be furnished to a defendant. Brady v. State, 206 Ga. App. 497, 426 S.E.2d 15 (1992) (decided under former O.C.G.A. § 17-7-210).

Failure to comply held harmless. — State's failure to furnish a written copy of the defendant's oral, in-custody statement upon request at least ten days prior to trial was harmless error since the victim positively identified the defendant as the perpetrator of the crimes and the defendant presented no evidence in the defendant's defense. Russell v. State, 183 Ga. App. 209, 358 S.E.2d 631 (1987).

State's failure to timely provide the defendant with a written copy of the defendant's in-custody statement was harmless error since the evidence against the defendant was overwhelming. Coney v. State, 198 Ga. App. 272, 401 S.E.2d 304 (1991) (decided under former O.C.G.A. § 17-7-210).

Failure of the state to provide the defendant with a knife before trial did not require the court to exclude the knife from evidence since the defendant made no showing that the defendant was prejudiced and since no continuance was requested to cure any prejudice which may have precipitated as a result of the state's failure to comply. Tucker v. State, 222 Ga. App. 517, 474 S.E.2d 696 (1996); Parrott v. State, 240 Ga. App. 173, 523 S.E.2d 29 (1999); Roberts v. State, 244 Ga. App. 330, 534 S.E.2d 526 (2000).

Trial court did not have authority, under O.C.G.A. § 17-16-4, to exercise discretion and exclude the defendant's incriminating statement from evidence. Defendant made no showing of prejudice by the state's failure to make the defendant's custodial statement available prior to the trial, and the defendant did not ask for a continuance. Bell v. State, 224 Ga. App. 191, 480 S.E.2d 241 (1997); Knight v. State, 239 Ga. App. 710, 521 S.E.2d 851 (1999).

Because the defendant made no showing at trial that the defendant was prejudiced by the state's failure to make a scientific report available before trial, the trial court did not err in allowing the state's use of the report. Aleman v. State, 224 Ga. App. 391, 480 S.E.2d 393 (1997).

Since defense counsel admitted at trial that the notice of intent to present similar transaction evidence informed the defendant that the defendant had been convicted of a similar transaction because the notice recited that the state intended to introduce certain documents, including "disposition, guilty by trial," the fact that a copy of the conviction was not included did not affect the adequacy of the notice because no prejudice to the defendant was shown, and harm as well as error must be shown to warrant reversal. Arnold v. State, 236 Ga. App. 380, 511 S.E.2d 219, aff'd, 271 Ga. 780, 523 S.E.2d 14 (1999).

Although the state violated O.C.G.A.

§ 17-16-4(a)(3) because discoverable evidence of a photographic line-up was in the state's possession but not disclosed within the applicable statutory time period, the defendant could not show that the defendant suffered harm as a result of the late disclosure; thus, the trial court did not abuse the court's discretion in refusing to grant a mistrial. Jones v. State, 276 Ga. App. 728, 624 S.E.2d 275 (2005).

Trial court did not abuse the court's discretion by refusing to exclude the medical examiner as a witness after the state failed to include the examiner's name on a witness list and provide the defense with the autopsy report as the defendant interviewed the examiner, the trial was continued to allow a gunshot residue test to be completed, and the defendant failed to show prejudice. Tarpley v. State, 298 Ga. 442, 782 S.E.2d 642 (2016).

Defendant failed to show prejudice from the state's failure to provide timely notice of an expert's particular opinion as the expert was included on the state's witness list, the expert's report was provided to defense counsel prior to trial, and the defendant made no showing of what additional evidence the defendant would have presented or how the undisclosed opinion would have changed the defense strategy. Murphy v. State, 299 Ga. 238, 787 S.E.2d 721 (2016).

Admission of 9-1-1 tape admitted. — Because defense counsel had the opportunity to listen to the tape before allowing the tape's admission into evidence, the trial court acted within the court's discretion in allowing the 9-1-1 tape into evidence. Rooks v. State, 238 Ga. App. 177, 518 S.E.2d 179 (1999).

Admission of evidence held reversible error. — Admission of a detective's testimony regarding the defendant's custodial statement in violation of subsection (c) of former O.C.G.A. § 17-7-210 was not harmless error and required reversal of the defendant's conviction of theft by receiving stolen property since the challenged statement directly contradicted the defendant's trial testimony that the defendant thought the property belonged to an acquaintance. Davis v. State, 198 Ga. App. 375, 401 S.E.2d 581 (1991) (decided under former O.C.G.A. § 17-7-210).

Admission of evidence concerning an incriminating in-custody statement which a statutory rape the defendant made to police during their investigation of a prior rape was reversible error due to the state's failure to produce the statement in response to the defendant's request, notwithstanding the state's contention that the state was not required to provide the defendant with a copy of the statement because the statement did not concern the offense for which the defendant was on trial. Byars v. State, 198 Ga. App. 793, 403 S.E.2d 82 (1991) (decided under former O.C.G.A. § 17-7-210).

Even though the state did not receive a scientific report until four days before trial, a continuance was warranted for the state's failure to provide the defendant with a copy ten days before trial, and denial of a motion therefor was reversible error. Brady v. State, 233 Ga. App. 287, 503 S.E.2d 906 (1998).

State's discovery obligations met. — As the trial court found no due process violation in the release of the defendant's pickup truck, allegedly involved in a murder, to the lienholder, due to a lack of bad faith on the part of the state and a lack of exculpatory value in the truck, and for the same reasons, the trial court also determined that the state did not violate the state's discovery obligations, the trial court did not err in denying the defendant's motion to dismiss or to exclude evidence. Brannan v. State, 275 Ga. 70, 561 S.E.2d 414, cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002).

Because: (1) the defendant did not object to the admissibility of three cash invoices on the ground that the state failed to produce the invoices during discovery; and (2) the state produced a jail inventory list as soon as was practicable, the defendant denied an offer for a continuance, and never presented any evidence of prejudice based on its admission, no violation of O.C.G.A. § 17-16-4 occurred requiring sanctions against the state under O.C.G.A. § 17-16-6. Bennett v. State, 289 Ga. App. 110, 657 S.E.2d 6 (2008).

Four boxes of documents were properly admitted into evidence despite the defendant's claim that the documents had not

State's Duty to Comply (Cont'd)

been made available during discovery because the documents had been provided to previous trial counsel and counsel and an associate were given a break during trial to review the documents. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689 (2013).

Trial court did not err in denying defendant's motion for a new trial based on the prosecution's failure to disclose the existence of certain documents because the prosecutor gave notice to the defendant that the physical objects were available for inspection, copying, or photographing and O.C.G.A. § 17-16-4(a)(3)(A) did not require the state to take the initiative and furnish the defense with copies of physical evidence. Ananaba v. State, 325 Ga. App. 829, 755 S.E.2d 225 (2014).

Plain language of O.C.G.A. § 17-16-4(a)(3)(A) does not require the state to take the initiative and furnish the defense with copies of physical evidence; the state fulfills the state's obligation by making the evidence available to the defense to inspect and copy. Ananaba v. State, 325 Ga. App. 829, 755 S.E.2d 225 (2014).

Trial court did not err in refusing to grant a mistrial based on the state's failure to disclose a therapist's notes until just before trial began as the state shared the notes shortly after receiving the notes, the defendant asserted no bad faith on the part of the state, the defendant was granted a short continuance to review the materials, and the defendant had notice that the therapist might testify two weeks before trial and could have retained an expert to counter the therapist's testimony. Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

Because there was no evidence the emergency room doctor who treated the defendant made an oral or partially oral report, the state was under no duty to reduce to writing a non-existent oral report. Williams v. State, 302 Ga. 474, 807 S.E.2d 350 (2017).

Time of Receipt of Statements

Waiver of ten-day period. — Since the defendant gave no indication that the defendant's motion to suppress the defendant's statements at the crime scene was intended to encompass the time limitations of this section, nor did the defendant make any attempt to explain why the motion was not filed in time to allow ten days for compliance, the ten-day time limitation must be considered waived. Thomas v. State, 163 Ga. App. 151, 293 S.E.2d 540 (1982) (decided under former Code 1933, § 27-1302).

Since the defendant made a proper and timely request for production of the defendant's pretrial statement but was not served with a copy of such statement until the scheduled trial date, after the jury was selected but not sworn, any error in admission of the statement was waived since the defendant refused the offer of another jury more than ten days after receiving the statement. Todd v. State, 163 Ga. App. 814, 294 S.E.2d 714 (1982) (decided under former Code 1933, § 27-1302).

Harmless error in late disclosure of Facebook posts. — Late disclosure of Facebook messages sent by the defendant did not necessitate reversal as no bad faith or prejudice was shown. Hawkins v. State, 304 Ga. 299, 818 S.E.2d 513 (2018).

Harmless error. — Fact that the defendant's first taped interview, in which the defendant admitted furnishing a gun to a minor, was not provided to the defendant until nine days before trial was harmless error because nothing in the material surprised the defendant as the defendant testified to the same information at the minor's trial. Rollinson v. State, 276 Ga. App. 375, 623 S.E.2d 211 (2005).

Substitution of defense counsel. — Because defense counsel succeeded prior defense counsel five days before trial and requested statements under this section three days before trial, and because the statements were received the day before trial, the trial court did not err in overruling the defense's objection to the introduction of the defendant's pretrial statements on the ground that the statements had not been furnished ten days before trial. McCannon v. State, 161 Ga. App. 685, 288 S.E.2d 663 (1982) (decided under former Code 1933, § 27-1302).

English transcription to Spanish defendant. — Failure to provide the de-

fendant with a copy of the defendant's statement in Spanish at least ten days prior to trial did not require suppression of an English transcription of the statement which had been timely provided to the defendant since the defendant was clearly notified by the state of the substance of the statement the state anticipated using against the defendant. Windelberg v. State, 257 Ga. 289, 357 S.E.2d 583 (1987) (decided under former O.C.G.A. § 17-7-210).

Late disclosure of witness statement not done in bad faith. — Due to interpretation difficulties, the state did not know that the defendant held a knife during an armed robbery until the Thursday before trial. As the state's disclosure to the defendant of this newly discovered evidence by at least the following Monday complied with O.C.G.A. § 17-16-4(c), the state did not act in bad faith, and the defendant was not prejudiced by the late disclosure; thus, evidence of the knife was properly admitted. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Trial court did not err by refusing to exclude evidence of the state's expert witness due to the state failing to provide a written summary of the expert's findings no later than ten days before trial, pursuant to O.C.G.A. § 17-16-4(a)(4), because the defendant failed to show either prejudice or bad faith on the part of the state, and the defendant did not seek a recess or continuance or request any other remedy authorized by O.C.G.A. § 17-16-6, except to object to the expert's qualifications. Hodges v. State, 319 Ga. App. 657, 738 S.E.2d 111 (2013).

Oral additional recollections by a caseworker. — With regard to a defendant's convictions on two counts of cruelty to children, the trial court did not err by allowing a caseworker to testify to additional recollections the caseworker realized were not contained in the report that was prepared following an interview with the defendant as the information that the defendant asserted that the defendant should have received before trial did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker; therefore, the recollections did not constitute a "statement of a witness" under O.C.G.A. § 17-16-1(2), and the state was not obligated to produce the information prior to trial under O.C.G.A. § 17-16-7. Hinds v. State, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

Report disclosed immediately upon receipt by state. — Defendant was not entitled to relief based on an alleged violation of O.C.G.A. § 17-16-4 and failure to remedy the violation under O.C.G.A. § 17-16-6 because the state turned over the subject records immediately after receiving the records and counsel did not move for a continuance, but the trial court gave counsel additional time to review the records. Hambrick v. State, 353 Ga. App. 666, 839 S.E.2d 664 (2020).

Time of Making Statement

Statement by defendant after pat-down search and before arrest. — Statement was noncustodial and not subject to discovery under former O.C.G.A. § 17-7-210 since the oral statement by the defendant as to ownership of and license for a derringer was given to the officer when the officer had probable cause to conduct a pat-down weapon search and the burden of proving that the defendant had a valid license for carrying the pistol was upon the defendant. The defendant was arrested only after the defendant admitted to not having a license. Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983) (decided under former O.C.G.A. § 17-7-210).

Section only applies to statements made while in custody. — Former § 17-7-210 related only to those statements made by the defendant while in police custody. Shelton v. State, 196 Ga. App. 163, 395 S.E.2d 618 (1990), overruled on other grounds by State v. Burns, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (Ga. 2019) (decided under former O.C.G.A. § 17-7-210).

Statement made by the defendant to another while both were in jail constituted a statement while in police custody requiring disclosure upon the defendant's request. Walraven v. State, 250 Ga. 401, 297 S.E.2d 278 (1982), aff'd, 255 Ga. 276, 336 S.E.2d 798 (1985) (decided under former Code 1933, § 27-1302).

Time of Making Statement (Cont'd)

Statements not made while defendant in custody. — See Yeargin v. State, 164 Ga. App. 835, 298 S.E.2d 606 (1982) (decided under former Code 1933, § 27-1302); Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (1998) (decided under former Code 1933, § 27-1302), but see Mason v. State, 177 Ga. App. 184, 338 S.E.2d 706 (1985) (decided under former O.C.G.A. § 17-7-210).

Section inapplicable to statement made while not in custody. — Because a party suspected of drunk driving was stopped by a police officer and asked to recite the alphabet that party was not in custody and therefore there was no requirement under former O.C.G.A. § 17-7-210 that the state provide a written summary of the attempted recitation. Wilson v. State, 173 Ga. App. 805, 328 S.E.2d 418 (1985) (decided under former O.C.G.A. § 17-7-210).

Only a custodial statement is required to be supplied pursuant to former O.C.G.A. § 17-7-210. Johnson v. State, 177 Ga. App. 705, 340 S.E.2d 662 (1986) (decided under former O.C.G.A. § 17-7-210).

Defendant's statement to a police officer which is made at a time when the defendant is not in custody is not subject to discovery pursuant to former O.C.G.A. § 17-7-210. Webb v. State, 179 Ga. App. 101, 345 S.E.2d 648 (1986) (decided under former O.C.G.A. § 17-7-210).

Defendant was not entitled to receive summaries of statements that the defendant made in a recorded telephone conversation which occurred while the defendant was free on bond and not in custody. Martin v. State, 179 Ga. App. 551, 347 S.E.2d 247 (1986) (decided under former O.C.G.A. § 17-7-210).

Defendant's statements are not custodial and therefore not subject to discovery pursuant to former O.C.G.A. § 17-7-210, when, although the object of the police officers' visit to the defendant's residence was for the defendant's arrest, the defendant was not under arrest at the time of the defendant's spontaneous statements to the officers. That Code section related only to those statements made by the defendant while in police custody. Hudgins v. State, 186 Ga. App. 883, 369 S.E.2d 54 (1988) (decided under former O.C.G.A. § 17-7-210).

Only a custodial statement is required to be supplied pursuant to O.C.G.A. § 17-6-4, and an accused is not in custody when an accused is out on bond. Newsome v. State, 192 Ga. App. 111, 385 S.E.2d 794 (1989).

Belief of defendant and police that defendant in custody. — When statement occurred at a time when the defendant believed the defendant was not free to leave and both officers also agreed that the defendant was not free to leave, although the decision to formally arrest came later, the lower court was in error in concluding that former O.C.G.A. § 17-7-210 did not apply. D'Anna v. State, 201 Ga. App. 731, 412 S.E.2d 857 (1991) (decided under former O.C.G.A. § 17-7-210).

Testimony before court official. — Person testifying before a magistrate or other judicial officer in open court at a preliminary hearing was not in police custody within the contemplation of former O.C.G.A. § 17-7-210. Maddox v. State, 210 Ga. App. 526, 436 S.E.2d 730 (1993) (decided under former O.C.G.A. § 17-7-210).

Statement made by defendant to victim during commission of offense was not a statement as was required to be produced under this section. Williams v. State, 165 Ga. App. 69, 299 S.E.2d 402 (1983) (decided under former Code 1933, § 27-1302).

Utterances made by appellant during commission of, or in connection with, crime charged do not constitute statements given "while in custody." Holbrook v. State, 162 Ga. App. 400, 291 S.E.2d 729 (1982) (decided under former Code 1933, § 27-1302).

Statements made during driving while under influence stop. — State had no duty to provide a driver with statements made to an officer in response to preliminary questions after the driver was stopped but before the driver was arrested for driving under the influence. Hudgins v. State, 176 Ga. App. 719, 337 S.E.2d 378 (1985) (decided under former

O.C.G.A. § 17-7-110).

Statements made following driving while under influence arrest. — State had no duty to provide a driver with statements made to and officer after a driving under the influence arrest and Miranda warning as the statements were made voluntarily and were neither incriminating nor exculpatory. Hudgins v. State, 176 Ga. App. 719, 337 S.E.2d 378 (1985) (decided under former O.C.G.A. § 17-7-210).

Statement while out on bond. — Incriminating letter written by a defendant while the defendant was out on bond to the child whom the defendant was accused of molesting was not discoverable pursuant to former O.C.G.A. § 17-7-210 and was not erroneously admitted into evidence. McCoy v. State, 174 Ga. App. 621, 330 S.E.2d 746 (1985) (decided under former O.C.G.A. § 17-7-210).

Waiver on appeal for failing to object. — If the state did not supply the defendant with a statement through pretrial discovery, the defendant waived this ground of appeal by failing to make a timely objection to the testimony as the statement was being presented into evidence. Cloud v. State, 169 Ga. App. 51, 311 S.E.2d 491 (1983) (decided under former O.C.G.A. § 17-7-210).

If the defendant makes a motion for discovery of all statements made while in police custody, and of all scientific tests to be introduced at trial, the denial of such information to the defendant, and the subsequent use of the information by the prosecutor at trial, will not be grounds for an appeal unless a proper objection or motion for mistrial is made at the trial court level. Huguley v. State, 253 Ga. 709, 324 S.E.2d 729 (1985) (decided under former O.C.G.A. § 17-7-210).

If an objection pursuant to former O.C.G.A. § 17-7-210 was not made at the time the testimony was offered, the objection is waived. Johnson v. State, 191 Ga. App. 845, 383 S.E.2d 346 (1989) (decided under former O.C.G.A. § 17-7-210).

Letter voluntarily written to a party other than the state or law enforcement officers is prima facie not a statement given by the defendant while in policy custody and therefore the defendant is not allowed to receive a copy of the letter as a statement made by the defendant while in police custody. Williams v. State, 202 Ga. App. 728, 415 S.E.2d 327 (1992) (decided under former O.C.G.A. § 17-7-210).

Scientific Reports

This section was an extension of defendant's right to pretrial discovery by making scientific reports available to a the defendant upon proper and timely written demand if such information was in the possession of or available to the district attorney. Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981) (decided under former Code 1933, § 27-1303).

Preparation of expert's report not required. — O.C.G.A. § 17-16-4(a)(4) does not require the state to have the state's expert prepare a report; rather, it requires that if such a report exists the report be made available to the defendant. Garey v. State, 273 Ga. 133, 539 S.E.2d 123 (2000).

Section does not apply to testimony of therapists and psychologists. — Former § 17-7-211 did not apply to the testimony of mental health therapists and psychologists, even if such testimony was based on written notes or reports. Horne v. State, 192 Ga. App. 528, 385 S.E.2d 704, cert. denied, 192 Ga. App. 902, 385 S.E.2d 704 (1989), 494 U.S. 1006, 110 S. Ct. 1302, 108 L. Ed. 2d 479 (1990) (decided under former O.C.G.A. § 17-7-211).

Section does not provide basis for discovery of child abuse records. — Former § 17-7-211 does not provide an independent statutory basis for discovery of "scientific records" of child abuse maintained by institutions listed in O.C.G.A. § 49-5-40. In the absence of obtaining a statutory exception by compliance with O.C.G.A. § 49-5-41 or O.C.G.A. § 49-5-41.1, as applicable, such child abuse records remain protected. Horne v. State, 192 Ga. App. 528, 385 S.E.2d 704, cert. denied, 192 Ga. App. 902, 385 S.E.2d 704 (1989), 494 U.S. 1006, 110 S. Ct. 1302, 108 L. Ed. 2d 479 (1990) (decided under former O.C.G.A. § 17-7-211), cert. denied, 192 Ga. App. 902, 385 S.E.2d 704 (1989); 494 U.S. 1006, 110 S. Ct. 1302, 108 L. Ed. 2d 479 (1990) (decided under former O.C.G.A. § 17-7-211).

Scientific Reports (Cont'd)

Not introduced into evidence. — Inasmuch as a scientific report that was not made available to defense counsel was not introduced into evidence by the state in the state's case-in-chief or in rebuttal, the state did not violate O.C.G.A. § 17-16-4(a)(3) by failing to disclose the report to a defendant with regard to the defendant's trial for murder and related offenses. Castillo v. State, 281 Ga. 579, 642 S.E.2d 8 (2007).

Illegible writing. — This section was not violated since the physician's handwriting was illegible but the state allowed the defense to confer with the physician and the parties during trial and agreed to a recess to decipher the physician's handwriting. Brown v. State, 161 Ga. App. 544, 288 S.E.2d 882 (1982) (decided under former Code 1933, § 27-1302).

Use of tests conducted other than pursuant to crime in question. — If the state was planning to put into evidence the results of comparison tests of material not collected from the defendant, the victim, or the crime scene, but which tests were performed as part of the investigation of the crime, and the results of the test have been reduced to the form of a written report, then former O.C.G.A. § 17-7-211 required the prosecution to provide the defendant with a copy of that report within the statutory period. State v. Mulkey, 252 Ga. 201, 312 S.E.2d 601 (1984) (decided under former O.C.G.A. § 17-7-211).

Tests performed immediately prior to or during trial. — Former § 17-7-211 did not prohibit the prosecution from introducing evidence of scientific tests performed immediately prior to or during the trial absent a showing that the prosecution attempted to circumvent the discovery process. Wellborn v. State, 258 Ga. 570, 372 S.E.2d 220 (1988) (decided under former O.C.G.A. § 17-7-211).

Defendant is not entitled to internal documents and work products of crime lab, such as a computer printout. Walker v. State, 168 Ga. App. 130, 308 S.E.2d 404 (1983) (decided under former O.C.G.A. § 17-7-211).

State is not entitled to discover from defendant that which defendant would not be entitled to discover from state. Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994) (decided under former O.C.G.A. § 17-7-211).

State's right to defendant's reports. — State is entitled to obtain a copy of a written scientific report by a defendant's expert. Caldwell v. State, 260 Ga. 278, 393 S.E.2d 436 (1990) (decided under former O.C.G.A. § 17-7-211).

When denial, and prosecutorial use, of information appealable. — If the defendant makes a motion for discovery of all statements made while in police custody, and of all scientific tests to be introduced at trial, the denial of such information to the defendant, and the subsequent use of the information by the prosecutor at trial, will not be grounds for an appeal unless a proper objection or motion for mistrial is made at the trial court level. Huguley v. State, 253 Ga. 709, 324 S.E.2d 729 (1985) (decided under former O.C.G.A. § 17-7-210).

Prosecutorial misconduct. — Any error on the part of the prosecution in failing to produce a document cannot be classified as prosecutorial misconduct barring retrial unless the prosecutor's action was intended to subvert the protections afforded by the double jeopardy clause. Williams v. State, 258 Ga. 305, 369 S.E.2d 232, cert. denied, 488 U.S. 891, 109 S. Ct. 225, 102 L. Ed. 2d 215 (1988) (decided under former §§ 17-7-210 and 17-7-211).

Prosecution did not violate O.C.G.A. § 17-16-4 by failing to turn over the recordings of the defendant's conversations because the prosecutor did not access the jail's telephone monitoring system, which was under the dominion of the county jail and, thus, there was nothing in the prosecutor's possession, custody, or control to turn over to the defendant. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011).

Accessibility to prosecutor's files. — Neither a demand for scientific reports nor a generalized notice to produce statements seized from a defendant would authorize the defendant to pursue at will the prosecutor's files to ascertain if there are any witness statements which might refer

to the defendant or admissions made by the defendant to that witness. Griffin v. State, 168 Ga. App. 696, 310 S.E.2d 278 (1983) (decided under former O.C.G.A. § 17-7-211).

Five minutes to review polygraph test results unreasonable. — If the trial court allowed evidence regarding a polygraph test over the objection that no report of the results had been furnished pursuant to a timely request and then permitted defense counsel five minutes to read such report, the time permitted was unreasonable and was tantamount to failing altogether to furnish a report thus making admission of the evidence error. Taylor v. State, 172 Ga. App. 408, 323 S.E.2d 212 (1984) (decided under former §§ 17-7-210 and 17-7-211).

Machine printout of numerals or letters, which required interpretation by the machine's operator to attain significance, was not a "scientific report" and was thus not discoverable under former O.C.G.A. § 17-7-211. Dunn v. State, 178 Ga. App. 6, 341 S.E.2d 877 (1986) (decided under former O.C.G.A. § 17-7-211).

Testimony concerning unsuccessful breath test. — In a trial for driving under the influence of alcohol, the trial court's allowing certain testimony in evidence concerning a breath test given the defendant following the defendant's arrest was not erroneous since the test was ultimately unsuccessful due to the defendant's inability to provide a sufficient sample to be tested and the evidence complained of was the testimony of the intoximeter operator relating to the steps the operator took to prepare the breath-testing device for the test to be conducted on the defendant's breath. Looney v. State, 180 Ga. App. 693, 350 S.E.2d 29 (1986) (decided under former O.C.G.A. § 17-7-210).

Codefendant not precluded from cross-examining witness regarding report. — Exclusionary portion of former O.C.G.A. §§ 17-7-210 and 17-7-211 applied only if the state sought to admit scientific reports the state had not timely provided to the defendant; those sections did not prevent a codefendant from cross-examining a witness with regard to the contents of a scientific report. Shearer v. State, 259 Ga. 51, 376 S.E.2d 194, cert. denied, 492 U.S. 922, 109 S. Ct. 3251, 106 L. Ed. 2d 597 (1989) (decided under former §§ 17-7-210 and 17-7-211).

State's discovery rights. — With regard to scientific reports, the state is entitled to only those discovery rights specifically granted to the defendant by former O.C.G.A. § 17-7-211, overruling in part, Sabel v. State, 248 Ga. 10, 282 S.E.2d 61 (1981). Rower v. State, 264 Ga. 323, 443 S.E.2d 839 (1994); Johnson v. State, 265 Ga. 833, 463 S.E.2d 123 (1995) (decided under former O.C.G.A. § 17-7-211).

State may discover only those written reports generated by defense experts which the defense intends to introduce at trial. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994) (decided under former O.C.G.A. § 17-7-211).

State's failure to respond to demand for scientific reports. — When the defendant was told of the information or knew as much as the prosecution did and had an equal opportunity to obtain the document from a nonaffiliated witness, it was not a violation of former O.C.G.A. § 17-7-211 for the state to fail to produce the document in response to a demand for scientific reports. Kosal v. State, 204 Ga. App. 708, 420 S.E.2d 621 (1992) (decided under former O.C.G.A. § 17-7-211).

Motion to produce inadequate. — Motion to produce pursuant to former O.C.G.A. § 24-10-26 (see O.C.G.A. § 24-13-27) which included a demand for production of all reports of any scientific tests, experiments, or studies made in connection with the defendant's case was not adequate pursuant to former O.C.G.A. § 17-7-211 for production of scientific reports. Murray v. State, 203 Ga. App. 858, 418 S.E.2d 624 (1992) (decided under former O.C.G.A. § 17-7-211).

Service of scientific reports not required. — Language of O.C.G.A. § 17-16-4(a)(4) requires only that the state make reports of scientific tests available for inspection and copying, not that such reports be served upon the defendant. Lawson v. State, 224 Ga. App. 645, 481 S.E.2d 856 (1997).

With regard to a defendant's trial on various drug charges, the trial court did

Scientific Reports (Cont'd)

not err by refusing to exclude the evidence of a crime lab report for the methamphetamine allegedly sold based upon defense counsel not receiving a copy of the report as the record showed that the prosecution provided the defense with a certificate of service showing that the state served defense counsel with the crime lab results and the certificate of service also included the handwritten note that defense counsel was free to inspect the report at any time. The prosecution was not obligated to serve a copy of the lab report upon the defense and the defendant failed to prove bad faith on the part of the state and prejudice to the defense. Rogers v. State, 298 Ga. App. 895, 681 S.E.2d 693 (2009).

Trial court did not err in admitting testimony and evidence relating to the second and third reports of an investigator who compared the latent fingerprints taken from the scene of the crime with the defendant's fingerprints and confirmed a match of the defendant's fingers because the state did not act in bad faith by failing to provide the second and third reports to the defendant prior to trial; the second report was provided to the defendant in discovery from the state, and the third report revealed newly discovered evidence, which the state did not discover until the investigator enlarged the defendant's fingerprint on charts in the investigator's preparation for trial, and as soon as the state received the third report from the state's investigator, the state provided the report to the defendant pursuant to O.C.G.A. § 17-16-4(c). Mallory v. State, 306 Ga. App. 684, 703 S.E.2d 120 (2010).

Defendant's ineffective assistance of counsel claim failed based on defense counsel failing to object to the testimony of a firearms examiner concerning the results of the examiners' ballistics examination because the testimony complained of was elicited by the co-defendant during cross-examination and not by the state so the state had no obligation to provide the defendant with notice of the firearms examiner's opinion and the defendant also failed to show any prejudice or bad faith. Bryant v. State, 296 Ga. 456, 769 S.E.2d 57 (2015).

Blood tests not scientific report. — Blood testing conducted by the American Red Cross was not the type of investigation-generated written scientific report subject to the discovery provision of former O.C.G.A. § 17-7-211. White v. State, 263 Ga. 94, 428 S.E.2d 789 (1993) (decided under former O.C.G.A. § 17-7-211).

Death certificate was not a scientific report that the state must furnish to the defense upon the state's timely written request pursuant to former O.C.G.A. § 17-7-211. Conklin v. State, 254 Ga. 558, 331 S.E.2d 532, cert. denied, 474 U.S. 1038, 106 S. Ct. 606, 88 L. Ed. 2d 584 (1985) (decided under former O.C.G.A. § 17-7-211).

Defendant was entitled to a copy of a scientific report even though the prosecutor orally informed defense counsel prior to trial of the information the defendant received from the crime lab. Alexander v. State, 203 Ga. App. 375, 416 S.E.2d 762, cert. denied, 203 Ga. App. 905, 416 S.E.2d 762 (1992) (decided under former O.C.G.A. § 17-7-211).

State was not required to explain testing procedures used by the FBI in a scientific report furnished to the state by the FBI and requested by the defendant. Moody v. State, 210 Ga. App. 431, 436 S.E.2d 545 (1993) (decided under former O.C.G.A. § 17-7-211).

Operating record for a photo-electric intoximeter was a pre-printed form which was essentially a checklist of steps to insure proper operation of the machine; this was essentially the recording of an officer's working notes, not a scientific report within the ambit of former O.C.G.A. § 17-7-211. Johnson v. State, 174 Ga. App. 579, 330 S.E.2d 791 (1985) (decided under former O.C.G.A. § 17-7-211).

Intoximeter results printout. — Intoximeter breath test results printout was a written scientific report for purposes of former O.C.G.A. § 17-7-211. Ratliff v. State, 207 Ga. App. 112, 427 S.E.2d 85 (1993) (decided under former O.C.G.A. § 17-7-211).

Tape recordings of drug transaction. — Tape recording of a drug transaction was not discoverable pursuant to for-

mer O.C.G.A. § 24-10-26 (see O.C.G.A. § 24-13-27) nor under § 17-7-210 [repealed], since the recording was not of any taped statement given by the defendant while in police custody, nor under former O.C.G.A. § 17-7-211 since the tape recording did not constitute a written scientific report. Weldon v. State, 204 Ga. App. 221, 419 S.E.2d 59 (1992) (decided under former O.C.G.A. §§ 17-7-210 and 17-7-211).

Photograph depicting defendant, printed from negative taken from stolen camera was not a "written scientific report" under former O.C.G.A. § 17-7-211. Gosdin v. State, 176 Ga. App. 381, 336 S.E.2d 261 (1985) (decided under former O.C.G.A. § 17-7-211).

Photograph depicting fingerprint smudges on windowsill of victim's apartment was not a written scientific report, and, therefore, not subject to discovery under former O.C.G.A. § 17-7-211. Thomas v. State, 176 Ga. App. 53, 335 S.E.2d 135 (1985) (decided under former O.C.G.A. § 17-7-211).

Enlargements of fingerprints, which were prepared as jury aids, were not written scientific reports within the meaning of this section. Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982) (decided under former Code 1933, § 27-1303).

Latent fingerprint card which had to be interpreted by a testifying police officer in order to attain significance was not a "scientific report" discoverable under former O.C.G.A. § 17-7-211. Griffin v. State, 183 Ga. App. 386, 358 S.E.2d 917 (1987) (decided under former O.C.G.A. § 17-7-211).

Report of the officer who lifted the fingerprint was not a "scientific report" discoverable under former O.C.G.A. § 17-7-211; the trial court did not err in allowing the officer to testify that a latent print had been lifted or in allowing an expert to testify that, in the officer's opinion, that print had been made by the defendant. Wester v. State, 205 Ga. App. 336, 422 S.E.2d 433 (1992).

Written waiver of rights signed by the defendant is not a scientific report. Dean v. State, 168 Ga. App. 172, 308 S.E.2d 434 (1983) (decided under former O.C.G.A. § 17-7-210).

Emergency room record is a "written scientific report" although not specifically included in the statutory language. Paggett v. State, 188 Ga. App. 174, 372 S.E.2d 504 (1988) (decided under former O.C.G.A. § 17-7-211).

Physician's notes do not constitute written report. — Hospital emergency room record containing a physician's notes of the defendant's inculpatory statement did not constitute a scientific report subject to discovery under former O.C.G.A. § 17-7-211. Conyers v. State, 260 Ga. 506, 397 S.E.2d 423 (1990) (decided under former O.C.G.A. § 17-7-211).

Medical investigator's notes not "scientific report." — Chief medical investigator's notes compiled solely upon the investigator's observation of the scene of a homicide were not a "scientific report" for purposes of former O.C.G.A. § 17-7-211. Pierce v. State, 209 Ga. App. 366, 433 S.E.2d 641 (1993) (decided under former O.C.G.A. § 17-7-211).

Handwritten notes and experiments of state's experts were not scientific reports for purposes of discovery under former O.C.G.A. § 17-7-211. Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983) (decided under former O.C.G.A. § 17-7-211).

Graphs not scientific reports. — Graphs from an instrument known as a micro spectro photometer were not scientific reports for the purposes of discovery under former O.C.G.A. § 17-7-211 because the graphs did not contain the conclusions of the microanalyst from the crime laboratory, but had to be interpreted by a microanalyst in order to attain the significance of the graphs. Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983) (decided under former O.C.G.A. § 17-7-211).

Former § 17-7-211 did not mandate that notes, graphs, preliminary tests, and work product be furnished because those items did not constitute scientific reports. Andrews v. State, 196 Ga. App. 790, 397 S.E.2d 63 (1990) (decided under former O.C.G.A. § 17-7-211).

Reports prepared by arson investigators not scientific reports. — In an action for arson, any reports prepared by the county and state arson investigators did not constitute "scientific reports" within the meaning of former O.C.G.A.

Scientific Reports (Cont'd)

§ 17-7-211 because the investigators' analyses of the fire scene was based upon the investigators' general knowledge gleaned from experience and training rather than on any tests performed on material taken from the scene. Kosal v. State, 204 Ga. App. 708, 420 S.E.2d 621 (1992) (decided under former O.C.G.A. § 17-7-211).

Autopsist's photographs were not "written scientific reports" discoverable under former O.C.G.A. § 17-7-211. Taylor v. State, 261 Ga. 287, 404 S.E.2d 255, cert. denied, 502 U.S. 947, 112 S. Ct. 393, 116 L. Ed. 2d 343 (1991) (decided under former O.C.G.A. § 17-7-211).

Experiment of forensic serologist to determine whether serological testing could show the presence of blood in a bloodprint impressed on plastic after the print had gone through fingerprint processing, when neither the experiment nor the experiment's results were reduced to writing, was not subject to exclusion under former O.C.G.A. § 17-7-211. Ruger v. State, 263 Ga. 548, 436 S.E.2d 485 (1993) (decided under former O.C.G.A. § 17-7-211).

Dental impressions, x-rays, and photographs were not discoverable as written scientific reports inasmuch as those items did not contain the dentist's conclusions and findings but had to be interpreted by the dentist to attain significance. Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991) (decided under former O.C.G.A. § 17-7-211).

Ballistics examination. — Court would reject the contention that the state violated the statute by failing to provide sufficient discovery regarding the ballistics examination since: (1) the record showed that the defendant was provided before trial with the report of the state firearms expert listing the expert's conclusions, which were based on the expert's microscopic examination of bullets and shell casings for each weapon tested in the case; and (2) the defendant was not entitled to the internal documents and work product of the crime lab. Cook v. State, 270 Ga. 820, 514 S.E.2d 657, cert. denied, 528 U.S. 974, 120 S. Ct. 419, 145 L. Ed. 2d 327 (1999).

Defendant's counsel was not ineffective because there was no evidence that the state acted in bad faith with respect to the time within which the state provided the ballistics testing report to trial counsel as the record revealed that the state provided the test results to defense counsel as soon as the results became available; and, to the extent that the defendant claimed that the defendant's trial counsel should have objected to the state expert's testimony at trial based on having received the ballistics report less than ten days prior to trial, the admission of that testimony could not have created a reasonable probability that the outcome of the trial would have been different in light of the overwhelming evidence of the defendant's guilt. Crump v. State, 301 Ga. 871, 804 S.E.2d 364 (2017).

Drug's physical effects not scientific report. — Testimony by two expert witnesses that, in the witnesses' knowledge and experience, a drug was a hallucinogenic which also caused certain physical effects in those who used the drug was properly admitted. The expert witnesses were not testifying as to any undisclosed scientific test results of appellant's own bodily fluids. Kirkland v. State, 206 Ga. App. 27, 424 S.E.2d 638 (1992) (decided under former O.C.G.A. § 17-7-211).

Failure to provide summary of basis for expert opinions. — Trial court did not err by ordering the defendant's psychologist to provide the state with a copy of the interview notes upon which the psychologist was relying as the basis for the expert opinions because the defendant had not otherwise provided an updated "summary" of the basis for those opinions; during the psychologist's testimony, it became apparent that the psychologist was basing the expert testimony in part on additional interviews that the psychologist had conducted since the defendant had served the state with discovery. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

In an action for aggravated assault and aggravated battery, the trial court abused the court's discretion in denying the defendant's motion for a continuance after the state failed to provide the defendant,

no later than ten days prior to trial, a written summary of an oral report by a gang expert. Williams v. State, No. A20A0397, 2020 Ga. App. LEXIS 403 (June 29, 2020).

Trial court erred in disclosing to the state its ex parte orders. — In a capital murder case in which the defendant was granted ex parte orders for mental health experts to examine the defendant, the trial court erred in revealing to the state the identities of the experts, their areas of practice, and the bases for the examinations; remand was required to assess the likelihood of prejudice and take curative measures. Putnal v. State, 303 Ga. 569, 814 S.E.2d 307 (2018).

Report not excludable. — Since the record showed that there were no scientific reports to be provided ten days before trial and that the prosecution advised the defendant of the results of the test concerning the presence of semen on the rape kit slides when learned, the report itself was not excludable under the statute since there was no written report available before the trial. Davis v. State, 204 Ga. App. 657, 420 S.E.2d 349 (1992) (decided under former §§ 17-7-210 and 17-7-211).

Since the indictment charged the defendant with possession of cocaine and marijuana, the cocaine field-tested positive, the witness who performed the test was timely included in the state's witness list and the transcript contained no evidence that the admission of the test report impaired the defendant's trial strategy in any way, the fact that the state did not provide the defense with the report pursuant to O.C.G.A. § 17-16-4 did not necessitate the report's exclusion, particularly as the defendant did not argue that the defendant was surprised by the results and had declined a continuance. Guild v. State, 236 Ga. App. 444, 512 S.E.2d 343 (1999).

Timely Request for Scientific Reports

For a request for disclosure of scientific reports to be timely, whether it be made "at arraignment" or at some other time, the request must precede the tenth day before trial of the case. State v. Meminger, 249 Ga. 561, 292 S.E.2d 681 (1982) (decided under former Code 1933, § 27-1303); Randall v. State, 195 Ga. App. 755, 395 S.E.2d 2 (1990) (decided under former O.C.G.A. § 17-7-210).

Five-day span between the demand and trial precludes a finding of timeliness under subsection (b) of this section. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, aff'd, 251 Ga. 525, 307 S.E.2d 904 (1983) (decided under former Code 1933, § 27-1303).

Continuance or recess. — Only when the prosecutor fails altogether to furnish a written scientific report does the exclusionary rule apply; when a written scientific report is furnished late, the appropriate remedy "perhaps" is to grant a continuance or recess upon timely request by the defendant. Wilburn v. State, 199 Ga. App. 667, 405 S.E.2d 889 (1991) (decided under former O.C.G.A. § 17-7-211); Shannon v. State, 205 Ga. App. 831, 424 S.E.2d 51, cert. denied, 205 Ga. App. 901, 424 S.E.2d 51 (1992) (decided under former O.C.G.A. § 17-7-211).

Trial court did not abuse the court's discretion by failing, sua sponte, to allow the defendant more than a 15-minute recess to examine medical records which were not provided to the defendant until the day of trial since the defendant never requested a continuance or a recess. Wilburn v. State, 199 Ga. App. 667, 405 S.E.2d 889 (1991) (decided under former O.C.G.A. § 17-7-211).

Request by Defense for Scientific Reports

Brady motion insufficient to invoke discovery. — Brady motion requesting to have disclosed and produced "the results of reports of any scientific or other tests, analysis, experiments, or studies made in connection with this case" was insufficient to invoke the disclosure requirements of former O.C.G.A. § 17-7-211. Massey v. State, 251 Ga. 515, 307 S.E.2d 489 (1983); McCutchen v. State, 177 Ga. App. 719, 341 S.E.2d 260 (1986); Johnson v. State, 187 Ga. App. 803, 371 S.E.2d 419 (1988) (decided under former O.C.G.A. § 17-7-211).

Since the defendant contended that the trial court erred in allowing evidence of scientific reports to which the defendant

Request by Defense for Scientific Reports (Cont'd)

objected because the prosecution allegedly failed to comply with the requirements of former O.C.G.A. § 17-7-211, and since the record showed that the defendant made no written request pursuant to that Code section and the defendant's Brady motion failed to make reference to that Code section or to specifically invoke the ten-day time frame of that Code section, the trial court's ruling admitting the evidence was not error. Cassie v. State, 192 Ga. App. 484, 385 S.E.2d 129, cert. denied, 192 Ga. App. 901, 385 S.E.2d 129 (1989) (decided under former O.C.G.A. § 17-7-211).

Adequacy of notice. — Notice under this section is adequate if the defense specifically referred to that Code section or if it makes clear that scientific reports, whether inculpatory or exculpatory, should be furnished prior to the ten-day limit. State v. Madigan, 249 Ga. 571, 292 S.E.2d 406 (1982) (decided under former Code 1933, § 27-1303); State v. Meminger, 249 Ga. 561, 292 S.E.2d 681 (1982) (decided under former Code 1933, § 27-1303).

Court did not err in admitting certain scientific reports which were not provided to the defendant at least ten days prior to trial pursuant to former O.C.G.A. § 17-7-211 since the request made was a general "Brady" motion without reference to scientific reports. Harden v. State, 166 Ga. App. 279, 304 S.E.2d 456 (1983) (decided under former O.C.G.A. § 17-7-211).

Pretrial motion demanding a copy of any written scientific reports in the possession of the prosecution and to be introduced against the defendant but which did not mention former O.C.G.A. § 17-7-211 as authority for such demand and did not request that the scientific reports be produced ten days prior to trial did not constitute a valid request for discovery under that section. Lariscey v. State, 254 Ga. 241, 328 S.E.2d 213 (1985) (decided under former O.C.G.A. § 17-7-211).

Defense request must precede tenth day before trial. — For a request to be timely, whether it was made at arraignment or at some other time, the request must precede the tenth day before trial as otherwise it would be impossible for the state to comply with former Code 1933, § 27-1303. State v. Meminger, 249 Ga. 561, 292 S.E.2d 681 (1982) (decided under former Code 1933, § 27-1303).

Motion for discovery of scientific reports filed at arraignment held ten days prior to trial was untimely. Abrams v. State, 164 Ga. App. 553, 297 S.E.2d 324 (1982) (decided under former O.C.G.A. § 17-7-211).

Evidence allowed if state complied with request. — If the trial transcript revealed that the defendant's demand for scientific reports was made after arraignment and seven days prior to trial and that the defendant's trial attorney received a copy of the relevant scientific report seven days prior to trial, the trial court did not abuse the court's discretion in denying the defendant's motion to exclude the laboratory expert's testimony identifying the substance the defendant sold to an undercover officer as cocaine. Rolling v. State, 204 Ga. App. 13, 418 S.E.2d 396 (1992) (decided under former O.C.G.A. § 17-7-211).

No continuance for defense-requested testing. — Defendant was not entitled to a continuance pending receipt of the results of government laboratory testing which had not been requested by the state since the defendant had no right to seek, and the trial court had no authority to order, such a test for the defendant in the first place. Kendrix v. State, 206 Ga. App. 627, 426 S.E.2d 251 (1992) (decided under former O.C.G.A. § 17-7-211).

State's Duty to Comply with Request

Complete disclosure of all work materials used in compiling a scientific report was not contemplated under this section. The denial of such information did not unnecessarily prejudice the defendant or curtail the defendant's attorney in the presentation of the defendant's defense. Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981) (decided under former Code 1933, § 27-1303); Ledford v. State, 264 Ga. 60, 439 S.E.2d 917 (1994), cert. denied, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 641 (1995) (decided under former O.C.G.A. § 17-7-211).

Former § 17-7-211 applied only to "written scientific reports." If there was no writing, there was nothing to which the statute attaches. Law v. State, 251 Ga. 525, 307 S.E.2d 904 (1983) (decided under former O.C.G.A. § 17-7-211).

Former § 17-7-211 applied only when there was a writing. Faircloth v. State, 253 Ga. 67, 316 S.E.2d 457 (1984) (decided under former O.C.G.A. § 17-7-211).

Former § 17-7-211 applied to scientific reports in writing and not oral reports of experts relaying the results of tests. Perry v. State, 255 Ga. 490, 339 S.E.2d 922 (1986) (decided under former O.C.G.A. § 17-7-211); Herndon v. State, 187 Ga. App. 77, 369 S.E.2d 264 (1988) (decided under former O.C.G.A. § 17-7-211); Beck v. State, 196 Ga. App. 269, 396 S.E.2d 59 (1990) (decided under former O.C.G.A. § 17-7-211); Fulmer v. State, 205 Ga. App. 679, 423 S.E.2d 300 (1992) (decided under former O.C.G.A. § 17-7-211); Crumpton v. State, 213 Ga. App. 358, 444 S.E.2d 847 (1994) (decided under former O.C.G.A. § 17-7-211); Martin v. State, 214 Ga. App. 614, 448 S.E.2d 471 (1994) (decided under former O.C.G.A. § 17-7-211); Odom v. State, 214 Ga. App. 354, 447 S.E.2d 704 (1994) (decided under former O.C.G.A. § 17-7-211).

Former § 17-7-210 did not attempt to mandate the furnishing of written scientific reports that did not in fact exist. Givens v. State, 214 Ga. App. 774, 449 S.E.2d 149 (1994) (decided under former O.C.G.A. § 17-7-211); Gay v. State, 228 Ga. App. 248, 491 S.E.2d 469 (1997).

Exclusion of informal notes of investigator. — Trial court abused the court's discretion in imposing the extreme sanction of evidence exclusion for the state's failure to produce the investigator's notes because the record did not show that the investigator's informal notes, which the state could not produce, were subject to discovery under any of the provisions of Georgia's Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

Luminal test not required for disclosure. — "Luminal" test which was performed on the suspect vehicle at the scene of the crime and never reduced to writing was not required to be provided to the defendant. Harley v. State, 263 Ga. 875, 440 S.E.2d 178 (1994) (decided under former O.C.G.A. § 17-7-211).

Former O.C.G.A. § 17-7-211 did not require the state to produce the actual physical evidence upon which the purported scientific report was based. Mercer v. State, 169 Ga. App. 723, 314 S.E.2d 729 (1984) (decided under former O.C.G.A. § 17-7-211).

Photographic evidence. — Photo developer's cropping procedure eliminated one the defendant's cap from a photo; the state had the photo developed again, but the newly-developed photo, which showed the cap, was not provided to the defendants until the first day of jury selection. As the state did not act in bad faith, and alerted both the defendants and the court as soon as the state became aware of the problem, the trial court did not err by admitting the photo. Culler v. State, 277 Ga. 717, 594 S.E.2d 631 (2004).

When, in an aggravated assault case, a police officer's report notified defense counsel that photographs had been taken of the crime scene, the prosecution was not obligated by O.C.G.A. § 17-16-4(a)(3) to further notify counsel that those photographs had been developed as counsel was on notice of the distinct possibility that the photographs were part of the state's file, and counsel was given full access to that file and chose not to exercise that privilege, so the photographs were admissible even though the defendant had not seen the photographs. Monroe v. State, 273 Ga. App. 14, 614 S.E.2d 172 (2005).

In a prosecution for aggravated assault with intent to rape, the fact that the state failed to produce photos of the victim's injuries ten days before trial, as required by O.C.G.A. § 17-16-4(a)(3), was not grounds for reversal since the defendant did not ask for a continuance, did not show prejudice, and did not show that the state acted in bad faith. Murray v. State, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

Defendant did not show that defense counsel provided ineffective assistance by not objecting to the admission of photographs on the ground that the defense was not informed of the photographs in a timely manner, as required by O.C.G.A.

State's Duty to Comply with Request (Cont'd)

§ 17-6-4, because counsel did object on that ground, the objection was overruled, and that ruling was not appealed. Taylor v. State, 298 Ga. App. 145, 679 S.E.2d 371 (2009).

Defendant's claim that trial counsel was ineffective for failing to object to autopsy photographs solely on the ground that the photographs were not provided to the defense ten days before trial lacked merit as the defendant failed to show counsel performed in an objectively unreasonable way by objecting on several grounds and made no showing the outcome would have been different. Sloans v. State, 304 Ga. 363, 818 S.E.2d 596 (2018).

Summary of official report. — Any defect in compliance with former O.C.G.A. § 17-7-211 was not harmful error when the document produced pursuant to the defendants' request was not the official lab report itself, but was only a summary and differed from the official report produced at trial, and since the defendants had full right of cross-examination. Moon v. State, 194 Ga. App. 777, 392 S.E.2d 19 (1990) (decided under former O.C.G.A. § 17-7-211).

Polygraph examination results to be provided to defendant. — When a county police officer testified that two persons previously charged with the crime had been released on bond after the results of polygraph examination showed that one "was being honest in her statement", the results of this polygraph examination should have been turned over to the defense under the defendant's request for copies of scientific reports. Ford v. State, 256 Ga. 375, 349 S.E.2d 361 (1986) (decided under former §§ 17-7-210 and 17-7-211).

No violation if state does all state could reasonably do to furnish report. — If the trial court heard the parties and ruled as a factual matter that the state's attorney had properly mailed fingerprint reports to defense counsel and had done all the attorney reasonably could do to furnish the defendant with a copy and if, in fact, defense counsel knew of the report and was not surprised by the report's admission at trial, the defendant's rights under former O.C.G.A. § 17-7-211 were not violated. Pridgett v. State, 173 Ga. App. 409, 326 S.E.2d 581 (1985) (decided under former O.C.G.A. § 17-7-211).

No written report available. — Former § 17-7-211 did not serve to exclude testimony if no written scientific report was in the possession of the state and there was no evidence suggesting the state deliberately instructed witnesses not to prepare reports otherwise discoverable. McDaniel v. State, 169 Ga. App. 254, 312 S.E.2d 363 (1983) (decided under former O.C.G.A. § 17-7-211).

Since there was no written report of tests analyzing marijuana until the date of trial, no evidence of prosecutorial discovery circumvention, the test results were furnished as soon as the results became available, and the defendant did not request a continuance but did speak with the witness, the trial court did not err in admitting the analysis results. Hand v. State, 206 Ga. App. 501, 426 S.E.2d 18 (1992) (decided under former O.C.G.A. § 17-7-211).

Term "written report" limited in scope. — Right of pretrial discovery was intended by the legislature to allow a defendant to receive a complete written copy of the results of any scientific analysis, but the term "written report" as used in this section does not encompass the written work materials upon which the conclusions contained in the report were based. Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981) (decided under former Code 1933, § 27-1303).

Defendant's rights in pretrial discovery do not extend to a complete and detailed accounting of all police investigatory work on a case or to a detailed description of all analytical work performed by the crime laboratory. Sears v. State, 161 Ga. App. 515, 288 S.E.2d 757 (1982) (decided under former Code 1933, § 27-1303).

Notes and other work product. — State is not required to furnish the defendant with the state's expert's notes, work product, recordation of data, internal documents, or graphs. Roberts v. State, 196 Ga. App. 450, 396 S.E.2d 81 (1990) (decided under former O.C.G.A. § 17-7-211).

Testimony of chemist as to tests conducted. — State crime laboratory fo-

rensic drug chemist's testimony as to scientific tests conducted on alleged cocaine was properly admitted since the individual test results did not include any expression of the expert's conclusions or opinion so as to amount to a "written scientific report." Roberts v. State, 196 Ga. App. 450, 396 S.E.2d 81 (1990) (decided under former O.C.G.A. § 17-7-211).

Exclusion of evidence for noncompliance. — Former Code 1933, §§ 27-1302 and 27-1303 excluded from evidence any statements or scientific reports pertaining to a case if the defendant was not given copies of such at least ten days prior to trial after a proper request was made therefor. Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981) (decided under former Code 1933, §§ 27-1302 and 27-1303).

Evidence admissible when motion fails to invoke provisions of section. — Trial court did not err in admitting into evidence a death certificate because the prosecution failed to furnish the defendant a copy of the certificate prior to trial since the discovery motion failed to invoke the provisions of former O.C.G.A. § 17-7-211. Dunn v. State, 251 Ga. 731, 309 S.E.2d 370 (1983) (decided under former O.C.G.A. § 17-7-211).

Defendant entitled to document within reasonable time. — Defendant is entitled to have a scientific report at least ten days prior to trial. If ten days are not available, the defendant is entitled to the document within a reasonable time and may be entitled to a continuance or recess as the trial judge shall determine. Only if the prosecuting attorney fails altogether to furnish the document does the exclusionary rule apply. Law v. State, 251 Ga. 525, 307 S.E.2d 904 (1983) (overruling State v. Meminger, 249 Ga. 561, 292 S.E.2d 681 (1982)) (decided under former O.C.G.A. § 17-7-211).

Availability and not copies is the requirement. — Record revealed that the defendant was given complete access to the state's file on at least three occasions, and the state's file included copies of the experts' scientific reports; O.C.G.A. § 17-16-4(a)(4) did not require the state to serve the defendant with copies of scientific reports, but only to make such reports available for inspection and copying. Lopez v. State, 259 Ga. App. 720, 578 S.E.2d 304 (2003).

Former § 17-7-211 did not provide for personal service on defense counsel. Hodge v. State, 262 Ga. 242, 416 S.E.2d 518 (1992) (decided under former O.C.G.A. § 17-7-211).

No prejudice to preparation of defense. — Since the state showed without contradiction that the materials were delivered to defense counsel's office more than ten days before trial and defense counsel did not assert at trial any actual prejudice to the preparation of the defense, the purposes of former O.C.G.A. § 17-7-211 have clearly been served. Hodge v. State, 262 Ga. 242, 416 S.E.2d 518 (1992) (decided under former O.C.G.A. § 17-7-211).

Production of evidence not admitted at trial not required. — Evidence not admitted at trial was not statutorily required to be provided to the defense. Zamora v. State, 291 Ga. 512, 731 S.E.2d 658 (2012).

Delivery to counsel of copy of coroner's report four days prior to trial was not unreasonable under all of the circumstances, including the fact that the defendant was given fair warning of what the coroner's testimony would be not only by the coroner's report, but also by the autopsy report submitted to the defendant on the very day the appellant filed the appellant's request for scientific reports. Biddy v. State, 253 Ga. 289, 319 S.E.2d 842 (1984) (decided under former O.C.G.A. § 17-7-211).

Intoximeter results two days prior to trial. — One-hour continuance by trial court sufficed to compensate the state's provision of intoximeter results to the defendant only two days prior to trial since the defendant had not shown how additional time would have benefited the defendant or how the lack of time harmed the defendant. Johnson v. State, 209 Ga. App. 395, 433 S.E.2d 638 (1993) (decided under former O.C.G.A. § 17-7-211).

Furnishing report on day prepared. — Since it appears from the transcript that a microanalyst's report was made available to defense counsel on the same day the report was prepared and fur-

State's Duty to Comply with Request (Cont'd)

nished to the state's attorney, and it further appears that the witness did not actually testify until several days later, and, further, since former O.C.G.A. § 17-7-211 did not require that scientific reports be made available to the defense until the reports are "in the possession of or available to the prosecuting attorney", there was no violation of the defendant's discovery rights under the statute. Daniel v. State, 180 Ga. App. 179, 348 S.E.2d 720 (1986) (decided under former O.C.G.A. § 17-7-211).

Omission of actual figures regarding quantity of alcohol or other drugs found in the defendant's blood and urine after a laboratory test rendered the test results in noncompliance with former O.C.G.A. § 17-7-211 and was fatal to the prosecution's case. Camarata v. State, 188 Ga. App. 41, 371 S.E.2d 885, cert. denied, 188 Ga. App. 911, 371 S.E.2d 885 (1988) (decided under former O.C.G.A. § 17-7-211).

Furnishing wrong report held harmless error. — If a scientific report is furnished on demand and timely, albeit the wrong report, and there is no evidence whatsoever that the error was other than an innocent mistake, and no harm results to the defendant, the rule of exclusion should not automatically apply. White v. State, 181 Ga. App. 170, 351 S.E.2d 536 (1986) (decided under former O.C.G.A. § 17-7-211).

Defendant's remedy for noncompliance. — Remedy under this section for the state's failure to furnish a defendant with a copy of any written scientific report when a proper and timely demand had been made therefor was the exclusion and suppression of such reports from evidence in the state's case-in-chief or in rebuttal. Tanner v. State, 160 Ga. App. 266, 287 S.E.2d 268 (1981) (decided under former Code 1933, § 27-1303).

Since the state had not provided the state crime lab's report when requested by the defendant under this section, testimony and evidence arising from the report must be suppressed as well as the report itself. Luck v. State, 163 Ga. App. 657, 295 S.E.2d 584 (1982) (overruling Blackmon v. State, 158 Ga. App. 665, 281 S.E.2d 634 (1981)) (decided under former Code 1933, § 27-1303).

Even if there has been a violation by the state, the remedy is exclusion of the evidence rather than a mistrial. Dawson v. State, 166 Ga. App. 515, 304 S.E.2d 570 (1983); Pontoon v. State, 177 Ga. App. 868, 341 S.E.2d 505 (1986); Burton v. State, 191 Ga. App. 822, 383 S.E.2d 187 (1989) (decided under former O.C.G.A. § 17-7-211).

Remedy for a violation of former O.C.G.A. § 17-7-211 is not the grant of a motion for mistrial, but the suppression of the evidence. Curtis v. State, 183 Ga. App. 6, 357 S.E.2d 849 (1987); Burton v. State, 191 Ga. App. 822, 383 S.E.2d 187 (1989) (decided under former O.C.G.A. § 17-7-211).

Remedy for a violation of former O.C.G.A. § 17-7-211 is the exclusion of the evidence rather than the grant of a mistrial. Green v. State, 194 Ga. App. 343, 390 S.E.2d 285, aff'd, 260 Ga. 625, 398 S.E.2d 360 (1990), cert. denied, 500 U.S. 935, 111 S. Ct. 2059, 114 L. Ed. 2d 464 (1991) (decided under former O.C.G.A. § 17-7-211).

If the state did not provide the defendant with the fingerprint examination report demanded pursuant to former O.C.G.A. § 17-7-211, it was error to exclude the report itself, but allow the expert to testify about the fingerprint examination and the examination's results. Wester v. State, 260 Ga. 228, 391 S.E.2d 765 (1990) (decided under former O.C.G.A. § 17-7-211).

Defendant's remedy for a violation of former O.C.G.A. § 17-7-211 was to request a continuance or to make a motion to strike the contested testimony, and as neither of these remedies was sought, the court's refusal to grant the defendant's mistrial motion was proper. Prejean v. State, 209 Ga. App. 411, 433 S.E.2d 628 (1993) (decided under former O.C.G.A. § 17-7-211).

Scientific report in the possession of the FBI laboratory was available to the state prosecutor, and it was error to deny the defendant's motion for a continuance when the defendant sought to prepare a

defense to the report which was provided to the defendant by the state only seven days before the trial. Moody v. State, 210 Ga. App. 431, 436 S.E.2d 545 (1993) (decided under former O.C.G.A. § 17-7-211).

Proper remedy for the state's failure to comply with O.C.G.A. § 17-16-4(a)(4) was to postpone the testimony of the state's blood spatter expert until late in the trial as the trial court did, pursuant to O.C.G.A. § 17-16-6. Further, by failing to ask for more time to prepare for the expert, the defendant waived any claim of error. Valentine v. State, 293 Ga. 533, 748 S.E.2d 437 (2013).

Failure to produce held not error. — If the defendant is told of the requested information or knows as much as the prosecution does and has an equal opportunity to obtain the pertinent document from a nonaffiliated witness, it is not a violation of the statute for the state to fail to produce the document in response to a demand for scientific reports. Worth v. State, 183 Ga. App. 68, 358 S.E.2d 251, cert. denied, 183 Ga. App. 907, 358 S.E.2d 251 (1987); Paggett v. State, 188 Ga. App. 174, 372 S.E.2d 504 (1988); Morris v. State, 196 Ga. App. 811, 397 S.E.2d 159 (1990) (decided under former O.C.G.A. § 17-7-211).

In a prosecution for drug possession, the state did not violate the defendant's discovery requests by failing to give the defendant the result of a negative urine test. There was no indication that the defendant was unable to obtain the test report personally. Defendant could not simply neglect to compel production of the report before trial and then complain after trial that the report's absence prejudiced the defendant. Sanders v. State, 199 Ga. App. 671, 405 S.E.2d 727 (1991) (decided under former O.C.G.A. § 17-7-211).

Statement the defendant made while attempting to elude police was not required to be disclosed under O.C.G.A. § 17-16-4(a)(1); trial counsel was not ineffective for failing to object to the introduction of the statement on the grounds that the state failed to disclose the statement during discovery. Usher v. State, 258 Ga. App. 459, 574 S.E.2d 580 (2002).

If the defendant has already been provided with a copy of test results by the police, the defendant cannot be harmed by the state's failure to provide the results. Henson v. State, 168 Ga. App. 210, 308 S.E.2d 555 (1983); Johnson v. State, 194 Ga. App. 501, 391 S.E.2d 132 (1990) (decided under former O.C.G.A. § 17-7-211).

If the defendant already had been provided with a copy of intoximeter test results, the defendant was not harmed by the state's failure to provide the results pursuant to former O.C.G.A. § 17-7-211. Starnes v. State, 196 Ga. App. 262, 395 S.E.2d 603 (1990) (decided under former O.C.G.A. § 17-7-211).

Certificate of service prima facie proof that report was provided. — Trial court did not commit reversible error by denying the defendant's motion for a continuance and allowing crime reports and testimony concerning those reports to be admitted at trial since an assistant district attorney's certificate of service established prima facie proof that a scientific report had been furnished. Williams v. State, 201 Ga. App. 384, 411 S.E.2d 316 (1991) (decided under former O.C.G.A. § 17-7-211).

Restriction on oral testimony as to inadmissible report. — State cannot establish the substance of a scientific crime laboratory report through oral testimony if failure of the state to comply with this section rendered the report itself inadmissible. Madigan v. State, 160 Ga. App. 656, 288 S.E.2d 34 (1981), rev'd on other grounds, 249 Ga. 571, 292 S.E.2d 406 (1982); Osborn v. State, 161 Ga. App. 132, 291 S.E.2d 22 (1982) (decided under former Code 1933, § 27-1303).

In a prosecution for violation of the Controlled Substances Act, the state failed to produce to appellant the crime lab analysis of suspect plants until the morning of trial, and since the appellant asked for a continuance and was denied one, the trial court erred in permitting the crime lab expert to testify concerning the expert's analysis of the plants since the expert's testimony was the chief and conclusive proof that the suspect plants were marijuana, and it was highly probable that the error of the trial court in admitting such testimony contributed to the guilty verdict and required reversal.

State's Duty to Comply with Request (Cont'd)

Asbell v. State, 163 Ga. App. 514, 295 S.E.2d 182 (1982) (decided under former Code 1933, § 27-1303).

If scientific reports are not provided, the testimony of witnesses based upon the reports is also excluded. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 17-7-211).

Familiarity with preparer's testimony obviated need for disclosing report. — If appellant was already aware of the testimony the physician would offer, the appellant could not have been harmed by the state's failure to disclose the substance of the medical report pursuant to this section. Mackler v. State, 164 Ga. App. 874, 298 S.E.2d 589 (1982) (decided under former Code 1933, § 27-1303).

Notes an FBI employee prepared to assist the employee in testifying did not constitute a "scientific report." Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 17-7-211).

Letter of transmittal from an FBI employee, which stated that two enhanced copies of an original tape were made, one reel and one cassette, and that in order to obtain maximum intelligibility the enhanced reel copy should be played on a good tape player and reviewed using quality headphones, does not qualify as a "scientific report." Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 17-7-211).

Avoiding discovery by calling experts who performed tests. — State cannot avoid discovery of documentary recording of test results by calling instead the actual experts who performed the tests and thereafter contending that the defense was not entitled to documentation of the test results because the state did not use the results. Metts v. State, 162 Ga. App. 641, 291 S.E.2d 405 (1982) (decided under former Code 1933, § 27-1303).

Former § 17-7-211(c) did not serve to exclude other testimony since no report was in the possession of the state. Olson v. State, 166 Ga. App. 104, 303 S.E.2d 309 (1983), cert. denied, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984) (decided under former O.C.G.A. § 17-7-211).

Tests conducted after commencement of trial. — If a forensic scientist testifying for the state performed tests after the trial began so as to rebut evidence presented by the defendant at trial, the results of such test were not "in the possession of or available to the prosecuting attorney" when the defendant sought discovery and thus were admissible. Billings v. State, 161 Ga. App. 500, 288 S.E.2d 622 (1982), overruled on other grounds, Bangs v. State, 198 Ga. App. 404, 401 S.E.2d 599 (1991) (decided under former Code 1933, § 27-1303).

Document from health department showing that defendant had been treated for herpes constituted report required to be provided by state. Bramlett v. State, 162 Ga. App. 584, 291 S.E.2d 739 (1982) (decided under former Code 1933, § 27-1303).

Testimony not based on scientific analysis admissible. — Since none of a state fire marshal investigator's testimony was derived from any scientific analysis, as the testimony only related to what the investigator had seen and done at the fire site and in connection with an informant's activities, and the investigator offered no opinions or conclusions based upon any scientific examinations, the investigator's testimony was not excludable under former O.C.G.A. § 17-7-211. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 17-7-211).

Report available to but not received by the district attorney is discoverable, and if the report is not provided to the defendant upon request, it is error to admit testimony based on the report. Luck v. State, 163 Ga. App. 657, 295 S.E.2d 584 (1982) (decided under former Code 1933, § 27-1303).

Results of laboratory test admissible when no written scientific report prepared. — Trial court properly admitted testimony of a forensic chemist with the Georgia State Crime Lab, describing the results of the laboratory analysis of the substance found in the motel room, since there was no written scientific re-

port and the record revealed no apparent effort by the state to circumvent subsection (b) of former Code 1933, § 27-1303 nor even a hint of prosecutorial "sandbagging," but, on the contrary, there was testimony that the substance was tested by an independent analyst on behalf of the defense with the cooperation of the state. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, aff'd, 251 Ga. 525, 307 S.E.2d 904 (1983) (decided under former Code 1933, § 27-1303).

State is not required to furnish the defendant a "scientific report" showing the results of the comparison between prints taken at the scene of the crime and those taken from the defendant at the jail if the crime lab expert who makes the comparison does not see the prints obtained from the defendant at the jail until they are shown to the expert at trial and, consequently, has no opportunity to prepare a report on the expert's findings. Lemons v. State, 167 Ga. App. 863, 307 S.E.2d 747 (1983) (decided under former O.C.G.A. § 17-7-211).

Results via traffic citation. — Providing the defendant with a notation of the test results in writing on the Uniform Traffic Citation given to the defendant constituted sufficient notice of the test results for purposes of former O.C.G.A. § 17-7-211. Ratliff v. State, 207 Ga. App. 112, 427 S.E.2d 85 (1993) (decided under former O.C.G.A. § 17-7-211).

Specificity required on lab reports. — Results of chemical tests administered to the defendant are inadmissible when the crime laboratory report on the tests does not state on the report's face the exact numerical quantity of the drugs found in the defendant's blood and urine. Box v. State, 187 Ga. App. 260, 370 S.E.2d 28 (1988) (decided under former O.C.G.A. § 17-7-211).

Former § 17-7-211 did not require the creation of a report if none exists. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 17-7-211).

Remedy meaningless if pathologist allowed to testify from recollection. — Allowing a pathologist to testify from the pathologist's recollection, or from the pathologist's recollection as refreshed by an autopsy report otherwise excluded from evidence because the defendant was denied a copy of the report contrary to provisions of former Code 1933, § 27-1303, rendered meaningless the exclusionary remedy provided by that section. Tanner v. State, 160 Ga. App. 266, 287 S.E.2d 268 (1981) (decided under former Code 1933, § 27-1303).

Evidence lost by state. See Dawson v. State, 166 Ga. App. 515, 304 S.E.2d 570 (1983) (decided under former O.C.G.A. § 17-7-211).

Complete failure to furnish means exclusions. — If the prosecuting attorney furnished a copy of a scientific report but not in the time frame specified, there was nothing in former O.C.G.A. § 17-7-211 to require exclusion of the document from evidence. Only if the prosecuting attorney failed altogether to furnish the document did the exclusionary rule apply. Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988), cert. denied, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992) (decided under former O.C.G.A. § 17-7-211).

Conviction reversed. — Defendant's conviction for driving under the influence was reversed since the state's failure to produce evidence of marijuana usage in a "written scientific report" left the defense counsel at a huge disadvantage in trying to cross-examine the state's witness as to the implications of the test results and the formation of the defense counsel's opinion based upon the results. Durden v. State, 187 Ga. App. 154, 369 S.E.2d 764 (1988) (decided under former O.C.G.A. § 17-7-211).

Waiver

Failure to request continuance. — Trial court did not err in admitting into evidence the CDs retrieved from inside a CD changer seized from the defendant's home since: (1) the state timely disclosed the CD changer, which contained the CDs, and the prosecutor asserted that the prosecutor told defense counsel prior to trial that the CDs might be inside; (2) even if there was a discovery violation, the defendant failed to show bad faith by the prosecutor and prejudice; and (3) the defendant failed to request a continuance to

Waiver (Cont'd)

cure any prejudice that might have resulted from the state's failure to comply with the reciprocal discovery requirements under O.C.G.A. § 17-16-4. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Failure to identify harm. — Defendant's claim of a violation of O.C.G.A. § 17-16-4(a)(3) was rejected as the defendant failed to identify any harm resulting from the alleged error. Dupree v. State, 267 Ga. App. 561, 600 S.E.2d 654 (2004).

Failure to object to introduction of polygraph examination results waived issue. — When a witness made reference to the results of a polygraph examination, defense counsel made no objection, thus, the defendant's objection under former O.C.G.A. § 17-7-210 with respect to the admission of the results of the polygraph examination was waived. Ford v. State, 256 Ga. 375, 349 S.E.2d 361 (1986) (decided under former O.C.G.A. § 17-7-210).

Defendant waived any objection to service of a laboratory report. — Defendant waived any objection that the defendant might have had to service of a laboratory report only nine days prior to trial by agreeing, after the trial court had granted the state's motion for a one-day continuance, to stipulate that the case was tried one day later than the case was actually tried. Campbell v. State, 191 Ga. App. 390, 381 S.E.2d 599 (1989) (decided under former O.C.G.A. § 17-7-211).

Failure to object or strike testimony. — Defendant's demand for a mistrial after a fire scene investigator testified that the investigator had prepared a report regarding the defendant's arson case was rejected since the defendant had not objected to the fire scene investigator's testimony nor had the defendant made a motion to strike the testimony offered by the fire scene investigator. Owens v. State, 204 Ga. App. 5, 418 S.E.2d 631 (1992) (decided under former O.C.G.A. § 17-7-211).

Objection waived to scientific expert's testimony. — Trial court did not err in admitting undisclosed scientific evidence from an expert witness since no objection or motion for mistrial was made when the testimony was given. Strawder v. State, 207 Ga. App. 365, 427 S.E.2d 792 (1993) (decided under former O.C.G.A. § 17-7-211).

Failure to object. — Failure of defense counsel to object to the evidence of the defendant's in-custody statements when the statement was proffered at trial constituted a waiver of the state's noncompliance with counsel's request for a copy of the defendant's in-custody statement. Parrish v. State, 194 Ga. App. 760, 391 S.E.2d 797 (1990) (decided under former O.C.G.A. § 17-7-210).

Defendant waived error based on the prosecutor's failure to provide the defendant with a complete copy of the defendant's in-custody statement by failing to object or move for a mistrial until after the defendant cross-examined the investigating officer concerning the omitted portion of the statement. Al-Beti v. State, 210 Ga. App. 312, 436 S.E.2d 50 (1993) (decided under former O.C.G.A. § 17-7-210).

When the prosecutor responded that the prosecutor did not have a copy of the 9-1-1 tapes, and the defense did not object or seek relief, the defendant waived the issue of whether the state violated the discovery rules by failing to turn over a copy of the tapes. Smith v. State, 250 Ga. App. 465, 552 S.E.2d 468 (2001).

Statement in the possession of an investigating officer is deemed to be in the possession of the state, whether or not the statement is in the state's file, and the state is obliged to notify the defense of the statement's existence. However, the defendant waived the right to object to testimony based on this statement by failing to object to the testimony during direct examination, or even earlier at the Jackson-Denno hearing. Finally, even if the defendant's objection had been properly preserved, any error from the investigative officer's testimony was harmless because the evidence was cumulative. Smiley v. State, 260 Ga. App. 283, 581 S.E.2d 310 (2003).

Because an inmate never argued that the state failed to comply with the discovery provisions of O.C.G.A. § 17-16-4, nor did the inmate request a Jackson/Denno hearing to determine the voluntariness of

a prior statement given in an administrative hearing, the inmate was precluded from making these arguments for the first time on appeal. Pugh v. State, 280 Ga. App. 137, 633 S.E.2d 439 (2006).

With regard to a defendant's challenges to the admission of the defendant's self-incriminating statements that were not timely disclosed to the defense by the state, the defendant waived the right to appeal the state's failure to comply with O.C.G.A. § 17-16-1 et seq., by both failing to specifically object on the grounds that the defendant's statements were not properly disclosed to the defendant under O.C.G.A. § 17-16-4, and by failing to seek a continuance to cure any prejudice which may have resulted from the state's failure to comply with the statute. Jaheni v. State, 285 Ga. App. 266, 645 S.E.2d 735 (2007).

Trial court did not abuse the court's discretion in allowing a witness to be called as an expert because the defendant's trial counsel agreed to the trial court's suggestion that the state's witness be treated as a rebuttal witness testifying out of order; trial counsel's affirmative withdrawal of an objection previously made returned the situation to one in which no objection was made, and the failure to object at trial constituted a waiver of the defendant's ability to raise the issue on appeal. Danenberg v. State, 291 Ga. 439, 729 S.E.2d 315 (2012), cert. denied, 568 U.S. 1124, 133 S. Ct. 941, 184 L. Ed. 2d 726 (2013).

Failure to elect. — Court of Appeals rejected the defendant's claimed discovery violation as the defendant could not complain that discovery materials were not made available to counsel before trial since the defendant failed to show an election to proceed under the reciprocal discovery statute and could not show what materials were withheld, or how the availability of the materials might have changed the outcome of the trial. Hall v. State, 282 Ga. App. 562, 639 S.E.2d 341 (2006).

Failure to request relief. — Pretermitting whether the state upheld the state's reciprocal discovery obligations, the defendant's failure during trial to assert a discovery violation deprived the trial court of an opportunity to formulate appropriate relief, if any. Garrett v. State, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

Failure to request in camera inspection — In a child molestation conviction, after the defendant determined during trial that the state had not informed the defendant of an additional interview conducted by the victim's counselor, the state did not violate the Georgia Reciprocal Discovery Act, O.C.G.A. § 17-16-4(a)(3)(a), by failing to provide this material because the defendant had not requested an in camera inspection of the confidential therapist's records as required by O.C.G.A. § 49-5-41. Waters v. State, 303 Ga. App. 187, 692 S.E.2d 802 (2010).

Exclusion of doctor's opinion not required. — Although the defendant argued that a neurosurgeon's opinion should have been excluded because the state failed to provide notice of the neurosurgeon's opinion regarding Shaken Baby Syndrome ten days prior to trial as required by the reciprocal discovery statute, the defendant failed to show that the defendant was prejudiced by the state's non-disclosure of the neurosurgeon's opinion, warranting an exclusion of the testimony as two of the state's expert witnesses had already testified regarding Shaken Baby Syndrome, defense counsel was on notice that the Shaken Baby Syndrome theory could be put forward by the state through those experts, and the defense presented its own expert at trial as rebuttal expert testimony. Wyatt v. State, 300 Ga. 509, 796 S.E.2d 701 (2017).

Expert testimony based on opinion not subject to this Code section. — When expert's testimony would have been independent of any scientific tests of experiments and would have been based on the expert's opinion derived from information available to both parties and which did not require the results and scientific tests or experiments, it was not subject to O.C.G.A. §17-16-4(b)(2) Green v. State, No. S19A0644, 2019 Ga. LEXIS 721 (Oct. 31, 2019).

Defendant's consent to move forward. — Defendant's counsel visited the defendant in jail prior to the trial and

Waiver (Cont'd)

expressed counsel's belief that the trial court would grant the defendant a continuance based upon the short period of time between counsel's receipt of the state's discovery and the scheduled trial date under O.C.G.A. § 17-16-4 since the state must disclose and make available certain discoverable materials no later than ten days prior to trial. Defendant and defense counsel came to the mutual decision to move forward with the trial as scheduled and the fact that the defendant later regretted making that choice did not afford the defendant the right to a new trial. Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

State's violation of O.C.G.A. § 17-16-4(a)(1) by failing to timely to disclose the defendant's in-custody offer to bribe the victim not to testify did not mandate reversal as the defendant waived the right to assert this error by not requesting relief at trial under O.C.G.A. § 17-16-6. Spencer v. State, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Trial court did not err in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the notice of the state's intent to seek recidivist sentencing was served on defense counsel on the first day of trial prior to the jury being sworn, and certified copies of the convictions were admitted without objection; therefore, any defects or untimeliness in the notice under O.C.G.A. § 17-16-4(a)(5) were waived. Ross v. State, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code Section 17-7-210, decided prior to its repeal by Ga. L. 1994, p. 1895, § 1, are included in the annotations for this Code section.

Defendant in probate court is entitled to the discovery rights under former O.C.G.A. §§ 17-7-110 and 17-7-211. 1986 Op. Att'y Gen. No. U86-13 (decided under former O.C.G.A. § 17-7-210).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Reliability of Polygraph Examination, 14 POF2d 1.

ALR. — Right of state in criminal contempt case to obtain data from the defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 A.L.R.2d 431.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of the defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A.L.R.3d 571.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 A.L.R.3d 1170.

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses, 95 A.L.R.3d 832.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 A.L.R.4th 837.

Right of accused in state courts to inspection or disclosure of tape recording of his own statements, 10 A.L.R.4th 1092.

Accused's right to production of composite drawing of suspect, 13 A.L.R.4th 1360.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by the defendants or other nonexpert witnesses — modern cases, 33 A.L.R.4th 301.

What is accused's "statement" subject to state court criminal discovery, 57 A.L.R.4th 827.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process, 93 A.L.R.5th 527.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — weapons, 53 A.L.R.6th 81.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — personal items other than weapons, 55 A.L.R.6th 391.

Absolute immunity for failing to disclose exculpatory evidence under 42 U.S.C.A. § 1983 following Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), 63 A.L.R.6th 255.

Constitutional duty of federal prosecutor to disclose Brady evidence favorable to accused, 158 A.L.R. Fed. 401.

17-16-5. Alibi witnesses.

(a) Upon written demand by the prosecuting attorney within ten days after arraignment, or at such time as the court permits, stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days of the demand of the prosecuting attorney or ten days prior to trial, whichever is later, or as otherwise ordered by the court, upon the prosecuting attorney a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names, addresses, dates of birth, and telephone numbers of the witnesses, if known to the defendant, upon whom the defendant intends to rely to establish such alibi unless previously supplied.

(b) The prosecuting attorney shall serve upon the defendant within five days of the defendant's written notice but no later than five days before trial, whichever is later, a written notice stating the names, addresses, dates of birth, and telephone numbers of the witnesses, if known to the state, upon whom the state intends to rely to rebut the defendant's evidence of alibi unless previously supplied.

(c) If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subsection (a) or (b) of this Code section, the party shall promptly notify the other party of the existence and identity of such additional witness.

(d) Upon a showing that a disclosure required by this Code section would create a substantial threat of physical or economic harm to a witness, the court may grant an exception to any of the requirements of subsections (a) through (c) of this Code section.

(e) If the defendant withdraws the notice of intention to rely upon an alibi defense, the notice and intention to rely upon an alibi defense are not admissible. However the prosecuting attorney may offer any other evidence regarding alibi.

History. — Code 1981, § 17-16-5, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2.

Law reviews. — For article, "Death Penalty Law," see 53 Mercer L. Rev. 233 (2001). For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004).

JUDICIAL DECISIONS

Duty of state. — Use of the word "shall" indicates clearly that the state is required to file a rebuttal to the defendant's notification. White v. State, 271 Ga. 130, 518 S.E.2d 113 (1999).

State did not satisfy the state's obligation under O.C.G.A. § 17-16-5 because the state previously supplied a list of witnesses and the rebuttal witnesses were named on that list. White v. State, 271 Ga. 130, 518 S.E.2d 113 (1999).

State was obligated to respond to the defendants' notification of the defendants' intention to rely upon alibi as a defense, and neither the state's general witness list, nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under former O.C.G.A. §§ 24-9-82 and 24-9-83 (see O.C.G.A. §§ 24-6-608, 24-6-13, and 24-6-621), was a substitute for compliance with O.C.G.A. § 17-16-5(b). Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001).

"Witness" does not include defendant. — Term "witness", as it is used in subsection (a) of O.C.G.A. § 17-16-5, and as defined by O.C.G.A. § 17-16-1(3) "does not include the defendant"; thus, the trial court's ruling requiring the defendant to give notice to the state of any alibi testimony the defendant might give at trial on the defendant's own behalf was erroneous. Johnson v. State, 272 Ga. 468, 532 S.E.2d 377 (2000).

Failure to disclose. — If the defendant acted in bad faith in failing to provide information regarding alibi witnesses, and the state was prejudiced thereby, the defendant could be prevented from presenting the testimony of witnesses not properly disclosed. Davis v. State, 226 Ga. App. 83, 485 S.E.2d 508 (1997); Freeman v. State, 245 Ga. App. 384, 537 S.E.2d 776 (2000).

Defendant could not show a reasonable probability that the outcome of the trial would have been different had counsel met the notice requirements in O.C.G.A. § 17-16-5(a) and presented the defendant's alibi defense because of the overwhelming evidence against the defendant. Thus, the defendant did not receive ineffective assistance of counsel when the defendant's counsel failed to properly notify the prosecution of the defendant's alibi defense, which resulted in the exclusion of alibi testimony at trial pursuant to O.C.G.A. § 17-16-6. Jones v. State, 266 Ga. App. 679, 598 S.E.2d 65 (2004).

Exclusion of an alibi witness was proper as the record disclosed evidence of bad faith by the defense in failing to disclose the witness within ten days of trial as required by O.C.G.A. § 17-16-5(a). Specific findings of fact regarding prejudice and bad faith had not been required as such findings were implicit in the trial court's decision to exclude the witness. Theophile v. State, 295 Ga. App. 517, 672 S.E.2d 479 (2009).

Failure to timely come forward with alibi defense. — Trial court did not abuse the court's discretion when the court excluded the defendant's alibi evidence, including the testimony of the defendant's alibi witnesses, pursuant to O.C.G.A. § 17-16-6, because the defendant's failure to timely come forward with the defendant's alibi defense constituted prejudice and bad faith; the state had notice of the alibi just three days before the start of trial, and although the defendant made the defendant's alibi witnesses available, at least one witness was uncooperative, further prejudicing the state. Huckabee v. State, 287 Ga. 728, 699 S.E.2d 531 (2010).

Exclusion of alibi evidence was not error as the defendant failed to notify the state of the alibi until the day of trial, despite the prosecutor's request for such evidence no more than five days prior to trial. Rembert v. State, 324 Ga. App. 146, 749 S.E.2d 744 (2013).

Presentation of alibi witness showed defendant not prejudiced by delay in appointment of counsel. — Defendant could not show that the delay in defense counsel's appointment denied the defendant the benefit of an alibi witness's testimony because the defendant's trial counsel filed a notice of intent to present an alibi defense, identifying the witness, and the witness was present and testified that the defendant's counsel had located the witness and interviewed the witness prior to the trial. Woods v. State, 342 Ga. App. 301, 802 S.E.2d 822 (2017).

Preservation of alibi defense. — Trial court erred in finding that the defendant failed to properly preserve an alibi defense pursuant to O.C.G.A. § 17-16-5(a) because the defendant had not gone to trial. Johnson v. State, 313 Ga. App. 895, 723 S.E.2d 100 (2012).

Premature filing of notice of alibi not ineffective assistance. — In an armed robbery prosecution, trial counsel was not ineffective for disclosing the defendant's alibi defense before the prosecution filed a demand for notice of alibi under O.C.G.A. § 17-16-5(a) because counsel knew that such a demand was going to be filed, and the defendant was not prejudiced by the premature disclosure. Fuller v. State, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Compliance required. — Defendant, whose evidence was the sole evidence in support of an alibi defense, was required to file an intention to offer an alibi defense under O.C.G.A. § 17-16-5(a), even when the state was aware that the defendant claimed to be elsewhere on the day of the crime, and such did not affect the defendant's right to testify under the Sixth Amendment; moreover, it was irrelevant that the state was already aware that the defendant claimed to be elsewhere on the date of the crime because the statute provided no exception for such prior knowledge, and because the mere claim to be elsewhere when confronted by authorities was a far cry from intending to present the legal defense of alibi. State v. Charbonneau, 281 Ga. 46, 635 S.E.2d 759 (2006).

Defendant's testimony about alibi. — Trial court did not err in excluding the defendant's testimony regarding the defendant's alibi defense since the defendant failed to provide information as required by O.C.G.A. § 17-16-5 ten days before the trial. Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

State's failure to comply with O.C.G.A. § 17-16-5 did not demand that the trial court grant the defendant's motion for acquittal since the defendant did not raise the noncompliance at trial, the court did not have the opportunity to exercise the court's discretion in formulating a remedy under O.C.G.A. § 17-6-6, and the defendant could not complain for the first time on appeal. White v. State, 271 Ga. 130, 518 S.E.2d 113 (1999).

Defendants were not entitled to relief based upon the state's failure to serve the defendants with the notice required by O.C.G.A. § 17-16-5(b) because the defendants did not show that the state acted in bad faith nor that the defendants were prejudiced by the state's failure to separately disclose the names of the witnesses who would rebut the defendants' alibi defense. Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001).

Trial court did not err in granting the state's motion for a mistrial as the defendant's failure to disclose all of the defendant's alibi witnesses after the state demanded that the defendant do so, coupled with defense counsel's mentioning in opening statement several witnesses who could place the defendant in another state at the time of the murders for which the defendant was on trial, warranted granting the mistrial because a ruling otherwise would violate the state's right to a fair trial and reward the defendant for the misconduct of the defendant's counsel. Tubbs v. State, 276 Ga. 751, 583 S.E.2d 853 (2003).

In the defendants' trial on a charge of murder and other crimes, the trial court did not abuse the court's discretion by limiting the testimony of a defense witness who was named as an alibi witness shortly before trial began. Reddick v. State, 264 Ga. App. 487, 591 S.E.2d 392 (2003), overruled on other grounds by State v. Springer, 297 Ga. 376, 774 S.E.2d 106 (2015).

Defendant's choice not to testify about alibi. — Trial court properly denied the defendant's motion for a new trial based on ineffective assistance as although the state filed a notice for demand of alibi defense, the defendant never maintained such a defense at trial and the record showed that the defendant decided not to testify based on having a prior conviction; thus, trial counsel's choice of trial strategy was consistent with the defendant's desire not to testify and was a reasonable choice based upon the pretrial assessment. Bostic v. State, 341 Ga. App. 402, 801 S.E.2d 89 (2017).

Reply to defendant's notice not required. — Defendant's notice of the defendant's alibi defense did not place the burden on the prosecution to file a rebuttal. White v. State, 233 Ga. App. 24, 503 S.E.2d 26 (1998), aff'd, 271 Ga. 130, 518 S.E.2d 113 (1999).

Discretion of court in permitting witness to testify. — Although the state failed to comply with the notification requirements of O.C.G.A. § 17-16-5(b), the trial court did not abuse the court's discretion in determining that the appropriate remedy was not to exclude the alibi witness, but to grant a continuance and permit the witness to testify. Malaguti v. State, 273 Ga. 398, 543 S.E.2d 1 (2001), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Exclusion of witness was error. — Exclusion of a the defendant's alibi witness was error, although the defendant failed to give the state the required ten-days' notice pursuant to O.C.G.A. § 17-16-5(a), as there was no finding of bad faith by the defendant or prejudice to the state under O.C.G.A. § 17-16-6. Ware v. State, 298 Ga. App. 232, 679 S.E.2d 797 (2009).

Claim that defendant not at crime scene. — Defendant is not required by O.C.G.A. § 17-16-5(a) to give notice to the state of the anticipated testimony of a witness who would testify merely that the defendant was not present at the crime scene at the relevant time when such testimony will not also assert that the defendant was at a specified location other than the crime scene at the time of the crime. Johnson v. State, 272 Ga. 468, 532 S.E.2d 377 (2000).

Evidence did not warrant instruction on alibi. — Evidence did not warrant an instruction on alibi because the evidence proffered at trial was insufficient to warrant the trial court to give an instruction on alibi; the trial court properly excluded alleged evidence of an alibi because the defendant's failure to timely come forward with the defendant's alibi defense constituted prejudice and bad faith. Huckabee v. State, 287 Ga. 728, 699 S.E.2d 531 (2010).

Failure to elect. — Court of Appeals rejected the defendant's claimed discovery violation as the defendant could not complain that discovery materials were not made available to counsel before trial since the defendant failed to show an election to proceed under the reciprocal discovery statute and could not show what materials were withheld, or how the availability of the materials might have changed the outcome of the trial. Hall v. State, 282 Ga. App. 562, 639 S.E.2d 341 (2006).

Challenge was not preserved for review. — Since the defendant did not raise at trial the issue of the state's alleged failure to comply with the notice requirements of O.C.G.A. § 17-16-5(b), the defendant could not raise the issue for the first time on appeal. Cordy v. State, 257 Ga. App. 726, 572 S.E.2d 73 (2002).

Because the defendant failed to object to the introduction of the notice of alibi on abandonment grounds at trial, but rather asserted only that the notice was a privileged communication, any error as to the introduction of the notice was waived on appeal. Hester v. State, 287 Ga. App. 434, 651 S.E.2d 538 (2007).

Failure to sustain appellate burden. — Trial court did not err in refusing to grant the defendant's requested remedy for the state's failure to respond to the defendant's notice of an alibi because although the state's provision of the state's general witness list did not satisfy the state's obligations under O.C.G.A. § 17-16-5(b); to be entitled to a new trial, the defendant was required to demonstrate what harm the defendant suffered as a result of the state's noncompliance, but the defendant showed no such harm; therefore, even assuming that the trial

court erred, the defendant failed to sustain the defendant's appellate burden and reversal was not warranted. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Counsel not ineffective for failing to object that notice not required. — Counsel was not ineffective in failing to specifically object that the defendant was not required to give the state notice of an alibi defense because, even if the trial court erred in failing to give an alibi instruction to the jury, the defendant was not prejudiced as the evidence did not provide the defendant a good alibi for the crime; the defendant admitted being at the crime scene with the victim on the night of the murder; and the girlfriend's testimony about when the defendant was home left the defendant ample time to kill the victim that night, and did not put the defendant at home when the minivan, like the one the defendant borrowed, was seen near the crime scene at about 1:30 A.M. Prince v. State, 295 Ga. 788, 764 S.E.2d 362 (2014).

Cited in Hargett v. State, 285 Ga. 82, 674 S.E.2d 261 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Alibi Defense, 27 POF2d 431.

17-16-6. Failure to comply with discovery requirements.

If at any time during the course of the proceedings it is brought to the attention of the court that the state has failed to comply with the requirements of this article, the court may order the state to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the state from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances. If at any time during the course of the proceedings it is brought to the attention of the court that the defendant has failed to comply with the requirements of this article, the court may order the defendant to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery, inspection, and interview and may prescribe such terms and conditions as are just.

History. — Code 1981, § 17-16-6, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2.

Law reviews. — For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration
Use of Media
Application
Appeals

General Consideration

Improper notice regarding witnesses. — Since the defendant acted in bad faith in failing to provide information regarding alibi witnesses, and the state was prejudiced thereby, the defendant could be prevented from presenting the testimony of witnesses not properly disclosed. Davis v. State, 226 Ga. App. 83, 485 S.E.2d 508 (1997); Bullard v. State, 242 Ga. App. 843, 530 S.E.2d 265 (2000); Freeman v. State, 245 Ga. App. 384, 537 S.E.2d 776 (2000).

Trial court was not required to consider any particular course of action in any particular order, but had discretion to take any listed corrective action the court deemed appropriate; the defendant's failure to notify the state that a witness had been discovered supported the finding that the defendant acted in bad faith. Jones v. State, 251 Ga. App. 285, 554 S.E.2d 238 (2001).

In the defendants' trial on a charge of murder and other crimes, the trial court did not abuse the court's discretion by limiting the testimony of a defense witness who was named as an alibi witness shortly before trial began. Reddick v. State, 264 Ga. App. 487, 591 S.E.2d 392 (2003), overruled on other grounds by State v. Springer, 297 Ga. 376, 774 S.E.2d 106 (2015).

Since the defendant failed to timely inform the attorney about the existence of an excluded witness, or to offer a justification or valid excuse for a failure to do so until three days before trial, the trial court did not err in excluding the witness's testimony. Card v. State, 273 Ga. App. 367, 615 S.E.2d 139 (2005).

Witness excluded. — Trial court did not abuse the court's discretion in excluding a witness as the defendant did not disclose the witness's written statement to the state within ten days of trial; further, the defendant did not include the witness's birth date on the witness list and the state was unable to investigate the witness' criminal record, if any. Clark v. State, 271 Ga. App. 534, 610 S.E.2d 165 (2005).

Ambiguity in trial court's order excluding evidence. — Trial court erred in excluding certain evidence on the basis that the evidence was not produced by the state until just over a month before trial, or had not been produced at all, in violation of the trial court's pre-trial scheduling order because the trial court's order was ambiguous both as to whether the trial court actually found bad faith on the part of the state at all in failing to produce the evidence, and as to the basis for the trial court's finding of prejudice to the defendant. State v. Bryant, 307 Ga. 850, 838 S.E.2d 855 (2020).

Bad faith justified exclusion. — Trial court had the discretion under O.C.G.A. § 17-16-6 to exclude witnesses provided by the defendant on the day of trial in violation of O.C.G.A. § 17-16-8(a); bad faith was satisfied because nothing in the record indicated that the defendant did not know of the witnesses, or did not intend to call the witnesses, until the day of the trial, and prejudice was established because the state had no notice of the witnesses until the day of trial and had no opportunity to investigate the witnesses or the witnesses' testimony. Acey v. State, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

Trial court did not err in excluding a witness's testimony because the state was not informed of the witness as a possible witness until the third day of trial and had no opportunity to investigate the witness's testimony or background. Similarly, the trial court was authorized to find bad faith because defense counsel knew about the witness's existence and had a plan to call the witness as a potential witness prior to trial, and yet failed to inform the state about the witness until the third day of trial. Hudson v. State, 284 Ga. 595, 669 S.E.2d 94 (2008).

With regard to the defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err in excluding testimony from the defendant's proffered expert witness on police interrogation techniques and false confessions based on the state not being timely notified of that witness and because the area in which the expert would express an opinion had not reached a level of scientific reliability so as to allow the evidence. It was within the trial court's authority to exclude the expert's testimony for the de-

fendant's failure to disclose the expert and there was no showing that the false confession theory and the interrogation method satisfied the evidentiary test in criminal cases set forth in case law. Wright v. State, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

Bad faith or prejudice finding not required for exclusion. — Trial court did not abuse the court's discretion in denying the defendant's request to call a witness due to delay because the requirement of prejudice to the state under O.C.G.A. § 17-16-6 was satisfied since the state had no notice of the witness or a videotaped interview of a victim until the day of trial and, thus, had no opportunity to interview the witness, and the requirement of bad faith was satisfied since nothing indicated that the defendant did not know of the witness or the videotape until the day of trial; O.C.G.A. § 17-16-6 does not require the trial court to make a finding of prejudice or bad faith. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Trial court did not abuse the court's discretion in refusing to allow an expert to testify that the defendant had post-traumatic stress disorder (PTSD) on the basis that the defendant did not disclose the expert as an expert witness in a timely fashion as the defendant did not make a proffer of the expert's testimony and, therefore, could not demonstrate prejudice; plus, the defendant testified at trial and informed the jury of the PTSD diagnosis. Keller v. State, 308 Ga. 492, 842 S.E.2d 22 (2020).

Failure to timely come forward with alibi defense. — Trial court did not abuse the court's discretion when the court excluded the defendant's alibi evidence, including the testimony of the defendant's alibi witnesses, pursuant to O.C.G.A. § 17-16-6, because the defendant's failure to timely come forward with the defendant's alibi defense constituted prejudice and bad faith; the state had notice of the alibi just three days before the start of trial, and although the defendant made the defendant's alibi witnesses available, at least one witness was uncooperative, further prejudicing the state. Huckabee v. State, 287 Ga. 728, 699 S.E.2d 531 (2010).

Exclusion of alibi evidence was not error as the defendant failed to notify the state of the alibi until the day of trial, and the finding that the defendant acted in bad faith was supported by the fact that the defendant presumably knew of an alibi when arrested but did not tell the arresting or investigating officers and neither alibi witness came forward to tell the prosecution or defense counsel of the alibi. Rembert v. State, 324 Ga. App. 146, 749 S.E.2d 744 (2013).

Defendant could not show a reasonable probability that the outcome of the trial would have been different if counsel met the notice requirements in O.C.G.A. § 17-16-5(a) and presented the defendant's alibi defense because of the overwhelming evidence against the defendant. Thus, the defendant did not receive ineffective assistance of counsel when the defendant's counsel failed to properly notify the prosecution of the defendant's alibi defense, which resulted in the exclusion of alibi testimony at trial pursuant to O.C.G.A. § 17-16-6. Jones v. State, 266 Ga. App. 679, 598 S.E.2d 65 (2004).

Trial court properly denied the defendant's motion for a new trial based on ineffective assistance as although the state filed a notice for demand of alibi defense, the defendant never maintained such a defense at trial and the record showed that the defendant decided not to testify based on having a prior conviction; thus, trial counsel's choice of trial strategy was consistent with the defendant's desire not to testify and was a reasonable choice based upon the pretrial assessment. Bostic v. State, 341 Ga. App. 402, 801 S.E.2d 89 (2017).

Undisclosed witness allowed to testify. — Trial court did not abuse the court's discretion in permitting a witness to testify for the state although the witness was not included on the state's witness list because the defendant made no showing that the prosecutor acted in bad faith in failing to disclose the witness before trial, nor that the defendant was prejudiced by the omission of the witness from the witness list. Childs v. State, 287 Ga. 488, 696 S.E.2d 670 (2010).

General Consideration (Cont'd)

Defendant's claim that the trial court erred in allowing a witness not on the state's witness list to testify failed because there was no evidence of prosecutorial misconduct or bad faith by the state, and the witness' name, address, telephone number, and notes related to the witness' interview with police were included in the discovery report provided to the defense. Wilkins v. State, 291 Ga. 483, 731 S.E.2d 346 (2012).

Delaying expert witness's testimony as remedy. — Proper remedy for the state's failure to comply with O.C.G.A. § 17-16-4(a)(4) was to postpone the testimony of the state's blood spatter expert until late in the trial as the trial court did, pursuant to O.C.G.A. § 17-16-6. Further, by failing to ask for more time to prepare for the expert, the defendant waived any claim of error. Valentine v. State, 293 Ga. 533, 748 S.E.2d 437 (2013).

State did not act in bad faith. — Trial court did not err in admitting the defendant's statement that the informant the defendant saw at jail was the person "who busted him," as the defendant failed to show that the state acted in bad faith in disclosing the statement to the defendant during trial even though O.C.G.A. § 17-16-6 normally requires such a statement to be disclosed ten days before trial. Dixon v. State, 252 Ga. App. 385, 556 S.E.2d 480 (2001).

Theft by shoplifting conviction was upheld on appeal, despite the defendant's claim that the state violated the reciprocal discovery requirements of the Georgia Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., as the defendant conceded at trial that the state did not act in bad faith, and failed to request a continuance, but instead, communicated a readiness for trial to both the court and the prosecutor. Brown v. State, 281 Ga. App. 557, 636 S.E.2d 717 (2006).

It could not be said that the state acted in bad faith or that the defendant was prejudiced; thus, a statement the defendant made to a coworker was properly admitted into evidence and the coworker allowed to testify at trial. When the state became aware six days before trial of the statement, the state immediately notified the defendant of the statement; two days later, the defendant was made aware of the fact that the state planned to use the coworker as a witness; and the trial court stated that the court was willing to make the witness available to the defendant for an interview and to give the defendant all the time necessary to question the witness before the witness took the stand. Holmes v. State, 284 Ga. 330, 667 S.E.2d 71 (2008).

Due to interpretation difficulties, the state did not know that the defendant held a knife during an armed robbery until the Thursday before trial. As the state's disclosure to the defendant of this newly discovered evidence by at least the following Monday complied with O.C.G.A. § 17-16-4(c), the state did not act in bad faith, and the defendant was not prejudiced by the late disclosure; thus, evidence of the knife was properly admitted. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Trial court did not err by refusing to exclude evidence of the state's expert witness due to the state failing to provide a written summary of the expert's findings no later than ten days before trial, pursuant to O.C.G.A. § 17-16-4(a)(4), because the defendant failed to show either prejudice or bad faith on the part of the state, and the defendant did not seek a recess or continuance or request any other remedy authorized by O.C.G.A. § 17-16-6, except to object to the expert's qualifications. Hodges v. State, 319 Ga. App. 657, 738 S.E.2d 111 (2013).

Trial court's failure to exercise discretion. — Because the trial court excluded the defendant's prior conviction based upon a belief that the court had no discretion based on the state's failure to give notice of the state's intent to use the prior conviction as required by O.C.G.A. § 17-16-4(a)(5), the trial court could consider the court's options under O.C.G.A. § 17-16-6 before re-sentencing. Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

No showing of prejudice. — Failure of the state to provide the defendant with a knife before trial did not require the court to exclude the knife from evidence

since the defendant made no showing that the defendant was prejudiced and since no continuance was requested to cure any prejudice which may have been precipitated as a result of the state's failure to comply. Tucker v. State, 222 Ga. App. 517, 474 S.E.2d 696 (1996); Parrott v. State, 240 Ga. App. 173, 523 S.E.2d 29 (1999); Roberts v. State, 244 Ga. App. 330, 534 S.E.2d 526 (2000).

Trial court did not have authority, under O.C.G.A. § 17-16-6, to exercise discretion and exclude the defendant's incriminating statement from evidence because the defendant made no showing that the defendant was prejudiced by the state's failure to make the defendant's custodial statement available to the defendant prior to the trial and because the defendant did not ask for a continuance. Bell v. State, 224 Ga. App. 191, 480 S.E.2d 241 (1997).

There was no error in denying the defendant's motion to exclude a supplemental crime lab report allegedly served in violation of the discovery act because the defendant did not request a continuance or make a showing of prejudice. Franklin v. State, 224 Ga. App. 578, 481 S.E.2d 852 (1997).

Abuse of discretion in exclusion of witness. — Without a basis to conclude that the state would have been prejudiced unless testimony of the defendant's witness was excluded, the trial court abused the court's discretion by excluding the witness. Hill v. State, 232 Ga. App. 561, 502 S.E.2d 505 (1998).

Since the defendant made no showing that the defendant was prejudiced as a result of the state's failure to make a custodial statement available to the defendant prior to trial or that the state acted in bad faith in failing to list a witness, the trial court did not abuse the court's discretion in permitting the witness to testify. Jones v. State, 243 Ga. App. 351, 532 S.E.2d 120 (2000).

Defendants were not entitled to relief based upon the state's failure to serve the defendants with the notice required by O.C.G.A. § 17-16-5(b) because the defendants did not show that the state acted in bad faith nor that the defendants were prejudiced by the state's failure to separately disclose the names of the witnesses who would rebut the defendants' alibi defense. Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001).

Trial court did not abuse the court's discretion when the court allowed a state's witness to testify even though the name of the witness did not appear on the state's witness list as the trial court granted the defendant an opportunity to interview the witness before the witness testified and the defendant did not demonstrate prejudice from the state's failure to list the name. Gay v. State, 258 Ga. App. 634, 574 S.E.2d 861 (2002).

Trial court did not abuse the court's discretion in denying the appellant's motion for a continuance based on the state untimely serving a portion of a witness's custodial interview three days prior to trial because the appellant's contention that proper cross-examination questioning was prevented was unsupported by the evidence and the appellant did not present the testimony of any potential witnesses or offer any other evidence to show that any prejudice resulted from the denial of the motion. Easley v. State, 352 Ga. App. 1, 833 S.E.2d 591 (2019).

Mistrial not required. — Failure of the state to produce transcripts or tapes of the statements of victim witnesses did not require a mistrial since there had been a substantial cross-examination of one of the witnesses about inconsistencies, counsel had the opportunity to review the transcripts during a recess, and the tapes were played for the jury. Hammitt v. State, 225 Ga. App. 21, 482 S.E.2d 437 (1997).

Provision of fingerprint report. — Because the trial court excluded fingerprint evidence that was not provided to the defendant before the trial and instructed the prosecutor to make no reference to the fingerprint evidence, the defendant could show no harm caused by the failure to disclose the fingerprint evidence before trial; therefore, the trial court properly denied the defendant's motion for mistrial. Davis v. State, 253 Ga. App. 803, 560 S.E.2d 711 (2002).

Mistrial inappropriate for failing to provide complete address. — Trial court properly dismissed the defendant's motion for a mistrial because the court did

General Consideration (Cont'd)

not abuse the court's discretion by concluding that the state did not act in bad faith by not furnishing the defendant with the victim's complete current address; furthermore, the defendant never requested a continuance to cure any prejudice which the defendant claimed may have resulted from the state's failure to comply with O.C.G.A. § 17-16-8(a). Consequently, the trial court did not have the authority, under O.C.G.A. § 17-16-6, to exercise discretion and exclude the victim's testimony at trial. Shields v. State, 264 Ga. App. 232, 590 S.E.2d 217 (2003).

In a case charging child molestation, the prosecution was obligated to provide the defense with a copy of a child's pretrial statement to an officer, even though the statement was in the exclusive possession of the police. However, since the defendant did not seek to prevent introduction of the statement, and counsel was allowed to inspect the report, the defendant failed to show that the defendant was prejudiced by the trial court's failure to order the state to make the report available to the defendant for copying, and the state's discovery violation did not give rise to any reversible error. Wilkerson v. State, 266 Ga. App. 721, 598 S.E.2d 364 (2004).

Provision of fingerprint report. — Trial court did not err in denying the defendant's motion to exclude latent fingerprints due to the state's alleged noncompliance with the reciprocal discovery statute because the state did provide the defendant and the expert with an opportunity to examine the evidence. Alexander v. State, 276 Ga. App. 288, 623 S.E.2d 160 (2005).

With regard to the defendant's murder conviction, the defendant was not entitled to a mistrial because the state failed to provide an accomplice's statement about an alleged conversation between the defendant and a codefendant indicating a consciousness of guilt as the record showed that the witness was available to the parties for interview through an attorney prior to trial and the testimony provided at trial had not been reduced to a writing or otherwise recorded, but rather had been revealed during an interview the state conducted for the purposes of trial preparation; thus, there was nothing for the state to produce during discovery. Lewis v. State, 293 Ga. 110, 744 S.E.2d 21 (2013).

Trial court did not err in denying the defendant's motion for a mistrial based on the failure to produce witness statements because there was no evidence that the statements were lost or misplaced due to bad faith on the state's part; any argument that the statements might have aided the defense or provided a basis to impeach the state's witnesses was simply speculative; defense counsel was able to use the statements' absence to attempt to undermine a deputy's credibility at trial; and granting a mistrial would not be just under the circumstances, especially since there was no evidence in the record that the statements might yet be found and thus potentially alter the defendant's strategy in a new trial. Burton v. State, 330 Ga. App. 503, 767 S.E.2d 510 (2014).

Trial court did not err in denying the defendant's motion for a mistrial based on the prosecutor's misconduct in failing to disclose the statement the defendant made to the first investigator until eliciting testimony about the statement from the first investigator at trial because the undisclosed statement that the defendant made to the first investigator was the same in substance as the defendant's longer, more detailed, and audio-recorded statement to the second investigator, which was properly disclosed to the defendant and was played for the jury at trial; and trial counsel admitted that the first investigator's testimony did not provide any information from the defendant that had not already been disclosed in discovery. Prince v. State, 295 Ga. 788, 764 S.E.2d 362 (2014).

Any error remedied below. — Defendant's sole enumeration that the trial court erred in failing to exclude three new witnesses' testimony presented nothing to review; the trial court remedied the defendant's concern over the state's presentation of new witnesses by granting the defendant's request to voir dire the jurors and by removing the lone juror who knew one of the witnesses. Lee v. State, 255 Ga. App. 576, 565 S.E.2d 902 (2002).

Under O.C.G.A. § 17-16-6, the trial court's actions in allowing the defendant's counsel to inspect a detective's notes as well as the chance to question the detective in that regard were a permissible response to any failure by the state to comply with the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq.; furthermore, the defendant did not allege bad faith, and there was no prejudice because the evidence was merely cumulative of direct testimony. Swanson v. State, 282 Ga. 39, 644 S.E.2d 845 (2007).

Continuance granted to review evidence. — In a the defendant's child molestation trial, because a detective on the stand used notes that had not been disclosed in discovery, the trial court properly granted time for defense counsel to review the notes pursuant to O.C.G.A. § 17-16-6. McIntyre v. State, 302 Ga. App. 778, 691 S.E.2d 663 (2010).

Failure to grant continuance. — Defendant was not entitled to a continuance or sanctions since, prior to trial: (1) the defendant's attorney and the state viewed tapes of statements from both the defendant and the defendant's ex-girlfriend victim in which they discussed their prior difficulty; (2) the state offered the defendant's attorney the opportunity to look at the state's files regarding the prior difficulty; (3) the defendant and the defendant's attorney were well aware of the prior difficulty before the defendant's trial began; (4) there was no evidence of the state's bad faith; (5) the victim was cross-examined; and (6) there was no evidence of prejudice. Jackson v. State, 270 Ga. App. 166, 605 S.E.2d 876 (2004).

Trial court did not abuse the court's discretion when the court refused to grant the defendant's motion for a continuance after the state violated the reciprocal discovery statute, O.C.G.A. § 17-16-1 et seq., because defense counsel attempted to interview three witnesses on the first day of trial and declined to seek another such opportunity despite the state's invitation to do so early on the second day, and although the witnesses declined an interview, defense counsel asked for no additional relief; the defendant failed to identify any testimony that was a surprise or to show that, with a continuance, the defendant would have uncovered helpful information that the defendant did not already know, and the defendant was able to use a prior inconsistent statement to impeach one of the three witnesses who, the defendant claimed, provided the testimony which was most beneficial for the state. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Trial court did not abuse the court's broad discretion under O.C.G.A. § 17-16-6 by denying the defendant a continuance and refusing to exclude evidence for the untimeliness of discovery because the trial court used the court's judgment to fashion a remedy appropriate to a case in which there was a speedy trial demand and no other reasonable time to proceed with the rather lengthy trial within the constraints of that demand. Higuera-Hernandez v. State, 289 Ga. 553, 714 S.E.2d 236 (2011).

Trial court did not err in denying the defendant's motion to continue the trial because, instead of delaying the entire trial, the trial court gave the defendant the opportunity to interview the state's gang expert witness, who testified a full week later; and providing that remedy instead of a continuance was well within the trial court's discretion under the circumstances, particularly because the allegations of gang affiliation should not have surprised the defendant's counsel and did not alter the defense's theory of the case. Cushenberry v. State, 300 Ga. 190, 794 S.E.2d 165 (2016).

Trial court did not abuse the court's broad discretion in denying a continuance because, assuming a discovery violation occurred, the trial court's remedy gave the defendant an oportunity to receive and review the recording before trial and the defendant made no showing that such remedy was inadequate or that any harm occurred; further, the recording in question was not even introduced into evidence at trial. Rowland v. State, 349 Ga. App. 650, 825 S.E.2d 231 (2019).

Denial of mistrial for failure to disclose officer's report appropriate. — Trial court properly denied the defendant's motion for mistrial based on alleged discovery misconduct under O.C.G.A. § 17-16-6; the defendant did not explain

General Consideration (Cont'd)

how the prosecution's failure to divulge a portion of an undercover officer's report prejudiced the defendant, and a mistrial, which would have been the equivalent of prohibiting the state from introducing or presenting the undisclosed evidence or witness, was not authorized by the statute. Ronoke v. State, 255 Ga. App. 420, 565 S.E.2d 594 (2002).

Defendant's failure to seek a continuance due to the state's alleged failure to comply with discovery waived the right to assert error on appeal; moreover, the defendant did not show that the defendant was prejudiced by the state improperly withholding any item to which the defendant was entitled, and thus failed to show reversible error. Sims v. State, 273 Ga. App. 723, 615 S.E.2d 785 (2005).

Pretermitting whether the state upheld the state's reciprocal discovery obligations, the defendant's failure during trial to assert a discovery violation deprived the trial court of an opportunity to formulate appropriate relief, if any. Garrett v. State, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

State's violation of O.C.G.A. § 17-16-4(a)(1) by failing to timely to disclose the defendant's in-custody offer to bribe the victim not to testify did not mandate reversal as the defendant waived the right to assert this error by not requesting relief at trial under O.C.G.A. § 17-16-6. Spencer v. State, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Defendant failed to show prejudice as a result of the trial court's failure to exclude testimony of the surviving victim based on an alleged discovery violation because, inter alia, the defendant did not seek a recess or continuance or seek any other remedy under O.C.G.A. § 17-16-6. Falay v. State, 320 Ga. App. 781, 740 S.E.2d 738 (2013).

Remediation by post-trial grant of habeas corpus. — Convicted of capital murder, the defendant's habeas corpus petition was granted, the conviction was reversed, and the defendant was awarded a new trial because the defendant prevailed on the Brady claim that the state failed to disclose to the defendant that the state had paid a confidential informant money for information that led to the defendant's conviction; the payment of money was exculpatory since the payment indicated that the informant could be impeached since the informant had a motive to lie. Schofield v. Palmer, 279 Ga. 848, 621 S.E.2d 726 (2005).

Procedural bars not found. — Defendant's habeas corpus petition based upon failure to obtain Brady information was not procedurally barred since the defendant tried to obtain that information from the state but was not able to obtain the information until discovery in conjunction with the habeas corpus hearings. Schofield v. Palmer, 279 Ga. 848, 621 S.E.2d 726 (2005).

State met discovery obligations. — Because: (1) the defendant did not object to the admissibility of three cash invoices on the ground that the state failed to produce the invoices during discovery; and (2) the state produced a jail inventory list as soon as was practicable, the defendant denied an offer for a continuance, and never presented any evidence of prejudice based on its admission, no violation of O.C.G.A. § 17-16-4 occurred requiring sanctions against the state under O.C.G.A. § 17-16-6. Bennett v. State, 289 Ga. App. 110, 657 S.E.2d 6 (2008).

No error in refusing to exclude evidence. — Trial court did not abuse the court's broad discretion under O.C.G.A. § 17-16-6 in fashioning an appropriate remedy and in refusing the harsh remedy of evidence exclusion for the untimeliness of discovery because a codefendant's testimony was not at variance with the testimony at the defendant's first trial, though it was couched in different terms; the trial court allowed the defense to interview the agent off the record before the agent took the stand and to introduce the transcript of the agent's prior testimony. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

Expert opinion not provided within ten days. — Although the defendant argued that a neurosurgeon's opinion should have been excluded because the state failed to provide notice of the neurosurgeon's opinion regarding Shaken Baby Syndrome ten days prior to trial as required by the reciprocal discovery stat-

ute, the defendant failed to show that the defendant was prejudiced by the state's non-disclosure of the neurosurgeon's opinion, warranting an exclusion of the testimony as two of the state's expert witnesses had already testified regarding Shaken Baby Syndrome, defense counsel was on notice that the Shaken Baby Syndrome theory could be put forward by the state through those experts, and the defense presented its own expert at trial as rebuttal expert testimony. Wyatt v. State, 300 Ga. 509, 796 S.E.2d 701 (2017).

Cited in Baker v. State, 238 Ga. App. 285, 518 S.E.2d 455 (1999); Sullivan v. State, 242 Ga. App. 839, 531 S.E.2d 367 (2000); Fairbanks v. State, 242 Ga. App. 830, 531 S.E.2d 381 (2000); Johnson v. State, 247 Ga. App. 660, 544 S.E.2d 496 (2001); Carter v. State, 253 Ga. App. 795, 560 S.E.2d 697 (2002); Parks v. State, 275 Ga. 320, 565 S.E.2d 447 (2002); Cordy v. State, 257 Ga. App. 726, 572 S.E.2d 73 (2002); Grier v. State, 276 Ga. App. 655, 624 S.E.2d 149 (2005); Muhammad v. State, 282 Ga. 247, 647 S.E.2d 560 (2007); Vega v. State, 285 Ga. 32, 673 S.E.2d 223 (2009); Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436 (2009); Day v. State, 302 Ga. App. 883, 691 S.E.2d 920 (2010); Leger v. State, 291 Ga. 584, 732 S.E.2d 53 (2012); Woods v. State, 342 Ga. App. 301, 802 S.E.2d 822 (2017).

Use of Media

Failure to give prior notice of letters. — Because the state did not gain possession of letters that were entered into evidence until after the beginning of the trial and because the letters were not relevant until the defendant testified, the state did not violate the criminal discovery statute by failing to give prior notice of the letters. Moreover, the record showed that the defendant did not present any evidence showing that the state acted in bad faith in failing to provide the defense attorney with the letters earlier or that the defendant was prejudiced by the state's failure to provide the letters to the defendant's attorney at an earlier time; consequently, the trial court did not abuse the court's discretion in denying the defendant's motion to exclude the letters from evidence at trial. Boykin v. State, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

Admission of CDs when no bad faith by state. — Trial court did not err in admitting into evidence the CDs retrieved from inside a CD changer seized from the defendant's home since: (1) the state timely disclosed the CD changer, which contained the CDs, and the prosecutor asserted that the prosecutor told defense counsel prior to trial that the CDs might be inside; (2) even if there was a discovery violation, the defendant failed to show bad faith by the prosecutor and prejudice; and (3) the defendant failed to request a continuance to cure any prejudice that might have resulted from the state's failure to comply with the reciprocal discovery requirements under O.C.G.A. § 17-16-4. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Admission of photographs. — Photo developer's cropping procedure eliminated one the defendant's cap from a photo; the state had the photo developed again, but the newly-developed photo, which showed the cap, was not provided to the defendants until the first day of jury selection. As the state did not act in bad faith, and alerted both the defendants and the court as soon as the state became aware of the problem, the trial court did not err in admitting the photo. Culler v. State, 277 Ga. 717, 594 S.E.2d 631 (2004).

Inadvertent omission of videotaped statements. — Defendant's new trial motion under O.C.G.A. § 5-5-22 was properly denied as the fact that the state failed to turn over two videotaped statements from the defendant's sons, arising from criminal charges due to a domestic dispute, was based on inadvertence rather than bad faith, there was unimpeached eyewitness testimony from other witnesses that was sufficient to support the defendant's convictions pursuant to former O.C.G.A. § 24-4-8 (see O.C.G.A. § 24-14-8), and there was no showing that the defendant suffered the kind of prejudice that undermined confidence in the outcome of the trial; accordingly, the defendant's Brady rights were not violated and there was no violation of O.C.G.A. §§ 17-16-6 and 17-16-7. Ely v. State, 275

Use of Media (Cont'd)

Ga. App. 708, 621 S.E.2d 811 (2005).

No bad faith for exclusion of video and photographic pornographic images. — In the absence of bad faith on the part of the state, as well as prejudice to the defendant, the trial court erred in excluding from evidence a videotape and photographs of child pornographic images taken from the defendant's computer as a sanction for the state's failure to comply with a court-ordered discovery deadline. State v. Jones, 283 Ga. App. 539, 642 S.E.2d 183 (2007).

Review of audiotape of witnesses. — Because the record supported the trial court's ruling that the state did not act in bad faith with regard to disclosure of a witness's statement, the severe remedies that the defendant sought under O.C.G.A. § 17-16-6 were not applicable; the defendant had other audiotaped statements of the witness and had interviewed the witness and obtained an affidavit from the witness before trial, and the trial court granted the defendant an overnight continuance to review the additional statement before cross-examining the witness. Jones v. State, 290 Ga. 576, 722 S.E.2d 853 (2012).

Disclosure of 911 tape. — Even if the state had been required to disclose a 911 tape prior to trial, the tape's admission was not reversible error as the defendant failed to show that the state acted in bad faith as neither the prosecutor nor the investigator knew about the tape's existence before the start of the trial. Adams v. State, 340 Ga. App. 1, 795 S.E.2d 330 (2016).

Failure to request relief. — Defendant was not entitled to relief based on an alleged violation of O.C.G.A. § 17-16-4 and failure to remedy the violation under O.C.G.A. § 17-16-6 because the state turned over the subject records immediately after receiving the records and counsel did not move for a continuance, but the trial court gave counsel additional time to review the records Hambrick v. State, 353 Ga. App. 666, 839 S.E.2d 664 (2020).

Handwritten statement cumulative of audio statement. — Failure of the trial court to turn over a handwritten statement of the victim in an assault case did not require a mistrial since the statement was merely cumulative of an audio tape of the victim's remarks and the court granted a continuance to allow the defendant to review the statement. Blankenship v. State, 229 Ga. App. 793, 494 S.E.2d 758 (1998).

No harm in admitting videotapes. — Because no specific evidence was cited, and no explanation was offered showing how the lack of evidence offered by a forensic examiner in opposition to the two challenged videotapes prejudiced the defense, and the defendant failed to show that any delay in production was in bad faith, no abuse of discretion resulted from admission of the videotapes. Milton v. State, 280 Ga. App. 179, 633 S.E.2d 606 (2006).

No prejudice from admission of audiotape. — Even if defense counsel had objected to the admission of an audiotape, the trial court would not have erred in permitting the audiotape to be played at trial as: (1) the defendant failed to object to the tape's admission at trial on the ground that the state failed to comply with discovery requirements; (2) the record disclosed that, during trial, the state made the defendant a copy of the audiotape, and permitted the defendant to listen to the audiotape during an overnight recess in the trial; and (3) the next day, the state did not play the tape, but had the investigator who conducted the taped interview testify only about the parts of the witness's statement that were inconsistent with that witness's trial testimony; hence, the defendant failed to show prejudice resulting from the admission of the audiotape. McNeal v. State, 281 Ga. 427, 637 S.E.2d 375 (2006).

No harm shown in admission of photographs. — Since the state failed to produce photographs ten days before trial, but the defendant rejected the trial court's offer of a continuance, and since the photographs were merely cumulative of other evidence, there was no prejudice to the defendant shown and no abuse of discretion in admitting the photographs. Brown v. State, 236 Ga. App. 478, 512 S.E.2d 369 (1999).

Even though the prosecutor did not give

the defendant sufficient notice of the existence of certain photographs, the defendant was not prejudiced by the admission of the photographs at trial. Corbin v. State, 240 Ga. App. 788, 525 S.E.2d 365 (1999).

In a prosecution for aggravated assault with intent to rape, the fact that the state failed to produce photos of the victim's injuries ten days before trial, as required by O.C.G.A. § 17-16-4(a)(3), was not grounds for reversal as the defendant did not ask for a continuance, did not show prejudice, and did not show that the state acted in bad faith. Murray v. State, 293 Ga. App. 516, 667 S.E.2d 382 (2008).

No harm in admission of booking photographs. — Murder defendant's claim that the defendant was prejudiced by being unable to prepare for the damaging evidence of a booking photograph showing the defendant wearing clothes that were later shown to have the deceased's blood on them was rejected because the photograph was cumulative of other evidence, including testimony regarding the defendant's clothing and the clothing itself. Carson v. State, 843 S.E.2d 421, No. S20A0288, 2020 Ga. LEXIS 348 (2020).

No harm arising out of delay in submission of audiotape. — Since defense counsel was unable to state any harm from the delay in being permitted access to an audiotape presented at trial by the state, the trial court did not err in refusing to exclude the tape from evidence. Sledge v. State, 223 Ga. App. 488, 477 S.E.2d 898 (1996).

Undiscovered audiotape evidence not introduced at trial. — Even if the defendant could show a violation of the discovery rule because a copy of an audiotape of the defendant's confession was not provided to the defendant's attorney, the defendant could show no harm because the tape was not introduced into evidence. Bertholf v. State, 224 Ga. App. 831, 482 S.E.2d 469 (1997).

Admission of photograph detailing injuries. — With regard to the defendant's domestic violence convictions, the trial court did not err in denying the admission into evidence of a photograph detailing the defendant's injuries based on failing to provide inspection of the photograph because any error by the trial court in excluding the photograph was harmless since the photograph was cumulative of both the defendant's testimony that the wife scratched the defendant as well as the wife's testimony that the wife tried to scratch the defendant. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

Failure to grant continuance for viewing videotapes. — Trial court did not abuse the court's discretion by refusing to grant a continuance to allow the defendant to review a police videotape of the defendant's arrest since the state failed to timely provide the tape during discovery, but the defendant did not show how the defendant was prejudiced by the delay, and, in addition, the court accommodated most of the defendant's concerns by allowing the defendant additional time to review the tape, by prohibiting the state from introducing the tape and allowing the defendant to introduce the tape at the defendant's discretion, and by making the state's witnesses available for cross-examination throughout the trial. Peeples v. State, 234 Ga. App. 454, 507 S.E.2d 197 (1998).

Wiretap communications. — Trial court did not err in admitting statements the defendant's coconspirators made during the commission of a crime because the defendant did not allege or show bad faith under O.C.G.A. § 17-16-6 and did not request a continuance upon learning of the alleged discovery violation; the defendant proceeded under the reciprocal discovery provisions of O.C.G.A. § 17-16-1 et seq., and audiotapes of wiretap communications that transpired between a confidential informant and the coconspirators were not introduced at trial since the state relied upon U.S. Drug Enforcement Administration agents' testimony describing the communications. Kohler v. State, 300 Ga. App. 692, 686 S.E.2d 328 (2009).

Application

No bad faith in handling expert's ballistics report. — Since a trial court found that there was no bad faith on the part of the state based on the failure of an expert's report to address testing done on a second bullet hole in the victim's shirt,

Application (Cont'd)

exclusion of the evidence was not a viable option so trial counsel's decision to pursue a mistrial instead was reasonable. Bales v. State, 277 Ga. 713, 594 S.E.2d 644 (2004).

No misconduct in admission of DNA result. — Trial court did not abuse the court's discretion in refusing to exclude the DNA results from testing of a bloody knife and tee-shirt in the defendant's trial for murder, which the state sought to introduce three days into the state's case-in-chief, since the state had just received the results and defense counsel acknowledged at the hearing on the defendant's motion for a new trial that there was no evidence of prosecutorial misconduct and it was undisputed that the defendant was afforded an opportunity to interview the witnesses. Cockrell v. State, 281 Ga. 536, 640 S.E.2d 262 (2007).

Service of notice of report adequate. — With regard to a the defendant's trial on various drug charges, the trial court did not err by refusing to exclude the evidence of a crime lab report for the methamphetamine allegedly sold based upon defense counsel not receiving a copy of the report as the record showed that the prosecution provided the defense with a certificate of service showing that the state served defense counsel with the crime lab results and the certificate of service also included the handwritten note that defense counsel was free to inspect the report at any time. The prosecution was not obligated to serve a copy of the lab report upon the defense and the defendant failed to prove bad faith on the part of the state and prejudice to the defense. Rogers v. State, 298 Ga. App. 895, 681 S.E.2d 693 (2009).

Provision of fingerprint reports. — Trial court did not err in admitting testimony and evidence relating to the second and third reports of an investigator who compared the latent fingerprints taken from the scene of the crime with the defendant's fingerprints and confirmed a match of the defendant's fingers because the state did not act in bad faith by failing to provide the second and third reports to the defendant prior to trial; the second report was provided to the defendant in discovery from the state, and the third report revealed newly discovered evidence, which the state did not discover until the investigator enlarged the defendant's fingerprint on charts in the investigator's preparation for trial, and as soon as the state received the third report from the state's investigator, the state provided the report to the defendant pursuant to O.C.G.A. § 17-16-4(c). Mallory v. State, 306 Ga. App. 684, 703 S.E.2d 120 (2010).

Trial court did not err by failing to exclude two fingerprint cards which had not been produced in discovery. Romero v. State, 247 Ga. App. 724, 545 S.E.2d 103 (2001).

Broad latitude in questioning late identified witness. — Under O.C.G.A. § 17-16-6, the trial court had discretion to exclude an inmate witness upon a showing of prejudice to the state and bad faith by the defense. Implicit in the trial court's decision that the court was permitted to exclude the inmate from testifying is the determination that prejudice and bad faith were shown; however, these determinations were not made and the prosecutor was properly given broad latitude in cross examining the inmate witness. Walker v. State, 268 Ga. App. 669, 602 S.E.2d 351 (2004).

Exclusion of witness was error. — Exclusion of a the defendant's alibi witness was error, although the defendant failed to give the state the required ten-days' notice pursuant to O.C.G.A. § 17-16-5(a), as there was no finding of bad faith by the defendant or prejudice to the state under O.C.G.A. § 17-16-6. Ware v. State, 298 Ga. App. 232, 679 S.E.2d 797 (2009).

Trial court erred in excluding a witness's testimony based solely on the fact that the witness was not listed on the defendant's witness list because the defendant was entitled to rely on the state's supplemental witness list as a document furnished to the defendant pursuant to the Criminal Discovery Act, O.C.G.A. § 17-16-10 and was not required to also list the witness on the defendant's own witness list in order to call the witness as a witness at trial; when the trial court excluded the testimony, it was not aware that the witness had been identified by

the state on the state's supplemental witness list, but when ruling on the state's objection to the witness because of an alleged discovery violation on the part of the defense. The trial court did not require the state to make the requisite showing of prejudice and bad faith on the part of the defendant as required by the Act, O.C.G.A. § 17-16-6, and the state could not have shown prejudice or bad faith on the part of the defendant because the state admitted that it had the witness's report and had researched the validity of the specific tests utilized by the witness, and the error was not harmless since it could not be said that the testimony would not have made a difference in the outcome of what the trial court described as a "very, very close case." Webb v. State, 300 Ga. App. 611, 685 S.E.2d 498 (2009).

Trial court erred in excluding testimony from two witnesses who came forward after the trial had started, because defense counsel could not have disclosed them prior to trial due to a lack of knowledge that they existed, and thus, there was no bad faith on the part of defense counsel. Mitchell v. State, 326 Ga. App. 899, 755 S.E.2d 308 (2014).

Same evidence used at probation revocation and trial. — Trial court did not err by admitting the state's evidence despite various alleged discovery violations because the state disclosed all of the state's evidence to the defendant and provided the defendant with the indictment and witness list during a probation revocation hearing 24 days prior to trial, and the defendant was informed at the revocation hearing that the evidence was the same as the evidence would be at the defendant's impending criminal trial; further, there was no evidence of bad faith on the part of the state. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

No bad faith in destruction of blood samples. — Trial court did not abuse the court's discretion in denying the defendant's claim that the destruction of blood samples constituted a failure by the state to comply with the reciprocal discovery requirements pursuant to O.C.G.A. § 17-16-4 when the defendant failed to show that the state acted in bad faith. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

No bad faith in providing gang evidence. — Trial court did not err in denying the defendant's motion to exclude gang evidence that was provided to the defense on the Friday before and the morning of trial because the trial court found that the prosecutor had not acted in bad faith with regards to the state's statutory discovery obligations, but instead acted promptly as the prosecutor received new evidence; the defendant was not prejudiced by receiving the evidence on the eve of trial; and the late-disclosed evidence did not alter the defendant's theory of defense, which was and continued to be the assertion that, despite the defendant's relationship with the co-indictees, the defendant was merely present with them and did not aid and abet the attempted robbery. Cushenberry v. State, 300 Ga. 190, 794 S.E.2d 165 (2016).

No bad faith in failure to produce jail medical records. — In an aggravated assault case, because there was no showing that the defense's discovery violation in failing to produce jail medical records showing the defendant's injuries was in bad faith as required by O.C.G.A. § 17-16-6, the trial court erred in excluding the records, and the error was not harmless given the defendant's testimony that the shooting occurred during a physical confrontation with the defendant's boyfriend and the prosecutor's emphasis on the lack of evidence of the defendant's injuries. Phillips v. State, 347 Ga. App. 147, 817 S.E.2d 711 (2018).

Failure to provide report within ten days prior to trial. — Since the state did not receive and deliver a scientific report until four days before trial, permitting defense counsel to inspect the report during that time was not adequate, and a continuance was warranted. Brady v. State, 233 Ga. App. 287, 503 S.E.2d 906 (1998).

Exclusion of expert's testimony. — Defendant failed to show that the defendant was prejudiced by trial counsel's failure to seek the exclusion of an expert's testimony as a sanction for the state's violation of O.C.G.A. § 17-16-6 because the trial court did not abuse the court's discretion by excluding, as a remedy, any specific testimony about the three victims.

Application (Cont'd)

Love v. State, 349 Ga. App. 741, 824 S.E.2d 745 (2019).

Service of scientific reports not required for admission. — Defendant's ineffective assistance of counsel claim failed based on defense counsel failing to object to the testimony of a firearms examiner concerning the results of their ballistics examination because the testimony complained of was elicited by a co-defendant during cross-examination and not by the state so the state had no obligation to provide the defendant with notice of the firearms examiner's opinion and the defendant also failed to show any prejudice or bad faith. Bryant v. State, 296 Ga. 456, 769 S.E.2d 57 (2015).

Trial court abused discretion excluding informal notes of investigator. — Trial court abused the court's discretion in imposing the extreme sanction of evidence exclusion for the state's failure to produce the investigator's notes because the record did not show that the investigator's informal notes, which the state could not produce, were subject to discovery under any of the provisions of Georgia's Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

Exclusion proper due to defendant's failure to preserve evidence. — In a first degree homicide by vehicle case, the exclusion of evidence that the car the defendant was driving had a possible mechanical malfunction was proper as the defendant violated the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., by acting in bad faith in failing to preserve the car for inspection by the state because defense counsel induced the court's order to preserve the car by assuring the court that the defendant's father owned the car and that the car was being preserved for inspection, but those assurances were not true; thus, defense counsel's action was designed to ensure that the court had no opportunity to take additional steps to preserve the car for inspection by the state and to obtain a tactical advantage for the defendant. Moceri v. State, 338 Ga. App. 329, 788 S.E.2d 899 (2016), cert. denied, No. S17C0095, 2017 Ga. LEXIS 210 (Ga. 2017).

Failure to provide birth dates of witnesses. — Trial court did not abuse the court's discretion under O.C.G.A. § 17-16-6 in permitting witnesses to testify whose birth dates were not provided to the defendant at least ten days before the trial as required under O.C.G.A. § 17-16-8 since: (1) the defendant did not request that the trial court exclude the witnesses' testimony; (2) the witnesses' birth dates were provided to the defense during trial; (3) the defense did not request a continuance to attempt to cure any prejudice from the failure to have the birth dates before trial; and (4) the defense had the opportunity to interview the witnesses before trial. Ehle v. State, 275 Ga. 560, 570 S.E.2d 284 (2002).

Mistrial warranted for conduct of defense counsel.. — Trial court did not err in granting the state's motion for a mistrial as the defendant's failure to disclose all of the defendant's alibi witnesses after the state demanded that the defendant do so, coupled with defense counsel's mentioning in opening statement several witnesses who could place the defendant in another state at the time of the murders for which the defendant was on trial, warranted granting the mistrial because a ruling otherwise would violate the state's right to a fair trial and reward the defendant for the misconduct of the defendant's counsel. Tubbs v. State, 276 Ga. 751, 583 S.E.2d 853 (2003).

Failure to disclose Brady information. — Defendant did not have to show that the defendant would have been acquitted if the defendant had been able to obtain the Brady information; the defendant simply had to show, and did show, that the state's evidentiary suppression undermined confidence in the outcome of the trial. Schofield v. Palmer, 279 Ga. 848, 621 S.E.2d 726 (2005).

Exclusion of telephone log and credit card receipt proper. — Trial court did not abuse the court's discretion in excluding a telephone log and credit card receipt the defendant produced two weeks after the start of the trial given the finding that the defendant acted in bad

faith in failing to provide discovery and that a continuance would unfairly burden the court and the state. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Testimony properly admitted. — Despite the fact that the state failed to notify the defendant of a similar transaction action witness more than ten days before trial, the admission of the testimony was not erroneous as the prosecutor indicated that the defense was informed of the witness as soon as the prosecutor got the evidence and defense counsel was given an opportunity to interview the witness prior to the witness's testimony. Johnson v. State, 322 Ga. App. 612, 744 S.E.2d 903 (2013).

Appeals

Showing of harm required for reversal of conviction. — Defendant could not rely on the erroneous exclusion of the defendant's witness as a basis for reversal of the defendant's conviction on appeal without an offer of proof in the trial record concerning the testimony the defendant expected the witness to give. Hill v. State, 232 Ga. App. 561, 502 S.E.2d 505 (1998).

In order to trigger the harsh sanction of excluding evidence improperly withheld from the defense, there must be a showing of prejudice to the defense and bad faith by the state. Brown v. State, 236 Ga. App. 478, 512 S.E.2d 369 (1999).

Since the defendant made no showing that the state improperly withheld evidence from the defendant or acted in bad faith so as to trigger the imposition of any of the sanctions authorized by O.C.G.A. § 17-6-6, the defendant failed to sustain the defendant's appellate burden of establishing how the defendant was harmed by the trial court's ruling regarding the defendant's failure to properly provide written notice to the prosecution under O.C.G.A. § 17-16-2(a). Miller v. State, 235 Ga. App. 724, 510 S.E.2d 560 (1999), appeal dismissed, 264 Ga. App. 801, 592 S.E.2d 450 (2003); Davis v. State, 240 Ga. App. 301, 522 S.E.2d 729 (1999).

Fact that the defendant's first taped interview, in which the defendant admitted furnishing a gun to a minor, was not provided to the defendant until nine days before trial, was harmless error because nothing in the material surprised the defendant as the defendant testified to the same information at the minor's trial. Rollinson v. State, 276 Ga. App. 375, 623 S.E.2d 211 (2005).

Harmless error. — Trial court's exclusion from evidence of two letters sent by a codefendant, after the codefendant's arrest, to the defendant's alibi witness, in which the codefendant recanted the custodial statements identifying the defendant as a participant in a store robbery, on the ground that the letters were not timely disclosed to the prosecution pursuant to O.C.G.A. § 17-16-4, even though the trial court made no specific finding that the defendant acted in bad faith and that the prosecution was prejudiced thereby, was harmless error, if any, as evidence was merely cumulative because the codefendant recanted the codefendant's custodial statement at trial. Brown v. State, 268 Ga. App. 24, 601 S.E.2d 405 (2004).

Objection waived. — Defendant waived the right to object to the introduction of a tape recording at trial by failing to object timely and expressly on the grounds that the introduction of the evidence would constitute a violation of any specific provision of the discovery statutes. Arrington v. State, 224 Ga. App. 676, 482 S.E.2d 400 (1997).

Failure to request relief. — Trial court did not err in allowing a witness to testify since the defendant did not request relief available under O.C.G.A. § 17-7-6, but merely stated that the defendant objected on the basis that the defendant was not properly served under the discovery statutes. Williams v. State, 226 Ga. App. 313, 485 S.E.2d 837 (1997).

RESEARCH REFERENCES

ALR. — Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — weapons, 53 A.L.R.6th 81.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — personal items other than weapons, 55 A.L.R.6th 391.

17-16-7. Statements of witnesses.

No later than ten days prior to trial or at such time as the court permits, or at the time of any post-indictment pretrial evidentiary hearing other than a bond hearing, the prosecution or the defendant shall produce for the opposing party any statement of any witness that is in the possession, custody, or control of the state or prosecution or in the possession, custody, or control of the defendant or the defendant's counsel that relates to the subject matter concerning the testimony of the witness that the party in possession, custody, or control of the statement intends to call as a witness at trial or at such post-indictment pretrial evidentiary hearing.

History. — Code 1981, § 17-16-7, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1994, "pretrial" was substituted for "pre-trial" in two places.

JUDICIAL DECISIONS

Service of statements of witnesses not required. — Language of O.C.G.A. § 17-16-7 that statements of witnesses be produced does not require that such statements be furnished or served upon the defendant. Lawson v. State, 224 Ga. App. 645, 481 S.E.2d 856 (1997).

Failure of the state to produce oral statements. — Failure of the state to produce oral and unrecorded statements made by the defendant's brother to the police did not violate the state's duty under O.C.G.A. § 17-16-7. State v. Scales, 209 Vt. 425, 206 A.3d 1263 (2019).

Because there can be no "possession, custody, or control" of an oral statement, the state had no obligation to produce a statement which had been neither recorded nor committed to writing. Cox v. State, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

State had no obligation to produce a gesture described by the victim as having been made by the defendant, assuming it were possible to do so. Thomas v. State, 249 Ga. App. 556, 548 S.E.2d 71 (2001).

Trial court did not err in denying the defendant's motion for a mistrial based on the state's alleged failure to comply with the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., requirements as the plain terms of that law dictated that the defendant, who allegedly molested the defendant's daughter, was not entitled to the oral, unrecorded statement the daughter provided to a police investigator as the state was required to produce statements within the state's possession, custody, or control and the daughter's unrecorded, oral statement did not qualify. Downs v. State, 257 Ga. App. 696, 572 S.E.2d 54 (2002).

Because no notes were taken during pre-trial interviews with witnesses, the defendant failed to establish that O.C.G.A. §§ 17-16-1(1) and 17-16-7 had been violated by the state's failure to produce the written notes. Hunt v. State, 278 Ga. 479, 604 S.E.2d 144 (2004).

No merit existed as to the defendant's assertion that a mistrial was warranted upon the state's violation of O.C.G.A. § 17-16-7 for withholding an oral statement by the deceased victim because the statement was not recorded or otherwise committed to writing. Buttram v. State, 280 Ga. 595, 631 S.E.2d 642 (2006).

Defendant was not entitled to a mistrial

for the state's alleged violation of O.C.G.A. § 17-16-7 for withholding an oral statement by a witness because the state had merely interviewed the witness during the state's investigation and any oral statement was not recorded or otherwise committed to writing. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

With regard to a defendant's convictions on two counts of cruelty to children, the trial court did not err by allowing a caseworker to testify to additional recollections the caseworker realized were not contained in the report that was prepared following an interview with the defendant as the information that the defendant asserted that the defendant should have received before trial did not involve a written statement, a written summary of a statement, or a contemporaneous recording of a statement by the caseworker; therefore, the recollections did not constitute a "statement of a witness" under O.C.G.A. § 17-16-1(2), and the state was not obligated to produce the information prior to trial under O.C.G.A. § 17-16-7. Hinds v. State, 296 Ga. App. 80, 673 S.E.2d 598 (2009).

With regard to a defendant's murder conviction, the defendant's claim on appeal that the trial court erred by failing to strike, in its entirety, the testimony of the victim's sibling's friend based on the defendant's assertion that the state violated O.C.G.A. § 17-16-7 was found meritless. The statute did not apply to the friend's prior oral statement not recorded or memorialized in any way because it was not, in the words of the statute, "in the possession, custody, or control of the state or prosecution," thus, the friend's statement did not fall under the purview of the statute. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, cert. denied, 558 U.S. 1076, 130 S. Ct. 800, 175 L. Ed. 2d 559 (2009).

Since there was no evidence in the record that any of the testifying witnesses gave the police or the prosecution a written or recorded statement that was not produced to the defendant, there was no evidence that a discovery violation occurred with regard to witness statements. Although O.C.G.A. § 17-16-7 required the state to produce any statement of a witness that was in the possession or control of the state, this requirement applied only to statements that had either been recorded or committed to writing. Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012).

Admission of a witness's testimony regarding the defendant's oral statement that someone had put something in the defendant's drink was not error as the statement was oral and subject to the disclosure requirements of O.C.G.A. § 17-16-7 and, even assuming there had been error, it was harmless given the other evidence in the case. Simmons v. State, 321 Ga. App. 743, 743 S.E.2d 434 (2013).

Statutory obligation of O.C.G.A. § 17-16-7 was not triggered when a witness merely made an oral statement and thus, the state was not obliged to inform the defendant that the victim had been taken for a medical exam until the state received written confirmation of the exam. Whatley v. State, 326 Ga. App. 81, 755 S.E.2d 885 (2014).

No bad faith in failing to turn over videotaped statements. — Defendant's new trial motion under O.C.G.A. § 5-5-22 was properly denied as the fact that the state failed to turn over two videotaped statements from the defendant's sons, arising from criminal charges due to a domestic dispute, was based on inadvertence rather than bad faith, there was unimpeached eyewitness testimony from other witnesses that was sufficient to support the defendant's convictions pursuant to former O.C.G.A. § 24-4-8 (see O.C.G.A. § 24-14-8), and there was no showing that the defendant suffered the kind of prejudice that undermined confidence in the outcome of the trial; accordingly, the defendant's Brady rights were not violated and there was no violation of O.C.G.A. §§ 17-16-6 and 17-16-7. Ely v. State, 275 Ga. App. 708, 621 S.E.2d 811 (2005).

State did not act in bad faith with regard to disclosure of witness statement. — Because the record supported the trial court's ruling that the state did not act in bad faith with regard to disclosure of a witness's statement, the severe remedies that the defendant sought under O.C.G.A. § 17-16-6 were not applicable; the defendant had other audiotaped state-

ments of the witness and had interviewed the witness and obtained an affidavit from the witness before trial, and the trial court granted the defendant an overnight continuance to review the additional statement before cross-examining the witness. Jones v. State, 290 Ga. 576, 722 S.E.2d 853 (2012).

When a witness merely makes an oral statement, the obligation of O.C.G.A. § 17-16-7 to produce the statement is not triggered since there can be no "possession, custody, or control" thereof. Forehand v. State, 267 Ga. 254, 477 S.E.2d 560 (1996), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020); Phagan v. State, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998); Baldwin v. State, 232 Ga. App. 335, 501 S.E.2d 548 (1998).

Victim's testimony that the defendant threatened to kill the victim's family if the victim told about the defendant's molestation of the victim was not required to be revealed before trial because the testimony was not a recorded statement in the possession, custody, or control of the state or prosecution. Frazier v. State, 252 Ga. App. 627, 557 S.E.2d 12 (2001).

State violated neither the discovery statute nor the Brady rule when the state allegedly withheld statements by another codefendant and a fourth man as the other codefendant's statement was elicited by a codefendant's counsel and there was no evidence the state withheld that statement; also, as to the fourth man, the statement was oral, and was neither recorded nor committed to writing other than in notes or summaries prepared by counsel, which meant the state did not have possession or control of the statement for purposes of producing the statement. Burgess v. State, 276 Ga. 185, 576 S.E.2d 863 (2003).

Copying of statements. — O.C.G.A. § 17-16-7 does not require the custodian of a document to allow copying; thus, the refusal to allow a party to photocopy a witness statement does not constitute reversible error. Taylor v. State, 272 Ga. 562, 532 S.E.2d 669 (2000).

Summary of statement not required. — Summary of a witness's statement to the prosecutor was not required to be provided to defense counsel. Williams v. State, 226 Ga. App. 313, 485 S.E.2d 837 (1997).

Reference to statement not required. — Even though the state had only a reference in an arrest report to an oral statement from a witness, the trial court did not err in admitting the eyewitness identification testimony over the defendant's objection that O.C.G.A. § 17-16-7 had been violated. Thompson v. State, 240 Ga. App. 26, 521 S.E.2d 876 (1999).

Defendant's failure to object to witness' testimony regarding matters not contained in statement. — When, in a murder trial, a witness testified to matters not contained in a summary of the witness's statement prepared by the state, pursuant to O.C.G.A. § 17-16-7, the defendant's failure to object rendered meritless the error alleged on appeal. Moore v. State, 279 Ga. 45, 609 S.E.2d 340 (2005).

Failure to timely disclose written statement. — Trial court did not abuse the court's discretion in excluding a witness as the defendant did not disclose the witness's written statement to the state within ten days of trial; further, the defendant did not include the witness's birth date on the witness list and the state was unable to investigate the witness's criminal record, if any. Clark v. State, 271 Ga. App. 534, 610 S.E.2d 165 (2005).

No duty to disclose. — Trial court did not err in denying the defendant's motion for mistrial on the grounds of prosecutorial misconduct because the defendant failed to show that the prosecutor violated the law, prejudiced the defense, or committed any act that could be construed as misconduct; there was no evidence in the record that the victim's mother gave the police or the prosecution a written or recorded statement that the victim had told the mother that the victim had lied about the molestation, but if the mother had given an unrecorded oral statement to that effect to the prosecutor, the prosecutor was not obligated under O.C.G.A. § 17-16-7 to disclose the oral statement to the defense, and it was patent from the opening statement that the

defendant intended to offer evidence in the defendant's defense that the victim had lied about the molestation and that some of that evidence would come from the victim's own mother. Chandler v. State, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Knowing defendant prior to crime. — Defendant's contention that trial counsel was ineffective for failing to move to suppress the identification by a victim prior to trial, object to the in-court identification of the defendant, or move for a mistrial because the state allegedly failed to provide notice that the victim could identify the defendant failed because the defendant knew the victim before the armed robbery, thus, there was an independent basis for the in-court identification, making futile any objection to the testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Exclusion of informal notes of investigator. — Trial court abused the court's discretion in imposing the extreme sanction of evidence exclusion for the state's failure to produce the investigator's notes because the record did not show that the investigator's informal notes, which the state could not produce, were subject to discovery under any of the provisions of Georgia's Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

Deficient counsel did not mandate finding that defendant prejudiced. — When defense counsel did not provide the prosecutor with timely notice of the defendant's expert witness or timely provide a copy of the witness's report, as required by O.C.G.A. §§ 17-16-4(b)(2), 17-16-7, and 17-16-8(a), and the witness was excluded, the defendant did not receive ineffective assistance of counsel; while counsel was deficient, it was not shown that the defendant was prejudiced as another expert testified to essentially the same facts and conclusions as the excluded witness, and referred to the excluded witness's findings, so the excluded witness's testimony would have been cumulative, and it was not shown that the outcome of the defendant's trial would have differed had counsel's performance not been deficient. Mann v. State, 276 Ga. App. 720, 624 S.E.2d 208 (2005).

Failure to disclose ten days prior to trial statements of co-indictee. — State did not violate O.C.G.A. § 17-16-7 by not disclosing, ten days before trial, a co-indictee's statement that the defendant threatened the co-indictee because the statement was not known by the state until trial, when the co-indictee and a second co-indictee were placed in the same holding cell. Silverio v. State, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

Failure to prove tape existed of entire witness interview. — Trial court did not abuse the court's discretion finding no reciprocal discovery violation on the part of the state as to a witness interview because there was no evidence that a recording of the entire interview ever existed as the record showed that the state provided the defendant with a recording of a brief portion of the witness's interview and represented to the trial court that no other portion of that interview was recorded, apparently due to an equipment malfunction. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162 (2019).

Cited in Hammitt v. State, 225 Ga. App. 21, 482 S.E.2d 437 (1997); Harris v. State, 256 Ga. App. 120, 567 S.E.2d 394 (2002).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 25B Am. Jur. Pleading and Practice Forms, Witnesses, § 1.

Am. Jur. Proof of Facts. — Unreliability of Eyewitness Identification, 18 POF2d 361.

Challenge to Eyewitness Testimony Through Expert Testimony, 35 POF3d 1.

17-16-8. Lists of names and information concerning witnesses.

(a) The prosecuting attorney, not later than ten days before trial, and the defendant's attorney, within ten days after compliance by the prosecuting attorney but no later than five days prior to trial, or as otherwise ordered by the court, shall furnish to the opposing counsel as an officer of the court, in confidence, the names, current locations, dates of birth, and telephone numbers of that party's witnesses, unless for good cause the judge allows an exception to this requirement, in which event the counsel shall be afforded an opportunity to interview such witnesses prior to the witnesses being called to testify.

(b) Nothing in this Code section shall be construed to require the prosecuting attorney to furnish the home address, date of birth, or home telephone number of a witness who is a law enforcement officer. Instead, in such cases, the prosecuting attorney shall furnish to the defense attorney the law enforcement officer's current work location and work phone number.

History. — Code 1981, § 17-16-8, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2; Ga. L. 1996, p. 1624, § 4.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, the existing provisions of this Code section were designated as subsection (a).

JUDICIAL DECISIONS

Failure to include coindictee's name on witness list was not reversible error since the defendant was notified a month before trial that the state was dropping charges against the coindictee in exchange for the coindictee's testimony against the defendant. Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999).

Even though a witness's name was not on the state's witness list, the state's formal disclosure of the witness as the confidential informant six weeks prior to trial, combined with: (i) the summary of the witness's testimony found in the search warrant affidavit given to the defendant; (ii) the defendant's admitted knowledge of the witness's identity prior to the formal disclosure; (iii) the defendant's own pretrial reference to the witness as a material witness; and (iv) the defendant's attempts to interview the witness prior to trial, fulfilled the purpose of the witness list rule. McLarty v. State, 238 Ga. App. 27, 516 S.E.2d 818 (1999).

No error occurred in permitting an unlisted witness, a police officer, to testify to facts contained in a police report regarding the defendant's arrest a decade earlier for rape as defense counsel was informed that the police officer would be called to testify if the victim of the attack a decade earlier could not be located, was notified during discovery that the police officer would have to testify, was given reports during discovery that contained the officer's name, and was allowed an opportunity to interview the officer. Rose v. State, 275 Ga. 214, 563 S.E.2d 865 (2002).

State was properly allowed to present a cab driver's testimony, even though the cab driver was not on the witness list, as the state established good cause for not having the cab driver on the witness list by demonstrating that the cab driver fled just before the trial commenced and as the defendant was given the opportunity to interview the cab driver prior to the cab driver testifying at trial. Puga-Cerantes v. State, 281 Ga. 78, 635 S.E.2d 118 (2006).

Trial court did not abuse the court's

discretion in allowing two witnesses to testify regarding damages done to a business's gate at the defendant's trial for armed robbery, theft of a motor vehicle, and other crimes, who were not identified on the prosecutor's witness list as the manager of the location from which the defendant stole the vehicle and damaged the gate suffered a severe back injury the day before testifying. The trial court properly allowed defense counsel to interview the repairman and the bookkeeper, who did testify as to the gate's damages, and the defendant never requested a continuance. Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

No request for recess to interview witness. — O.C.G.A. § 17-16-8 was not violated since the state provided the defendants with a copy of the taped statement of a witness on the day it was taken, four days before trial, and with a transcript thereof the following morning, and since, at trial, neither the defendant sought a recess to interview the witness. Johnson v. State, 241 Ga. App. 448, 526 S.E.2d 903 (1999).

No surprise or prejudice. — In a prosecution for armed robbery and furnishing a pistol to a minor, the trial court did not err in a motion in limine to exclude the testimony of a K-9 officer identified as a witness less than ten days before trial because the defendant was neither surprised nor prejudiced by the officer's testimony. Rollinson v. State, 276 Ga. App. 375, 623 S.E.2d 211 (2005).

With regard to the defendant's conviction for burglary, the trial court did not abuse the court's discretion by allowing a government witness to testify even though the state failed to include the witness on the state's witness list because the witness was not a "surprise" witness or unknown to the defendant; rather, the witness was a key element of the defendant's own explanation for the defendant's presence at the victims' home. Further, the trial court granted defense counsel an opportunity to interview the witness, and counsel asked for no additional relief following that interview, and the defendant did not argue or cite any evidence that the state's failure to list the witness as a witness resulted from bad faith. Luker v. State, 291 Ga. App. 434, 662 S.E.2d 240 (2008).

Trial court did not abuse the court's discretion in allowing a new witness for the state to testify at trial even though the state failed to disclose the witness at least ten days before trial in violation of O.C.G.A. § 17-16-8(a) because the defendant did not contend that the state acted in bad faith, and the defendant acknowledged in the defendant's appellate brief that the defendant believed that the state's failure to provide the name of the witness was unintentional; the defendant did not seek an opportunity to interview the witness despite the state's invitation for the defendant to do so. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a continuance and permitting the state's witnesses to testify because the defendant did not ask to interview the witnesses before the witnesses testified and did not contend that the defendant was surprised by the witnesses' testimony or prejudiced by not knowing earlier that the witnesses were going to testify; the defendant made no showing that the state acted in bad faith in failing to list the witnesses earlier. Powers v. State, 314 Ga. App. 733, 725 S.E.2d 848 (2012).

Trial court did not abuse the court's discretion by denying the defendant's request for a continuance when the court determined that the second similar transaction was admissible because the record showed months before trial, the state filed notice of the state's intent to introduce that similar transaction, listing the prior offense's case number, date of offense, county of offense, disposition, and victim's name, and defense counsel met with the victim prior to the testimony, but the victim refused to talk to counsel. Arbegast v. State, 332 Ga. App. 414, 773 S.E.2d 283 (2015).

Trial court erred in excluding the defendant's witness from testifying based on the failure to provide the state with a phone number and birth date for the witness because the state already possessed the information on the witness, who had been an occupant of the vehicle during the traffic stop. However, the error was harm-

less in light of the overwhelming evidence of the defendant's guilt. Diaz v. State, 348 Ga. App. 256, 820 S.E.2d 249 (2018), cert. denied, S20C0591, 2019 Ga. LEXIS 542 (Ga. 2019).

Birth dates not timely provided to defendant. — Because the defendant did not request a continuance upon denial of a motion to compel based on the state's failure to provide the birth date of a witness until shortly before trial, the defendant waived the right to argue that the trial court erred in allowing the witness to testify. Dickerson v. State, 241 Ga. App. 593, 526 S.E.2d 443 (1999).

Trial court did not abuse the court's discretion under O.C.G.A. § 17-16-6 in permitting witnesses to testify whose birth dates were not provided to the defendant at least ten days before the trial, as required under O.C.G.A. § 17-16-8, since: (1) the defendant did not request that the trial court exclude the witnesses' testimony; (2) the witnesses' birth dates were provided to the defense during trial; (3) the defense did not request a continuance to attempt to cure any prejudice from the failure to have the birth dates before trial; and (4) the defense had the opportunity to interview the witnesses before trial. Ehle v. State, 275 Ga. 560, 570 S.E.2d 284 (2002).

Failure to disclose birth date to state. — Trial court did not abuse the court's discretion in excluding a witness as the defendant did not disclose the witness's written statement to the state within ten days of trial; further, the defendant did not include the witness's birth date on the witness list and the state was unable to investigate the witness's criminal record, if any. Clark v. State, 271 Ga. App. 534, 610 S.E.2d 165 (2005).

Failure to provide information on witness harmless. — While the state failed to provide the defense with the requisite information on a witness, the trial court found no harm since information as to the witness's criminal history appeared in a transcript provided to the defense. Hammond v. State, 255 Ga. App. 549, 565 S.E.2d 873 (2002).

Failure to provide victim's address harmless. — Trial court properly dismissed the defendant's motion for a mistrial because the court did not abuse the court's discretion by concluding that the state did not act in bad faith by not furnishing the defendant with the victim's complete current address. Further, the defense counsel did not accept the offer to interview the victim under the condition that the victim imposed, and the defendant did not request a continuance. Shields v. State, 264 Ga. App. 232, 590 S.E.2d 217 (2003).

Incorrect contact information. — Trial court did not err in denying the defendant's motion in limine to exclude the testimony of two witnesses since the state's witness list provided 17 days prior to trial failed to contain the name of either witness and the list provided ten days prior to trial contained only one name but had incorrect contact information for that witness. Defendant failed to show how the defendant was prejudiced by the late identification or that the outcome would have been different absent such; nor did the defendant request a continuance to cure any prejudice the defendant claimed may have arisen as a result of the state's failure to comply with O.C.G.A. § 17-16-8(a). Morris v. State, 268 Ga. App. 325, 601 S.E.2d 804 (2004).

DNA evidence admitted despite lateness. — Trial court did not abuse the court's discretion in refusing to exclude the DNA results from testing of a bloody knife and tee-shirt in the defendant's trial for murder, which the state sought to introduce three days into the state's case-in-chief, since the state had just received the results and the defense counsel acknowledged at the hearing on the defendant's motion for a new trial that there was no evidence of prosecutorial misconduct and it was undisputed that the defendant was afforded an opportunity to interview the witnesses. Cockrell v. State, 281 Ga. 536, 640 S.E.2d 262 (2007).

Affirmative duty of the producing party. — Since the defendant made no showing that the defendant was prejudiced as a result of the state's failure to make a custodial statement available to the defendant prior to trial or that the state acted in bad faith in failing to list a witness, the trial court did not abuse the court's discretion in permitting the wit-

ness to testify. Jones v. State, 243 Ga. App. 351, 532 S.E.2d 120 (2000).

A party charged with producing the statutorily charged information may not rest solely on the fact that the information is not within their possession because the statute imposes an affirmative duty on the producing party to attempt to acquire the information. State v. Dickerson, 273 Ga. 408, 542 S.E.2d 487 (2001).

State provided opportunity to testify. — Although the name of the emergency medical technician (EMT) had not been provided to the state before trial in violation of subsection (a) of O.C.G.A. § 17-16-8, the EMT should have been allowed to testify after the state was afforded the opportunity to interview the EMT. Massey v. State, 272 Ga. 50, 525 S.E.2d 694 (2000).

Prosecution has no obligation to locate defense witnesses. — Trial court did not err in denying the defendant's request for a continuance based on the state violating the state's discovery obligations and failing to disclose exculpatory evidence when the state failed to provide the defendant with the transporting officer's out-of-state address because the state, acting in the state's role as the prosecution, has no obligation to locate defense witnesses and the defendant failed to show that any alleged discovery violation caused the defendant harm. Lafavor v. State, 334 Ga. App. 125, 778 S.E.2d 377 (2015).

Deficient performance of counsel does not mandate finding of prejudice. — When defense counsel did not provide the prosecutor with timely notice of the defendant's expert witness or timely provide a copy of the witness's report, as required by O.C.G.A. §§ 17-16-4(b)(2), 17-16-7, and 17-16-8(a), and the witness was excluded, the defendant did not receive ineffective assistance of counsel; while counsel was deficient, it was not shown that the defendant was prejudiced as another expert testified to essentially the same facts and conclusions as the excluded witness, and referred to the excluded witness's findings, so the excluded witness's testimony would have been cumulative, and it was not shown that the outcome of the defendant's trial would have differed had counsel's performance not been deficient. Mann v. State, 276 Ga. App. 720, 624 S.E.2d 208 (2005).

Timeliness. — One month before trial, the state filed a notice of the state's intent to present nonstatutory aggravating circumstances involving several incidents that occurred while the defendant was in jail awaiting trial; this notice and the supplement to the witness list were not untimely. Brannan v. State, 275 Ga. 70, 561 S.E.2d 414, cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err in excluding testimony from the defendant's proffered expert witness on police interrogation techniques and false confessions based on the state not being timely notified of that witness and because the area in which the expert would express an opinion had not reached a level of scientific reliability so as to allow the testimony. It was within the trial court's authority to exclude the expert's testimony for the defendant's failure to disclose the expert and there was no showing that the false confession theory and the interrogation method satisfied the evidentiary test in criminal cases set forth in case law. Wright v. State, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010).

No prejudice from denial of continuance after untimely disclosure. — Even if the trial court assigned an incorrect reason for denying the defendant a continuance after the state untimely revealed a confidential informant's identity under O.C.G.A. § 17-16-8(a), the defendant did not show prejudice; defense counsel interviewed the informant and cross-examined the informant extensively about the informant's criminal history. Ingram v. State, 286 Ga. App. 662, 650 S.E.2d 743 (2007), overruled on other grounds by State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020).

Revelation of expert witnesses. — In a capital murder case in which the defendant was granted ex parte orders for mental health experts to examine the de-

fendant, the trial court erred in revealing to the state the identities of the experts, the experts' areas of practice, and the bases for the examinations; remand was required to assess the likelihood of prejudice and take curative measures. Putnal v. State, 303 Ga. 569, 814 S.E.2d 307 (2018).

Trial court did not abuse the court's discretion in refusing to allow an expert to testify that the defendant had post-traumatic stress disorder (PTSD) on the basis that the defendant did not disclose the expert as an expert witness in a timely fashion as the defendant did not make a proffer of the expert's testimony and, therefore, could not demonstrate prejudice; plus, the defendant testified at trial and informed the jury of the PTSD diagnosis. Keller v. State, 308 Ga. 492, 842 S.E.2d 22 (2020).

Witness excluded. — Trial court had the discretion under O.C.G.A. § 17-16-6 to exclude witnesses provided by the defendant on the day of trial in violation of O.C.G.A. § 17-16-8(a); bad faith was satisfied because nothing in the record indicated that the defendant did not know of the witnesses, or did not intend to call the witnesses, until the day of the trial, and prejudice was established because the state had no notice of the witnesses until the day of trial and had no opportunity to investigate the witnesses or their testimony. Acey v. State, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

Excluding a witness's testimony on the ground that the defendants did not comply with proper discovery procedures, in violation of O.C.G.A. § 17-16-8(a), was harmless error, if error at all, in light of the overwhelming evidence of the defendants' guilt. Carter v. State, 285 Ga. 394, 677 S.E.2d 71 (2009).

Failure to make proffer. — Claim that the trial court abused the court's discretion by excluding the testimony of the defendant's father provided no basis for reversal because the defendant failed to make an offer of proof as to the father's testimony. Clemens v. State, 318 Ga. App. 16, 733 S.E.2d 67 (2012).

Witnesses who never testified. — Although the defendant had sought a mistrial after the prosecutor announced on the fourth day of trial that one disclosed witness had told the prosecutor of additional incriminatory testimony and that a previously undisclosed witness, who had not yet been found, might testify, neither witness ever testified; thus, the denial of the motion for mistrial was moot. Moreover, as required by O.C.G.A. § 17-16-8(a), the trial court allowed the defendant to interview the disclosed witness. Lankford v. State, 295 Ga. App. 590, 672 S.E.2d 534 (2009).

In a case in which the defendant argued that the trial court abused the court's discretion when the court denied the defendant's motion for a mistrial, arguing that the state violated O.C.G.A. § 17-16-8(a) by failing to disclose identifying information concerning a witness, the state did not violate § 17-16-8 since the state could not locate the witness and did not call the witness at trial. Manaois v. State, 300 Ga. App. 176, 684 S.E.2d 315 (2009).

Issue waived. — Defendant waived the issue that the trial court erred in denying the defendant's motion for a continuance and permitting the state's witnesses to testify because the defendant withdrew an objection when a substitute officer was called as a witness. Powers v. State, 314 Ga. App. 733, 725 S.E.2d 848 (2012).

Cited in Laney v. State, 271 Ga. 194, 515 S.E.2d 610 (1999); Sullivan v. State, 242 Ga. App. 839, 531 S.E.2d 367 (2000); Fairbanks v. State, 242 Ga. App. 830, 531 S.E.2d 381 (2000); Sweeder v. State, 246 Ga. App. 557, 541 S.E.2d 414 (2000); Wilbanks v. State, 251 Ga. App. 248, 554 S.E.2d 248 (2001); Grier v. State, 276 Ga. App. 655, 624 S.E.2d 149 (2005).

17-16-9. Reimbursement for costs.

Any party providing documents or statements to another party under this article shall be reimbursed for the actual cost incurred in providing

such documents. If the court has determined the defendant to be indigent, the court shall determine the means of reimbursement.

History. — Code 1981, § 17-16-9, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 2.

17-16-10. Material or information already furnished; who may be called as witness.

The defendant need not include in materials and information furnished to the prosecuting attorney under this article any material or information which the prosecuting attorney has already furnished to the defendant under this article. The prosecuting attorney need not include in materials and information furnished to the defendant under this article any material or information which that defendant has already furnished to the prosecuting attorney under this article. Either party may call as a witness any person listed on either the prosecuting attorney's or defendant's witness list.

History. — Code 1981, § 17-16-10, enacted by Ga. L. 1995, p. 1250, § 2.

JUDICIAL DECISIONS

Trial court erred in excluding a witness's testimony based solely on the fact that the witness was not listed on the defendant's witness list because the defendant was entitled to rely on the state's supplemental witness list as a document furnished to the defendant pursuant to the Criminal Discovery Act, O.C.G.A. § 17-16-10, and was not required to also list the witness on the defendant's own witness list in order to call the witness as a witness at trial; when the trial court excluded the testimony, it was not aware that the witness had been identified by the state on its supplemental witness list, but when ruling on the state's objection to the witness because of an alleged discovery violation on the part of the defense. The trial court did not require the state to make the requisite showing of prejudice and bad faith on the part of the defendant as required by the Act, O.C.G.A. § 17-16-6, and the state could not have shown prejudice or bad faith on the part of the defendant because the state admitted that it had the witness's report and had researched the validity of the specific tests utilized by the witness, and the error was not harmless since it could not be said that the testimony would not have made a difference in the outcome of what the trial court described as a "very, very close case." Webb v. State, 300 Ga. App. 611, 685 S.E.2d 498 (2009).

Cited in Jackson v. State, 233 Ga. App. 568, 504 S.E.2d 505 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1169 et seq. 81 Am. Jur. 2d, Witnesses, § 49 et seq.

C.J.S. — 22A C.J.S., Criminal Procedure and Rights of the Accused, § 382 et seq.

ARTICLE 2

MISDEMEANOR CASES

17-16-20. Applicability of article.

The provisions of this article shall apply only to misdemeanor cases or to felony cases docketed, indicted, or in which an accusation was returned prior to January 1, 1995, if the prosecuting attorney and the defendant do not agree in writing that the provisions of Article 1 of this chapter shall apply.

History. — Code 1981, § 17-16-20, enacted by Ga. L. 1994, p. 1895, § 4; Ga. L. 1995, p. 1250, § 3.

Law reviews. — For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 144 (1995).

JUDICIAL DECISIONS

Discovery applicable to misdemeanor cases. — Discovery provisions applicable to misdemeanor prosecutions are not the same as those applicable to felony prosecutions, and discovery requirements applicable to misdemeanors did not require the state to produce the items that the defendant claimed should have been produced, including police reports, copies of 9-1-1 recordings, crime scene photographs, the victim's criminal history, witness statements and repair records for the property the defendant damaged; the defendant admitted that the state provided the defendant with a copy of the accusation, as required by O.C.G.A. § 17-16-21, as well as the state's witness list and a copy of the defendant's criminal record, so under the circumstances, the state complied with the state's discovery obligations. Brooks v. State, 267 Ga. App. 663, 600 S.E.2d 737 (2004).

Witnesses' statements are not required to be made available by prosecutors for discovery by the defendant in a misdemeanor case. Brown v. State, 246 Ga. App. 517, 541 S.E.2d 112 (2000).

Cited in Bazemore v. State, 244 Ga. App. 460, 535 S.E.2d 830 (2000).

17-16-21. Right of the defendant to copy of indictment or accusation and list of witnesses.

Prior to arraignment, every person charged with a criminal offense shall be furnished with a copy of the indictment or accusation and, on demand, with a list of the witnesses on whose testimony the charge against such person is founded. Without the consent of the defendant, no witness shall be permitted to testify for the state whose name does not appear on the list of witnesses as furnished to the defendant unless the prosecuting attorney shall state that the evidence sought to be presented is newly discovered evidence which the state was not aware of at the time of its furnishing the defendant with a list of the witnesses.

History. — Code 1981, § 17-16-21, enacted by Ga. L. 1994, p. 1895, § 4.

JUDICIAL DECISIONS

Purpose. — Purpose of O.C.G.A. § 17-16-21 is to avoid surprises. Mowery v. State, 234 Ga. App. 801, 507 S.E.2d 821 (1998).

Transcending purpose of O.C.G.A. § 17-16-21 was to ensure that an accused was not confronted at trial with testimony against the accused from witnesses whom the accused had not had the opportunity to interview prior to trial; the remedies available for a defendant were a continuance or a mistrial. Hill v. State, 258 Ga. App. 339, 574 S.E.2d 394 (2002).

Application of exclusionary rule. — Exclusionary rule of O.C.G.A. § 17-16-21 applies only if the state fails altogether to furnish discovery material, and thus, if material is furnished late, the proper remedy may be, in the court's discretion, a continuance upon proper request by the accused. Mowery v. State, 234 Ga. App. 801, 507 S.E.2d 821 (1998).

Discovery applicable to misdemeanor cases. — Discovery provisions applicable to misdemeanor prosecutions are not the same as those applicable to felony prosecutions, and discovery requirements applicable to misdemeanors did not require the state to produce the items that the defendant claimed should have been produced, including police reports, copies of 9-1-1 recordings, crime scene photographs, the victim's criminal history, witness statements and repair records for the property the defendant damaged; the defendant admitted that the state provided the defendant with a copy of the accusation, as required by O.C.G.A. § 17-16-21, as well as the state's witness list and a copy of the defendant's criminal record, so under the circumstances, the state complied with the state's discovery obligations. Brooks v. State, 267 Ga. App. 663, 600 S.E.2d 737 (2004).

Dismissals due to failure to provide discovery. — Trial court's dismissal without prejudice as to 16 cases dismissed due to the failure of the state to provide discovery was affirmed because the statute of limitations had not expired on the date of the dismissals and the state could re-accuse those defendants. State v. Banks, 348 Ga. App. 876, 825 S.E.2d 399 (2019).

Witnesses could testify although names not on witness list. — Witnesses whose names were not on the accusation furnished to the defendant could testify because the record did not show that the defendant filed a demand for a list of witnesses prior to arraignment. Satterfield v. State, 228 Ga. App. 89, 491 S.E.2d 189 (1997); Lewis v. State, 246 Ga. App. 170, 539 S.E.2d 859 (2000).

Although the defendant objected to the testimony of a witness on the ground that the witness had not been identified on the list of witnesses supplied by the state, admission of the testimony was within the court's discretion based on the state's claim of surprise. Jackson v. State, 228 Ga. App. 877, 492 S.E.2d 897 (1997).

Since the state did not become aware that the witness had knowledge of the defendant's condition and conduct on the night of the defendant's arrest until after the trial began, there was no error in allowing the state to call the newly discovered witness. Brice v. State, 242 Ga. App. 163, 529 S.E.2d 178 (2000).

Proper identification of witness. — Witness was identified sufficiently to satisfy the requirement that the defendant's counsel be allowed to question the witness prior to trial since the witness's name was misspelled but the witness's correct address was provided. Dill v. State, 235 Ga. App. 265, 508 S.E.2d 739 (1998).

List of witnesses required. — Although O.C.G.A. § 17-16-21 obligates the state to provide the defendant with a list of the witnesses on whose testimony the charge against the defendant is founded, it does not obligate the state to list unanticipated impeachment witnesses. Brice v. State, 242 Ga. App. 163, 529 S.E.2d 178 (2000).

Failure to file demand for list of witnesses. — When a demand for a list of witnesses was not filed prior to arraignment, the trial court did not err in permitting an unlisted witness to testify over objection. Brown v. State, 246 Ga. App. 517, 541 S.E.2d 112 (2000).

Failure to request continuance when witness list not timely provided. — Defendant waived the defen-

dant's right to assert error in the state's failure to timely provide an updated witness list by failing to seek a continuance; given defense counsel's conduct, the fact that the witness list had been furnished to the defendant, and the defendant's absolute refusal to ask for a continuance, the trial court did not abuse the court's discretion in denying the defendant's motion to exclude the testimony of the witnesses on the updated witness list. Ruff v. State, 266 Ga. App. 694, 598 S.E.2d 362 (2004).

Failure to request continuance after late delivery of transcript. — Defendant was obliged to request a continuance to cure any prejudice which may have resulted from the state's failure to comply with the requirements of the Reciprocal Discovery Act, O.C.G.A. § 17-16-21; any claim of denial of the right to self-representation because the state did not give the defendant a transcript of the probable cause hearing until the day before trial was waived by the defendant's announcement that the defendant was ready for trial. Clark v. State, 278 Ga. App. 412, 629 S.E.2d 103 (2006).

Failure to arraign. — Reversal was required because the state acknowledged that the state could not show that the defendant was formerly arraigned and aware of the charges, and that because the defendant objected to the lack of a formal arraignment, the trial court should have arraigned the defendant. Sapp v. State, 338 Ga. App. 628, 791 S.E.2d 201 (2016).

Cited in Phillips v. State, 289 Ga. App. 281, 656 S.E.2d 905 (2008).

17-16-22. Right of defendant to copy of statement given while in police custody; failure of prosecution to comply; evidence discovered after filing of request.

(a) At least ten days prior to the trial of the case, the defendant shall be entitled to have a copy of any statement given by the defendant while in police custody. The defendant may make such request for a copy of any such statement, in writing, within any reasonable period of time prior to trial.

(b) If the defendant's statement is oral or partially oral, the prosecution shall furnish, in writing, all relevant and material portions of the defendant's statement.

(c) Failure of the prosecution to comply with a defendant's timely written request for a copy of such defendant's statement, whether written or oral, shall result in such statement being excluded and suppressed from the prosecution's use in its case-in-chief or in rebuttal.

(d) If the defendant's statement is oral, no relevant and material, incriminating or inculpatory, portion of the statement of the defendant may be used against the defendant unless it has been previously furnished to the defendant, if a timely written request for a copy of the statement has been made by the defendant.

(e) This Code section shall not apply to evidence discovered after a request has been filed. If a request has been filed, such evidence shall be produced as soon as possible after it has been discovered.

History. — Code 1981, § 17-16-22, enacted by Ga. L. 1994, p. 1895, § 4.

JUDICIAL DECISIONS

Purpose. — Purpose of O.C.G.A. § 17-16-22 is to avoid surprises. Mowery v. State, 234 Ga. App. 801, 507 S.E.2d 821 (1998).

Roadside questioning not custodial statements. — Statements that the defendant challenged were made during roadside questioning after a routine traffic stop before the defendant was formally arrested; therefore, the roadside statements were not custodial statements subject to the production requirements in O.C.G.A. § 17-16-22(a) and (b). Daugherty v. State, 248 Ga. App. 181, 546 S.E.2d 310 (2001).

Application of exclusionary rule. — Exclusionary rule of O.C.G.A. § 17-16-22 applies only if the state fails altogether to furnish discovery material, and thus, if material is furnished late, the proper remedy may be, in the court's discretion, a continuance upon proper request by the accused. Mowery v. State, 234 Ga. App. 801, 507 S.E.2d 821 (1998).

Evidence otherwise admitted without objection. — Even if the state failed to reply to a request for a copy of a uniform traffic citation showing the defendant's refusal to submit to a breath test, any error in admitting the uniform traffic citation into evidence was harmless as the arresting officer testified without objection that the defendant refused to submit to a breath test and the defendant admitted at trial that the defendant refused to take a breath test. Johnson v. State, 234 Ga. App. 58, 506 S.E.2d 212 (1998).

Cited in State v. Banks, 348 Ga. App. 876, 825 S.E.2d 399 (2019).

17-16-23. Right of defendant to copies of written scientific reports; failure to comply.

(a) As used in this Code section, the term "written scientific reports" includes, but is not limited to, reports from the Division of Forensic Sciences of the Georgia Bureau of Investigation; an autopsy report by the coroner of a county or by a private pathologist; blood alcohol test results done by a law enforcement agency or a private physician; and similar types of reports that would be used as scientific evidence by the prosecution in its case-in-chief or in rebuttal against the defendant.

(b) In all criminal trials the defendant shall be entitled to have a complete copy of any written scientific reports in the possession of the prosecution which will be introduced in whole or in part against the defendant by the prosecution in its case-in-chief or in rebuttal. The request for a copy of any written scientific reports shall be made by the defendant in writing at arraignment or within any reasonable time prior to trial. If such written request is not made at arraignment, it shall be within the sound discretion of the trial judge to determine in each case what constitutes a reasonable time prior to trial. If the scientific report is in the possession of or available to the prosecuting attorney, the prosecuting attorney must comply with this Code section at least ten days prior to the trial of the case.

(c) Failure by the prosecution to furnish the defendant with a copy of any written scientific report, when a proper and timely written demand has been made by the defendant, shall result in such report being excluded and suppressed from evidence in the prosecution's case-in-chief or in rebuttal.

History. — Code 1981, § 17-16-23, enacted by Ga. L. 1994, p. 1895, § 4.

JUDICIAL DECISIONS

Purpose. — Purpose of O.C.G.A. § 17-16-23 is to avoid surprises. Mowery v. State, 234 Ga. App. 801, 507 S.E.2d 821 (1998).

O.C.G.A. § 17-16-23(b) pertains only to written scientific reports and did not apply if test results were not reduced to writing and the medical examiner gave only oral testimony. Brown v. State, 268 Ga. 354, 490 S.E.2d 75 (1997).

Application of exclusionary rule. — Exclusionary rule of O.C.G.A. § 17-16-23 applies only if the state fails altogether to furnish discovery material, and thus, if material is furnished late, the proper remedy may be, in the court's discretion, a continuance upon proper request by the accused. Mowery v. State, 234 Ga. App. 801, 507 S.E.2d 821 (1998).

Certificate of inspection of breath testing instruments. — Certificate of inspection of breath testing instruments required by O.C.G.A. § 40-6-392(f) is not a written scientific report within the meaning of O.C.G.A. § 17-16-23. Harmon v. State, 224 Ga. App. 890, 482 S.E.2d 730 (1997); Fantasia v. State, 268 Ga. 512, 491 S.E.2d 318 (1997).

Certificate of Calibration. — Trial court did not err in allowing the state to enter into evidence and conduct direct examination regarding the Certificate of Calibration for the radar device used in the defendant's speeding case without first having provided that certificate to the defendant pursuant to the defendant's discovery request as that certificate was not a "written scientific report" subject to discovery because it did not involve a test generally carried out during the investigation of a crime, but, instead, reflected testing that was done to make sure the radar device was working properly. Putman v. State, 270 Ga. App. 45, 606 S.E.2d 50 (2004).

Source code for breath test machine. — In a DUI case, the defendant was not entitled to discovery of the "source code" used to program a breath test machine. The defendant did not show that the code was in the possession, custody, or control of the state as required by O.C.G.A. §§ 17-16-1(1) and 17-16-23(b). Hills v. State, 291 Ga. App. 873, 663 S.E.2d 265 (2008).

Breath test results, etc. were included within the terms of O.C.G.A. § 17-16-23 and should have been provided to the defendant in a prosecution for driving under the influence. Harmon v. State, 224 Ga. App. 890, 482 S.E.2d 730 (1997); Fantasia v. State, 268 Ga. 512, 491 S.E.2d 318 (1997).

When there was uncontroverted evidence that the defendant was given a copy of breath test results at the time the test was administered, the defendant was not harmed by the failure of the state to provide the results by discovery. Vincent v. State, 228 Ga. App. 691, 492 S.E.2d 604 (1997).

In the absence of a sufficient record, the appellate court would assume that the defendant received all reports regarding blood-alcohol test results to which the defendant was entitled. Self v. State, 232 Ga. App. 735, 503 S.E.2d 625 (1998).

Trial court did not err in failing to exclude evidence of the defendant's breath test results because the state failed to comply with O.C.G.A. § 17-16-23(b), based on the conduct of defense counsel in moving to exclude the documents at trial, after having no objection to the documents at the suppression hearing, and failing to move for a continuance, as counsel's motion to exclude was made as part of a strategy to ambush or trap the state; hence, in view of this conduct and the earlier availability of the documents, the trial court did not abuse the court's discretion in refusing to exclude the test results. Braswell v. State, 281 Ga. App. 500, 636 S.E.2d 689 (2006).

Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because the state was not required to produce the breath test slip to the defendant ten days before

trial as a part of discovery since the breath test slip did not constitute a written scientific report within the meaning of O.C.G.A. § 17-16-23; no test or analysis was performed because the sample was insufficient, and the breath test slip did not show any test results but reflected only a measurement of breath volume. State v. Tan, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Printout reflecting an "insufficient sample," and thus no analysis and no result is not subject to discovery under O.C.G.A. § 17-16-23 because if there is no test and no result, there is nothing to discover. State v. Tan, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

State did not violate the state's discovery obligations because the discovery statute only required production of any reports in the possession of the prosecution, and the undisputed evidence in the case was that the intoxilyzer printouts were lost, without any evidence of intentional destruction or bad faith on the part of the state. Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337 (2018).

Horizontal gaze nystagmus test. — Law required exclusion both of a written report and oral testimony regarding a horizontal gaze nystagmus test administered to the defendant since the defendant made a timely written demand for scientific reports and the state redacted the preprinted section of the police report in which the arresting officer hand wrote the results of the test. Rayburn v. State, 234 Ga. App. 482, 506 S.E.2d 876 (1998).

Gas chromatograph printout is not a scientific report. — Printout from a gas chromatograph is a graph or recordation of data and is not a scientific report; therefore, Rayburn v. State, 234 Ga. App. 482, 506 S.E.2d 876 (1998), along with other cases interpreting O.C.G.A. § 17-16-23, do not govern a discovery dispute regarding the printout. Birdsall v. State, 254 Ga. App. 555, 562 S.E.2d 841 (2002).

Admissibility of breath test slip. — Trial court erred in granting the defendant's motion to suppress a breath test slip from an intoxilyzer and all testimony about the intoxilyzer because no surprise occurred when the defendant's attorney had already been shown the breath test slip and cross-examined a police officer about the slip at the motion hearing, and the state agreed to provide the defendant a copy; although the better practice would have been to provide the defendant a copy of the slip before the trial date, the record demonstrated that the state provided a copy at the hearing on the pretrial motion. State v. Tan, 305 Ga. App. 55, 699 S.E.2d 74 (2010).

Receipt of breath test results from jail staff sufficient. — Court rejected a DUI the defendant's argument that the trial court erred in allowing the state to admit the results of the defendant's breathalyzer test because the state failed to provide a copy of the results to the defendant during discovery in violation of O.C.G.A. § 17-16-23; the uncontroverted evidence indicated that the defendant received a copy of the test results from the jail staff immediately after the results were recorded. Jacobson v. State, 306 Ga. App. 815, 703 S.E.2d 376 (2010), cert. denied, No. S11C0498, 2011 Ga. LEXIS 582 (Ga. 2011).

Failure to produce independent chemical test of blood. — O.C.G.A. § 40-6-392(a)(4), with regard to an independent chemical test of blood, specifies no deadline for requesting full information, no timetable for supplying the information, and no penalty for the state's failure to produce the information. State v. Thompson, 334 Ga. App. 692, 780 S.E.2d 67 (2015).

Cited in Renschen v. State, 225 Ga. App. 678, 484 S.E.2d 753 (1997); Cornwell v. State, 283 Ga. 247, 657 S.E.2d 195 (2008); Black v. State, 309 Ga. App. 880, 711 S.E.2d 428 (2011); State v. Banks, 348 Ga. App. 876, 825 S.E.2d 399 (2019).

CHAPTER 17

CRIME VICTIMS' BILL OF RIGHTS

Sec.

17-17-1. Declaration of policy.
17-17-2. Short title.
17-17-3. Definitions.
17-17-4. Designation of family member to act in place of physically disabled victim.
17-17-5. Notification to victim of accused's arrest, release, judicial proceedings, escape, and violations of electronic release and monitoring program.
17-17-5.1. Victim notification from Department of Behavioral Health and Developmental Disabilities.
17-17-6. Notification to victim of accused's pretrial release and of victims' rights and the availability of victims' compensation and services.
17-17-7. Notification to victim of accused's arrest and proceedings where accused's release is considered; victim's right to express opinion in pending proceedings and to file written complaint in event of release.
17-17-8. Notification by prosecuting attorney of legal procedures and of victim's rights in relation thereto; victims seeking restitution.
17-17-8.1. Procedures for a victim to be interviewed by an accused or accused's attorney or agent; duties and conditions.
17-17-9. Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.
17-17-9.1. Communications between victim assistance personnel and victims privileged.
17-17-10. Requirement by court that defense counsel not disclose victim information to accused.
17-17-11. Right of victim to express opinion on disposition of accused's case.
17-17-12. Notification to victim of accused's motion for new trial or appeal, release on bail or recognizance, appellate proceedings, and outcome of appeal; notifications regarding death penalty cases; victim's rights retained at new trial or on appeal.
17-17-12.1. Requests to prevent an accused from sending any form of written, text, or electronic communication to the victim's family, or the victim.
17-17-13. Notification to victim of impending parole, release for period exceeding 60 days, or pardon; notice of hearing on request to commute death sentence.
17-17-14. Victim required to provide current address and phone number to notifying parties.
17-17-15. Failure to provide notice not rendering responsible person liable or comprising basis for error; chapter not conferring standing upon victim to participate as party in criminal proceeding; existing rights not affected; waiver of rights by victim.
17-17-16. Temporary restraining and protective orders.

Cross references. — Notice of release of child from detention, § 15-11-51. Notice to victim of parole decision, § 42-9-43.

Law reviews. — For note on the 1995 enactment of this chapter, see 12 Ga. St. U.L. Rev. 158 (1995).

OPINIONS OF THE ATTORNEY GENERAL

Chapter not applicable to juvenile proceedings. — Crime Victims' Bill of Rights, O.C.G.A. § 17-7-1 et seq., is not applicable to juvenile court proceedings. 1996 Op. Att'y Gen. No. U96-1.

Crime Victims' Bill of Rights, O.C.G.A. § 17-17-1 et seq., has only limited application to juvenile court proceedings which are governed primarily by the provisions contained in O.C.G.A. T. 15, and the conclusion reached in 1996 Op. Att'y Gen. U96-1 remains. 2010 Op. Att'y Gen. No. 10-10.

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1208 et seq.

C.J.S. — 24 C.J.S., Criminal Procedure and Rights of the Accused, § 2472 et seq.

17-17-1. Declaration of policy.

The General Assembly hereby finds and declares it to be the policy of this state that victims of crimes should be accorded certain basic rights just as the accused are accorded certain basic rights. These rights include:

(1) The right to reasonable, accurate, and timely notice of any scheduled court proceedings or any changes to such proceedings;

(2) The right to reasonable, accurate, and timely notice of the arrest, release, or escape of the accused;

(3) The right not to be excluded from any scheduled court proceedings, except as provided in this chapter or as otherwise required by law;

(4) The right to be heard at any scheduled court proceedings involving the release, plea, or sentencing of the accused;

(5) The right to file a written objection in any parole proceedings involving the accused;

(6) The right to confer with the prosecuting attorney in any criminal prosecution related to the victim;

(7) The right to restitution as provided by law;

(8) The right to proceedings free from unreasonable delay; and

(9) The right to be treated fairly and with dignity by all criminal justice agencies involved in the case.

History. — Code 1981, § 17-17-1, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 6/HB 567.

Cross references. — Examination of sexual assault victims, § 35-1-2.

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U.L. Rev. 29 (2011).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state constitutional or statutory victims' bill of rights, 91 A.L.R.5th 343.

17-17-2. Short title.

This chapter shall be known and may be cited as the "Crime Victims' Bill of Rights."

History. — Code 1981, § 17-17-2, enacted by Ga. L. 1995, p. 385, § 2.

17-17-3. Definitions.

As used in this chapter, the term:

(1) "Accused" means a person suspected of and subject to arrest for, arrested for, or convicted of a crime against a victim.

(1.1) "Arrest" means an actual custodial restraint of a person or the person's submission to custody and includes the taking of a child into custody.

(2) "Arresting law enforcement agency" means any law enforcement agency, other than the investigating law enforcement agency, which arrests the accused.

(3) "Compensation" means awards granted by the Georgia Crime Victims Compensation Board pursuant to Chapter 15 of this title.

(4) "Crime" means an act committed in this state which constitutes any violation of Chapter 5 of Title 16; Chapter 6 of Title 16; Article 1, 3, or 4 of Chapter 7 of Title 16; Article 1 or 2 of Chapter 8 of Title 16; Chapter 9 of Title 16; Part 3 of Article 3 of Chapter 12 of Title 16; Code Section 40-6-393; Code Section 40-6-393.1; or Code Section 40-6-394.

(4.1) "Criminal justice agency" means an arresting law enforcement agency, custodial authority, investigating law enforcement agency, prosecuting attorney, or the State Board of Pardons and Paroles.

(5) "Custodial authority" means a warden, sheriff, jailer, deputy sheriff, police officer, correctional officer, officer or employee of the Department of Corrections or the Department of Juvenile Justice, community supervision officer or employee of the Department of Community Supervision, or any other law enforcement officer having actual custody of the accused.

(6) "Investigating law enforcement agency" means the law enforcement agency responsible for the investigation of the crime.

(7) "Notice," "notification," or "notify" means a written notice when time permits or, failing such, a documented effort to reach the victim by telephonic or other means.

(8) "Person" means an individual.

(9) "Prompt notice," "prompt notification," or "promptly notify" means notification given to the victim as soon as practically possible so as to provide the victim with a meaningful opportunity to exercise his or her rights pursuant to this chapter.

(10) "Prosecuting attorney" means the district attorney, the solicitor-general of a state court or the solicitor of any other court, the Attorney General, a county attorney opposing an accused in a habeas corpus proceeding, or the designee of any of these.

(11) "Victim" means:

(A) A person against whom a crime has been perpetrated or has allegedly been perpetrated; or

(B) In the event of the death of the crime victim, the following relations if the relation is not either in custody for an offense or the defendant:

(i) The spouse;

(ii) An adult child if division (i) of this subparagraph does not apply;

(iii) A parent if divisions (i) and (ii) of this subparagraph do not apply;

(iv) A sibling if divisions (i) through (iii) of this subparagraph do not apply; or

(v) A grandparent if divisions (i) through (iv) of this subparagraph do not apply; or

(C) A parent, guardian, or custodian of a crime victim who is a minor or a legally incapacitated person except if such parent, guardian, or custodian is in custody for an offense or is the defendant.

History. — Code 1981, § 17-17-3, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 1996, p. 748, § 17; Ga. L. 1997, p. 1453, § 1; Ga. L. 2010, p. 214, § 7/HB 567; Ga. L. 2013, p. 524, § 3-1/HB 78; Ga. L. 2015, p. 422, § 5-40/HB 310.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, "or" was added at the end of division (11)(B)(iv).

Pursuant to Code Section 28-9-5, in 2020, "of this subparagraph" was inserted in divisions (11)(B)(ii) through (11)(B)(v).

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred respon-

sibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30(b), not codified by the General Assembly, provides: "The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

17-17-4. Designation of family member to act in place of physically disabled victim.

If a victim is physically unable to exercise privileges and rights under this chapter, the victim may designate by written instrument his or her spouse, adult child, parent, sibling, or grandparent to act in place of the victim during the duration of the physical disability. During the physical disability, notices to be provided under this chapter to the victim shall continue to be afforded only to the victim.

History. — Code 1981, § 17-17-4, enacted by Ga. L. 1995, p. 385, § 2.

17-17-5. Notification to victim of accused's arrest, release, judicial proceedings, escape, and violations of electronic release and monitoring program.

(a) All victims, wherever practicable, shall be entitled to notification of:

(1) The accused's arrest;

(2) The accused's release from custody;

(3) Any judicial proceeding at which the release of the accused will be considered;

(4) An escape by the accused and his or her subsequent rearrest; and

(5) If the accused is released from custody and the terms or conditions of such release require that the accused participate in an electronic release and monitoring program, the accused's violation of the terms or conditions of the electronic release and monitoring program, provided that an arrest warrant has been issued for the accused and the accused is prohibited from contacting the victim.

(b) No such notification shall be required unless the victim provides a current address and telephone number to which such notice can be directed.

(c) The criminal justice agency having knowledge of an event described in subsection (a) of this Code section shall provide notice to the victim of such event. Such agency shall advise the victim of his or her right to notification pursuant to this chapter and of the requirement of the victim's providing a current address and telephone number to which the notification shall be directed. Such victim shall transmit the telephone number described in this subsection to the appropriate criminal justice agency or custodial authority as provided for in this chapter.

History. — Code 1981, § 17-17-5, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 8/HB 567.

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U.L. Rev. 29 (2011).

For article, "The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws," see 20 Ga. St. U.L. Rev. 565 (2004).

17-17-5.1. Victim notification from Department of Behavioral Health and Developmental Disabilities.

(a) If the accused is committed to the Department of Behavioral Health and Developmental Disabilities pursuant to the provisions of Part 2 of Article 6 of Chapter 7 of this title, the department shall, upon the written request of the victim, mail to the victim at least ten days before the release or discharge of the accused notice of the release or discharge of the accused.

(b) The Department of Behavioral Health and Developmental Disabilities shall mail to the victim immediately after the escape or subsequent readmission of the accused notice of such escape or subsequent readmission of the person who is placed by court order in the custody of the department pursuant to the provisions of Part 2 of Article 6 of Chapter 7 of this title.

History. — Code 1981, § 17-17-5.1, enacted by Ga. L. 2010, p. 214, § 9/HB 567.

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U.L. Rev. 29 (2011).

17-17-6. Notification to victim of accused's pretrial release and of victims' rights and the availability of victims' compensation and services.

(a) Upon initial contact with a victim, all law enforcement and court personnel shall make available to the victim the following information written in plain language:

(1) The possibility of pretrial release of the accused, the victim's rights and role in the stages of the criminal justice process, and the means by which additional information about these stages can be obtained;

(2) The availability of victim compensation and, if the victim has been trafficked for labor or sexual servitude as defined in Code Section 16-5-46, compensation available through the federal government pursuant to 22 U.S.C. Section 7105; and

(3) The availability of community based victim service programs.

(b) The Criminal Justice Coordinating Council is designated as the coordinating entity between various law enforcement agencies, the courts, and social service delivery agencies. The Criminal Justice Coordinating Council shall develop and disseminate written information upon which law enforcement personnel may rely in disseminating the information required by this chapter.

History. — Code 1981, § 17-17-6, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2011, p. 217, § 7/HB 200.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, a semicolon was substituted for a period at the end of paragraph (a)(1).

Cross references. — Restitution to victims of crime, § 17-14-1 et seq.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011).

17-17-7. Notification to victim of accused's arrest and proceedings where accused's release is considered; victim's right to express opinion in pending proceedings and to file written complaint in event of release.

(a) Whenever possible, the investigating law enforcement agency shall give to a victim prompt notification as defined in paragraph (9) of Code Section 17-17-3 of the arrest of an accused.

(b) The arresting law enforcement agency shall promptly notify the investigating law enforcement agency of the accused's arrest.

(c) Whenever possible, the prosecuting attorney shall notify the victim prior to any proceeding in which the release of the accused will be considered.

(d) Whenever possible, the prosecuting attorney shall offer the victim the opportunity to express the victim's opinion on the release of the accused pending judicial proceedings.

(e)(1) Whenever possible, the custodial authority shall give prompt notification to a victim of the release of the accused.

(2) Prompt notification of release from a county or municipal jail is effected by placing a telephone call to the telephone number provided by the victim and giving notice to the victim or any person answering the telephone who appears to be sui juris or by leaving an appropriate message on a telephone answering machine.

(3) Notification of release from the custody of the state or any county correctional facility shall be in the manner provided by law.

(f) If the court has granted a pretrial release or supersedeas bond, the victim shall have the right to file a written complaint with the prosecuting attorney asserting acts or threats of physical violence or intimidation by the accused or at the accused's direction against the victim or the victim's immediate family. Based on the victim's written complaint or other evidence, the prosecuting attorney may move the court that the bond or personal recognizance of an accused be revoked.

History. — Code 1981, § 17-17-7, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2014, p. 866, § 17/SB 340.

JUDICIAL DECISIONS

Trial court's authority to revoke bond. — Even absent specific bail bond conditions prohibiting contact with a victim, a trial court would have authority under O.C.G.A. § 17-17-7 to revoke a defendant's bond. Clarke v. State, 228 Ga. App. 219, 491 S.E.2d 450 (1997).

17-17-8. Notification by prosecuting attorney of legal procedures and of victim's rights in relation thereto; victims seeking restitution.

(a) Upon initial contact with a victim, a prosecuting attorney shall give prompt notification to the victim of the following:

(1) The procedural steps in processing a criminal case including the right to restitution;

(2) The rights and procedures of victims under this chapter;

(3) Suggested procedures if the victim is subjected to threats or intimidation;

(4) The names and telephone numbers of contact persons at both the office of the custodial authority and in the prosecuting attorney's office; and

(5) The names and telephone numbers of contact persons at the office of the investigating agency where the victim may make application for the return of any of the victim's property that was taken during the course of the investigation, as provided by Code Section 17-5-50.

(b) If requested in writing by the victim and to the extent possible, the prosecuting attorney shall give prompt advance notification of any scheduled court proceedings and notice of any changes to that schedule. Court proceedings shall include, but not be limited to, pretrial commitment hearings, arraignment, motion hearings, trial, sentencing, restitution hearings, appellate review, and post-conviction relief. The prosecuting attorney shall notify all victims of the requirement to make such request in writing.

(c)(1) In the event the victim seeks restitution, the victim shall provide the prosecuting attorney with his or her legal name, address, phone number, social security number, date of birth, and, if the victim has an e-mail address, his or her e-mail address. The victim shall also provide such information, other than a social security number, to the prosecuting attorney for a secondary contact person in the event the victim cannot be reached after reasonable efforts are made to contact such victim. The prosecuting attorney shall advise the victim of any agency that will receive such information and advise the victim that he or she is responsible for updating such information with the prosecuting attorney while the case involving the victim is pending and that he or she should update the agency with such information after a restitution order has been entered.

(2) The prosecuting attorney shall transmit the information collected in paragraph (1) of this subsection to the Department of Corrections, Department of Community Supervision, Department of Juvenile Justice, or the State Board of Pardons and Paroles, as applicable, if an order of restitution is entered.

(3) The information collected pursuant to paragraph (1) of this subsection shall be treated as confidential and shall not be disclosed to any person outside of the disclosure provided by this subsection; such information shall not be subject to Article 4 of Chapter 18 of Title 50, relating to open records, or subject to subpoena, discovery, or introduction into evidence in any civil or criminal proceeding.

History. — Code 1981, § 17-17-8, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 10/HB 567; Ga. L. 2015, p. 422, § 5-41/HB 310.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

17-17-8.1. Procedures for a victim to be interviewed by an accused or accused's attorney or agent; duties and conditions.

(a) A victim shall have the right to refuse to submit to an interview by the accused, the accused's attorney, or an agent of the accused. It shall be the duty of the prosecuting attorney to advise a victim that he or she has the right to agree to such an interview or to refuse such an interview.

(b) If a victim agrees to be interviewed, such victim may set conditions for such interview as he or she desires. Conditions may include, but shall not be limited to, the time, date, and location of the interview, what other persons may be present during the interview, any security arrangements for the interview, and whether or not the interview may be recorded. If requested by a victim, the prosecuting attorney or his or her agent may attend the interview. A victim has the right to terminate the interview at any time or to refuse to answer any question during the interview.

(c) The accused, the accused's attorney, and any agent of the accused shall not contact a victim in an unreasonable manner; and if a victim has clearly expressed to any such party a desire not to be contacted, no contact shall be made. When making any permissible contact with the victim, the accused's attorney or an agent of the accused shall make a clear statement that he or she is contacting the victim on behalf of the accused.

(d) For the purposes of this Code section, a peace officer shall not be considered a victim if the act that would have made the officer a victim occurs while the peace officer is acting within the scope of the officer's official duties.

(e) Except as provided in this Code section, the prosecuting attorney shall not take any action to deny an accused's attorney access to a victim for the purpose of interviewing such victim.

History. — Code 1981, § 17-17-8.1, enacted by Ga. L. 2010, p. 214, § 11/HB 567.

17-17-9. Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.

(a) A victim has the right to be present at all criminal proceedings in which the accused has the right to be present. A victim or member of the immediate family of a victim shall not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify unless it is established that such victim or family member is a material and

necessary witness to such hearing, trial, or proceeding and the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial. The provisions of this Code section shall not be construed as impairing the authority of a judge to remove a person from a trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provides for the exclusion or removal of the accused. A motion to exclude a victim or family members from the courtroom for any reason other than misconduct shall be made and determined prior to jeopardy attaching.

(b) A victim of a criminal offense who has been or may be subpoenaed to testify at such hearing or trial shall be exempt from the provisions of Code Section 24-6-615 requiring sequestration; provided, however, that the court shall require that the victim be scheduled to testify as early as practical in the proceedings.

(c) If the victim is excluded from the courtroom, the victim shall have the right to wait in an area separate from the accused, from the family and friends of the accused, and from witnesses for the accused during any judicial proceeding involving the accused, provided that such separate area is available and its use in such a manner practical. If such a separate area is not available or practical, the court, upon request of the victim made through the prosecuting attorney, shall attempt to minimize the victim's contact with the accused, the accused's relatives and friends, and witnesses for the accused during any such judicial proceeding.

History. — Code 1981, § 17-17-9, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 12/HB 567; Ga. L. 2011, p. 99, § 35/HB 24; Ga. L. 2014, p. 866, § 17/SB 340.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "the" was inserted preceding "same manner" in the third sentence of subsection (a).

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Victim's right to be present at trial. — Trial court did not commit reversible error when the court permitted the state to bring the first victim into the courtroom because evidence of the first victim's condition was clearly relevant to the state's cruelty to children in the first and second degree charges, including that the defendant caused the first victim bodily harm by rendering the first victim's brain, a member of the first victim's body, useless by violently shaking the victim, causing permanent brain damage; the probative value of viewing the victim was not substantially outweighed by the danger of unfair prejudice; and under the Crime Victims' Bill of Rights statute, O.C.G.A. § 17-17-1 et seq., the first victim had the

right to be present at the trial. Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

Children of deceased victim exempt from sequestration. — Trial court properly excluded the victim's children from the rule of sequestration as either victims or as immediate family members of a victim under the Crime Victims' Bill of Rights, O.C.G.A. § 17-17-1 et seq.. Thompson v. State, 843 S.E.2d 794, No. S20A0245, 2020 Ga. LEXIS 369 (2020).

Victim could testify after being present during trial. — Trial court did not abuse the court's discretion in allowing the victim to testify as a rebuttal witness after the defendant testified even though the victim had remained in the courtroom for the entire trial. Percell v. State, 346 Ga. App. 219, 816 S.E.2d 344 (2018).

Cited in Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

17-17-9.1. Communications between victim assistance personnel and victims privileged.

Communications between a victim, other than a peace officer, and victim assistance personnel appointed by a prosecuting attorney and any notes, memoranda, or other records made by such victim assistance personnel of such communication shall be considered attorney work product of the prosecuting attorney and not subject to disclosure except where such disclosure is required by law. Such work product shall be subject to other exceptions that apply to attorney work product generally.

History. — Code 1981, § 17-17-9.1, enacted by Ga. L. 2010, p. 214, § 13/HB 567.

Cross references. — Certain communications privileged, § 24-5-501.

17-17-10. Requirement by court that defense counsel not disclose victim information to accused.

As a condition of permitting a response to an inquiry as to the victim's current address, telephone number, or place of employment, the court may require counsel or any other officer of the court, including but not limited to counsel for the defendant, not to transmit or permit transmission to the defendant of the victim's current address, telephone number, or place of employment by the counsel or officer of the court or any employee, agent, or other representative of the counsel or officer of the court.

History. — Code 1981, § 17-17-10, enacted by Ga. L. 1995, p. 385, § 2.

17-17-11. Right of victim to express opinion on disposition of accused's case.

The prosecuting attorney shall offer the victim the opportunity to express the victim's opinion on the disposition of an accused's case, including the views of the victim regarding:

(1) Plea or sentence negotiations; and

(2) Participation in pretrial or post-conviction diversion programs.

This provision shall not limit any other right created pursuant to state law.

History. — Code 1981, § 17-17-11, enacted by Ga. L. 1995, p. 385, § 2.

17-17-12. Notification to victim of accused's motion for new trial or appeal, release on bail or recognizance, appellate proceedings, and outcome of appeal; notifications regarding death penalty cases; victim's rights retained at new trial or on appeal.

(a) Upon the written request of the victim, the prosecuting attorney shall notify the victim of the following:

(1) That the accused has filed a motion for new trial, an appeal of his or her conviction, or an extraordinary motion for new trial;

(2) Whether the accused has been released on bail or other recognizance pending the disposition of the motion or appeal;

(3) The time and place of any appellate court proceedings relating to the motion or appeal and any changes in the time or place of those proceedings; and

(4) The result of the motion or appeal.

(b) The Attorney General shall notify the prosecuting attorney of the filing of collateral attacks on convictions of this state which are being defended by the Attorney General.

(b.1) In cases in which the accused is convicted of a capital offense and receives the death penalty, the Attorney General shall:

(1) Notify the prosecuting attorney and upon the written request of the victim notify the victim of the filing and disposition of all collateral attacks on such conviction which are being defended by the Attorney General, including, but not limited to, petitions for a writ of habeas corpus, and the time and place of any such proceedings and any changes in the time or place of those proceedings; and

(2) Provide the prosecuting attorney and upon the written request of the victim provide the victim with a report on the status of all pending appeals, collateral attacks, and other litigation concerning such conviction which is being defended by the Attorney General at least every six months until the accused dies or the sentence or conviction is overturned or commuted or otherwise reduced to a sentence other than the death penalty.

(c) In the event the accused is granted a new trial or the conviction is reversed or remanded and the case is returned to the trial court for further proceedings, the victim shall be entitled to request the rights and privileges provided by this chapter.

History. — Code 1981, § 17-17-12, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2002, p. 1093, § 1; Ga. L. 2003, p. 247, § 4; Ga. L. 2010, p. 214, § 14/HB 567.

Law reviews. — For article, "Criminal Procedure," see 27 Ga. St. U.L. Rev. 29 (2011).

For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 128 (2002). For note on the 2003 amendment of this Code section, see 20 Ga. St. U.L. Rev. 119 (2003).

17-17-12.1. Requests to prevent an accused from sending any form of written, text, or electronic communication to the victim's family, or the victim.

(a) As used in this Code section, the term "mail" means any form of written communication, including, but not limited to, letters, cards, postcards, packages, parcels, and e-mail as defined by Code Section 16-9-100, text messaging, and any other form of electronic communication which is knowingly intended to be delivered to or received by a victim, any member of the victim's family, or any member of the victim's household.

(b)(1) A victim shall have the right to request not to receive mail from an inmate who was convicted of committing a criminal offense against such victim or was adjudicated by the juvenile court of having committed a delinquent act or designed felony against such victim.

(2) A victim's right to request not to receive mail from such inmate shall extend to any member of such victim's family or any member of such victim's household during the term of the sentence imposed or dispositional order for such offense.

(3) As soon as practical following a conviction or adjudication, a victim shall be provided with the instructions for requesting that inmate mail be blocked as provided in subsection (c) of this Code section. If the conviction is from a state or superior court, it shall be the duty of the prosecuting attorney to provide a victim with such instructions. If the adjudication is from the juvenile court, such instructions shall be provided by the juvenile court.

(c) The Department of Corrections and the Department of Juvenile Justice shall develop and provide to the prosecuting attorneys and juvenile courts, respectively, the procedures a victim shall follow in order to block inmate mail. Such procedures may include secure electronic means provided that an alternate, nonelectronic procedure is available for victims without access to a computer. Such departments

shall also develop and implement appropriate administrative sanctions which shall be imposed against an inmate violating the provisions of this Code section.

(d) If a victim submits a request to block inmate mail, the Department of Corrections, in the case of an adult, or the Department of Juvenile Justice, in the case of a juvenile, shall:

(1) Notify any other custodial authority having actual custody of the inmate of the names and addresses of such victim and the family or household members denoted by such victim;

(2) Notify the inmate of the request to have mail blocked and advise the inmate that sending mail directly or through any third party to such victim or the family or household members denoted by such victim is prohibited and will result in appropriate sanctions and review of all outgoing mail; and

(3) Institute such procedures to ensure that the inmate cannot send mail directly or through any third party to such victim or the family or household members denoted by such victim.

(e) Any custodial authority having actual custody of an inmate with mail restrictions shall not knowingly forward mail addressed to any person who requests not to receive mail pursuant to this Code section.

(f) The imposition of sanctions by a custodial authority pursuant to this Code section shall not preclude the imposition of any other remedies provided by law, nor shall such sanctions bar prosecution of the inmate for any criminal offense which may have been committed in sending such mail.

(g) Notwithstanding the provisions of Article 4 of Chapter 18 of Title 50, information concerning the names and addresses of a victim, and the family or household members denoted by such victim, who requests that inmate mail be blocked shall not be open to inspection by or made available to the public and shall not be subject to discovery in any civil or criminal case or administrative proceeding unless the court, after notice and a hearing, makes a finding of fact that such information is material and relevant to the case and that such information is not available from any other source.

History. — Code 1981, § 17-17-12.1, enacted by Ga. L. 2010, p. 214, § 15/HB 567; Ga. L. 2011, p. 752, § 17/HB 142.

17-17-13. Notification to victim of impending parole, release for period exceeding 60 days, or pardon; notice of hearing on request to commute death sentence.

The State Board of Pardons and Paroles shall give 20 days' advance notification to a victim whenever it considers making a final decision to grant parole, release a defendant for a period exceeding 60 days, or grant a pardon; and the board shall provide the victim with an opportunity to file a written objection to such action. Within 72 hours of receiving a request to commute a death sentence, the State Board of Pardons and Paroles shall provide notification to a victim of the date set for hearing such request and provide such victim an opportunity to file a written response to such request. No notification to the victim need be given unless the victim has expressed a desire for such notification and has provided the State Board of Pardons and Paroles with a current mailing or e-mail address and telephone number. Failure of the victim to inform the board of a change of address or telephone number shall not void a decision of the board.

History. — Code 1981, § 17-17-13, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2015, p. 207, § 1/HB 71.

17-17-14. Victim required to provide current address and phone number to notifying parties.

(a) It is the right and responsibility of the victim who desires notification under this chapter or under any other notification statute to keep the following informed of the victim's current address and phone number:

(1) The investigating law enforcement agency;

(2) The prosecuting attorney, until final disposition or completion of the appellate and post-conviction process, whichever occurs later;

(3) As directed by the prosecuting attorney, the sheriff if the accused is in the sheriff's custody for pretrial, trial, or post-conviction proceedings; the Department of Corrections if the accused is in the custody of the state; or any county correctional facility if the defendant is sentenced to serve time in a facility which is not a state facility;

(4) The Department of Community Supervision; and

(5) The State Board of Pardons and Paroles.

(b) Current addresses and telephone numbers of victims and their names provided for the purposes of notification pursuant to this chapter or any other notification statute shall be confidential and used solely for

the purposes of this chapter and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50, relating to inspection of public records.

History. — Code 1981, § 17-17-14, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2014, p. 866, § 17/SB 340; Ga. L. 2015, p. 422, § 5-42/HB 310.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

17-17-15. Failure to provide notice not rendering responsible person liable or comprising basis for error; chapter not conferring standing upon victim to participate as party in criminal proceeding; existing rights not affected; waiver of rights by victim.

(a) Failure to provide or to timely provide any of the information or notifications required by this chapter shall not subject the person responsible for such notification or that person's employer to any liability for damages.

(b) Failure to provide a victim with any of the rights required by law shall not give an accused a basis for error in either an appellate action or a post-conviction writ of habeas corpus.

(c)(1) Except as provided in this subsection, this chapter shall not confer upon a victim any standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.

(2)(A) When a victim has made a written request to the prosecuting attorney to be notified of all proceedings and has provided contact information to the prosecuting attorney, and such victim asserts that he or she was not provided notification of a proceeding, he or she may file a motion requesting to be heard on such matter. When a victim has made a written request to the prosecuting attorney to be heard according to this chapter in a criminal proceeding and alleges that he or she was not given such opportunity by the prosecuting attorney or court, such victim may file a motion requesting to be heard on such matter. When a victim alleges that any other provision of this chapter has not been complied with, such victim may file a motion alleging such deficiency and requesting to be heard on such matter.

(B) Such motion shall be filed as soon as possible, but not later than 20 days after the claimed denial. Such motion shall be filed in the criminal case, and the victim shall provide a copy of the motion and hearing notice to the prosecuting attorney and the defendant.

(3) The court may set the victim's motion for a hearing or issue an order disposing of the motion. If the court conducts a hearing, the

prosecuting attorney and the defendant shall have a right to be present at such hearing.

(4) The court's decision on all issues of fact and law raised in a motion under this subsection shall be final and shall not be subject to appeal.

(5) A motion filed pursuant to this subsection shall be the only means of raising or enforcing the rights provided under this chapter or Article I, Section I, Paragraph XXX of the Constitution of Georgia.

(6) When the victim's motion alleges potential failure by the prosecuting attorney, the prosecuting attorney may recuse in accordance with Code Section 15-18-5 or 15-18-65, as applicable. When the victim's motion alleges potential failure by the court, the judge may recuse in accordance with Code Section 15-1-8.

(d) The enumeration of these rights shall not be construed to deny or diminish other notification rights granted by state law.

(e) The victim may waive any of the information or notification or other rights provided for by this chapter.

History. — Code 1981, § 17-17-15, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2018, p. 920, § 1/SB 127.

The 2018 amendment, effective January 1, 2019, rewrote the provisions of subsection (c), which formerly read: "This chapter does not confer upon a victim any standing to participate as a party in a criminal proceeding or to contest the disposition of any charge."

Editor's notes. — Ga. L. 2018, p. 920, § 2/SB 127, not codified by the General Assembly, provides, in part, that the changes to subsection (c) of this Code section become effective January 1, 2019, upon the ratification of the question presented to the voters at the November 6, 2018 election. The constitutional amendment was approved by a majority of the qualified voters voting at the general election held on November 6, 2018.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U.L. Rev. 31 (2018).

17-17-16. Temporary restraining and protective orders.

(a) As used in this Code section, the term:

(1) "Course of conduct" spans a series of acts over a period of time, however short, indicating a continuity of purpose.

(2) "Harassment" means a course of conduct directed at a specific person that causes substantial emotional distress in such person.

(b)(1) A superior court, upon application of a prosecuting attorney, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a criminal case if the court finds from specific facts shown by affidavit or by verified complaint that there are reasonable grounds to believe that harassment of an identified victim or witness in a criminal case exists or that such order is necessary to

prevent and restrain an offense under Code Section 16-10-32 or 16-10-93.

(2)(A) A temporary restraining order may be issued under this Code section without written or oral notice to the adverse party or such party's attorney in a civil action under this Code section if the court finds, upon written certification of facts by the prosecuting attorney, that such notice should not be required and that there is a reasonable probability that the state will prevail on the merits.

(B) A temporary restraining order issued without notice under this Code section shall be endorsed with the date and hour of issuance and be filed forthwith in the office of the clerk of the court issuing the order.

(C) A temporary restraining order issued under this Code section shall expire at such time, not to exceed ten days from issuance, as the court directs. The court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to ten days or for such longer period agreed to by the adverse party.

(D) When a temporary restraining order is issued without notice, the motion for a protective order shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and at the hearing, if the prosecuting attorney does not proceed with the application for a protective order, the court shall dissolve the temporary restraining order.

(E) If on two days' notice to the prosecuting attorney or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(F) A temporary restraining order shall set forth the reasons for the issuance of such order, be specific in terms, and describe in reasonable detail and not by reference to the complaint or other document the act or acts being restrained.

(c)(1) A superior court, upon motion of the prosecuting attorney, shall issue a protective order prohibiting harassment of a victim or witness in a criminal case if the court, after a hearing, finds by a preponderance of the evidence that harassment of an identified victim or witness in a criminal case exists or that such order is necessary to prevent and restrain an offense under Code Section 16-10-32 or 16-10-93.

(2) At the hearing referred to in paragraph (1) of this subsection, any adverse party named in the complaint shall have the right to present evidence and cross-examine witnesses.

(3) A protective order shall set forth the reasons for the issuance of such order, be specific in terms, and describe in reasonable detail and not by reference to the complaint or other document the act or acts being restrained.

(4) The court shall set the duration of effect of the protective order for such period as the court determines necessary to prevent harassment of the victim or witness but in no case for a period in excess of three years from the date of such order's issuance. The prosecuting attorney may, at any time within 90 days before the expiration of such order, apply for a new protective order under this Code section.

(d) Article 5 of Chapter 11 of Title 9, relating to depositions and discovery, shall not apply to actions brought pursuant to this Code section.

History. — Code 1981, § 17-17-16, enacted by Ga. L. 1998, p. 270, § 10.

Cross references. — Definitions, § 34-1-7.

Law reviews. — For review of 1998 legislation relating to crimes and offenses, see 15 Ga. St. U.L. Rev. 80 (1998).

CHAPTER 18

WRITTEN STATEMENTS OF INFORMATION TO VICTIMS OF RAPE OR FORCIBLE SODOMY

Sec.
17-18-1. Duty of certain officials to offer written statement of information to victims of rape or forcible sodomy.
Sec.
17-18-2. Information for victims of rape or forcible sodomy.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, this new chapter as enacted by Ga. L. 1996, p. 1115, § 5 was redesignated as Chapter 18.

17-18-1. Duty of certain officials to offer written statement of information to victims of rape or forcible sodomy.

When any employee of the Department of Human Services, Department of Community Health, Department of Public Health, Department of Behavioral Health and Developmental Disabilities, a law enforcement agency, or a court has reason to believe that he or she in the course of official duties is speaking to an adult who is or has been a victim of a violation of Code Section 16-6-1, relating to rape, or Code Section 16-6-2, relating to aggravated sodomy, such employee shall offer or provide such adult a written statement of information for victims of rape or aggravated sodomy. Such written statement shall, at a minimum, include the information set out in Code Section 17-18-2 and may include additional information regarding resources available to victims of sexual assault. Information for victims of rape or aggravated sodomy may be provided in any language.

History. — Code 1981, § 17-18-1, enacted by Ga. L. 1996, p. 1115, § 5; Ga. L. 2009, p. 453, § 1-15/HB 228; Ga. L. 2011, p. 705, § 5-3/HB 214.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, the assignment of this new Code section was changed from Code Section 17-17-1 to Code Section 17-18-1.

Pursuant to Code Section 28-9-5, in 1996, "17-18-2" was substituted for "17-17-2" in the next-to-last sentence.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

17-18-2. Information for victims of rape or forcible sodomy.

The following information in substantially the form set out in this Code section shall be provided to adult victims of rape or aggravated sodomy in accordance with Code Section 17-18-1:

"INFORMATION FOR VICTIMS OF RAPE OR FORCIBLE SODOMY

If you are the victim of rape or forcible sodomy, you have certain rights under the law.

Rape or forcible sodomy by a stranger or a person known to you, including rape or forcible sodomy by a person married to you, is a crime. You can ask the government's lawyer to prosecute a person who has committed a crime. The government pays the cost of prosecuting for crimes.

If you are the victim of rape or forcible sodomy, you should contact a local police department or other law enforcement agency immediately. A police officer will come to take a report and collect evidence. You should keep any clothing you were wearing at the time of the crime as well as any other evidence such as bed sheets. Officers will take you to the hospital for a medical examination. You should not shower or douche before the examination. The law requires that the Georgia Crime Victims Emergency Fund pay for the medical examination to the extent of the cost for the collection of evidence of the crime."

History. — Code 1981, § 17-18-2, enacted by Ga. L. 1996, p. 1115, § 5; Ga. L. 2011, p. 214, § 6/HB 503.

Cross references. — Development of rape prevention and personal safety education program, § 20-2-314.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, the assignment of this new Code section was changed from Code Section 17-17-2 to Code Section 17-18-2.

Pursuant to Code Section 28-9-5, in 1996, "17-18-1" was substituted for "17-17-1" in the first sentence.

CHAPTER 19

GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM [REPEALED]

Sec.
17-19-1 through 17-19-5. [Repealed].

17-19-1 through 17-19-5.

Reserved. Repealed by Ga. L. 2013, p. 222, § 11/HB 349, effective June 30, 2018.

Editor's notes. — This chapter, consisting of Code Sections 17-19-1 through 17-19-5, was based on Ga. L. 2013, p. 222, § 11/HB 349.

Ga. L. 2018, p. 1112, § 17(3)/SB 365, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, reserved the designation of this chapter.

CHAPTER 20

IDENTIFICATION PROCEDURES FOR LIVE LINEUPS, PHOTO LINEUPS, AND SHOWUPS

Sec.
17-20-1. Definitions.
17-20-2. Written policies for live lineups, photo lineups, and showups.
17-20-3. Effect of failure to comply with requirements of this chapter.

RESEARCH REFERENCES

C.J.S. — 23 C.J.S., Criminal Procedure and Rights of the Accused, § 1087 et seq.

17-20-1. Definitions.

As used in this chapter, the term:

(1) "Fillers" means individuals who are not suspects.

(2) "Law enforcement agency" means a governmental unit of one or more individuals employed full time or part time by the state, a state agency or department, or a political subdivision which performs as its principal function activities relating to preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority.

(3) "Live lineup" means an identification procedure in which a suspect and fillers are displayed in person to a witness.

(4) "Photo lineup" means an identification procedure in which a photograph of a suspect and photographs of fillers are displayed to a witness, either in hard copy form or via computer.

(5) "Showup" means an identification procedure in which a witness is presented with a single individual.

(6) "Suspect" means the individual believed by law enforcement to be the possible perpetrator of an alleged crime.

(7) "Witness" means an individual who observes an alleged crime.

History. — Code 1981, § 17-20-1, enacted by Ga. L. 2015, p. 1046, § 4/SB 94.

Law reviews. — For article on the 2015 enactment of this chapter, see 32 Ga. St. U.L. Rev. 79 (2015). For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

JUDICIAL DECISIONS

Newspaper photograph was not identification procedure. — To the extent the defendant's motion for mistrial was based on the state's failure to disclose any identification procedure to the defense before trial, the defendant did not show a violation of the state's reciprocal discovery obligations as a witness's viewing of a photograph in a newspaper was not an identification procedure employed by law enforcement. Curry v. State, 305 Ga. 73, 823 S.E.2d 758 (2019).

Allegedly suggestive pretrial encounter must result from police or prosecution action. — Allegedly suggestive pretrial encounter must be the result of either police or prosecution action to have effect on admissibility of subsequent in-court identification. Curry v. State, 305 Ga. 73, 823 S.E.2d 758 (2019).

RESEARCH REFERENCES

ALR. — Criminal defendant's age or height as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 102 A.L.R.6th 365.

17-20-2. Written policies for live lineups, photo lineups, and showups.

(a) Not later than July 1, 2016, any law enforcement agency that conducts live lineups, photo lineups, or showups shall adopt written policies for using such procedures for the purpose of determining whether a witness identifies someone as the perpetrator of an alleged crime.

(b) Live lineup, photo lineup, and showup policies shall include the following:

(1) With respect to a live lineup, having an individual who does not know the identity of the suspect conduct the live procedure;

(2) With respect to a photo lineup, having an individual:

(A) Who does not know the identity of the suspect conduct the photo lineup; or

(B) Who knows the identity of the suspect use a procedure in which photographs are placed in folders, randomly shuffled, and then presented to the witness so that the individual conducting such procedure cannot physically see which photograph is being viewed by the witness until the procedure is complete;

(3) Providing the witness with instruction that the perpetrator of the alleged crime may or may not be present in the live lineup or photo lineup;

(4) Composing a live lineup or photo lineup so that the fillers generally resemble the witness's description of the perpetrator of the alleged crime;

(5) Using a minimum of four fillers in a live lineup and a minimum of five fillers in a photo lineup; and

(6) Having the individual conducting a live lineup, photo lineup, or showup seek and document, at the time that an identification of an individual or photograph is made, and in the witness's own words without necessarily referencing a numeric or percentage standard, a clear statement from the witness as to the witness's confidence level that the individual or photograph identified is the individual or photograph of the individual who committed the alleged crime.

(c) All law enforcement agency written policies adopted pursuant to this Code section shall be subject to public disclosure and inspection notwithstanding any provision to the contrary in Article 4 of Chapter 18 of Title 50.

History. — Code 1981, § 17-20-2, enacted by Ga. L. 2015, p. 1046, § 4/SB 94.

JUDICIAL DECISIONS

Noncompliance. — Defendant failed to show that trial counsel was ineffective for failing to move to suppress a photo identification made by one of the victims because noncompliance with O.C.G.A. § 17-20-2 would not result in the automatic exclusion of the identification, and none of the circumstances, including the prosecutor's failure to read an admonition form to the victim prior to handing the victim the phone, amounted to an unduly suggestive lineup procedure. Roseboro v. State, 308 Ga. 428, 841 S.E.2d 706 (2020).

RESEARCH REFERENCES

ALR. — Criminal defendant's age or height as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 102 A.L.R.6th 365.

17-20-3. Effect of failure to comply with requirements of this chapter.

The court may consider the failure to comply with the requirements of this chapter with respect to any challenge to an identification; provided, however, that such failure shall not mandate the exclusion of identification evidence.

History. — Code 1981, § 17-20-3, enacted by Ga. L. 2015, p. 1046, § 4/SB 94.

JUDICIAL DECISIONS

Noncompliance. — Defendant failed to show that trial counsel was ineffective for failing to move to suppress a photo identification made by one of the victims

because noncompliance with O.C.G.A. § 17-20-2 would not result in the automatic exclusion of the identification, and none of the circumstances, including the prosecutor's failure to read an admonition form to the victim prior to handing the victim the phone, amounted to an unduly suggestive lineup procedure. Roseboro v. State, 308 Ga. 428, 841 S.E.2d 706 (2020).

Cited in Curry v. State, 305 Ga. 73, 823 S.E.2d 758 (2019).

RESEARCH REFERENCES

ALR. — Criminal defendant's age or height as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 102 A.L.R.6th 365.

Index

A

ABANDONMENT.
Children.
Sentence modification, suspension or probation.
Payment of child support as condition, §17-10-1.
Minors.
Sentence modification, suspension or probation.
Payment of child support as condition, §17-10-1.
Support of spouse and minor child.
Sentence modification, suspension or probation.
Child support payment as condition, §17-10-1.

ABANDONMENT OF CHILD.
Sentence modification, suspension or probation.
Payment of child support as condition, §17-10-1.

ABDUCTION OF PERSONS.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Kidnapping.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ACCOUNTABILITY COURTS.
Public defenders.
Circuit public defender.
Compensation.
Accountability court salary supplement, §§17-12-25, 17-12-25.1.

ACCUSATIONS, §§17-7-70 to 17-7-73.
Trial in certain felony and misdemeanor cases, §17-7-70.1.

ACID.
Mayhem by use of poison or acid.
Simple battery generally.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ACQUITTAL.
Costs.
When costs imposed upon prosecutor, §17-11-4.
Direction of verdict, §17-9-1.
Jointly indicted defendants.
Acquittal or conviction where offense requires joint action or concurrence, §17-8-4.
Lack of prosecution after demand for trial, §17-7-170.
Capital cases and cases in which death penalty is sought, §17-7-171.
Mentally ill.
Plea of insanity or mental incompetency at time of crime.
Proceedings upon generally, §17-7-131.
Pretrial proceedings.
Demand for trial.
Capital cases.
Discharge and acquittal where no trial held before end of two court terms, §17-7-171.
Discharge and acquittal for lack of prosecution, §17-7-170.
Profits of crimes.
Escrow moneys.
Disposition upon acquittal, §17-14-31.

ACTIONS.
Attorney general.
Plaintiff in penal action, §17-1-2.
Criminal actions.
Maintenance, §17-1-2.
Governor.
Plaintiff in penal action, §17-1-2.
Voidable transactions.
Restitution.
Action to set aside deceptive transfers under voidable transactions act, §17-14-17.

ADMISSIONS.
Continuances.
Criminal trials.
Admission by opposing party of facts to be proved.
Effect upon allowance of continuance, §17-8-32.

AFFIDAVITS.
Arrest.
Contents, §17-4-41.
Form of affidavit for arrest warrant, §17-4-45.
Warrants issued by video conference, §17-4-47.
Extradition of criminals.
Applications for requisitions.
Fugitives from justice of state of Georgia, §17-13-1.
Harassment of victim or witness in criminal case.
Temporary restraining orders, §17-17-16.

AGED PERSONS.
Assault.
Simple assault against person 65 years of age or over.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Limitation on prosecutions.
Victim 65 or older, §17-3-2.2.
Vulnerable adults.
Arrest by law enforcement officers, §17-4-20.

AGGRAVATED ASSAULT.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Sentencing certain juveniles, §17-10-14.

AGGRAVATED BATTERY.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

AGGRAVATED CHILD MOLESTATION.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

AGGRAVATED CHILD MOLESTATION —Cont'd
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.

AGGRAVATED SEXUAL BATTERY.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.

AGGRAVATED SODOMY.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims, §§17-18-1, 17-18-2.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Time of prosecution.
Where victim under sixteen years of age, §17-3-2.1.

AGGRAVATED STALKING.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

AGGRAVATING CIRCUMSTANCES.
Death penalty, §§17-10-2, 17-10-30 to 17-10-35.

AIDS.
HIV tests.
Person convicted of AIDS transmitting crime.
Report of results, §17-10-15.
Reporting requirements.
Persons convicted of AIDS transmitting crimes.
Results of HIV test, §17-10-15.
Transmitting crimes.
Requiring defendant to submit to HIV test and report of results, §17-10-15.

AIRCRAFT.
Hijacking.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Death penalty.
Imposition authorized, §17-10-30.

ALCOHOLIC BEVERAGES.
Minors.
Identification of purpose of purchasing.
Fake ID's.
Arrest by citation, §17-4-23.
Purchase or possession by persons under 21.
Arrest by citation, §17-4-23.
Trial upon summons or citation without accusation, §17-7-72.
Prohibited acts.
Minors.
Identification for purpose of purchasing.
Fake ID's.
Arrest by citation, §17-4-23.
Purchase or possession by persons under 21.
Arrest by citation, §17-4-23.
Trial upon summons or citation without accusation, §17-7-72.

ALIENS.
Bail and recognizance.
Forfeitures.
Deportation.
Conditions not warranting forfeiture for failure to appear, §17-6-72.
Criminal investigations.
Investigation of illegal alien status, §17-5-100.
Witness' or victim's immigration status not investigated, §17-5-100.
Enforcement of immigration laws in state.
Criminal investigations.
Investigation of illegal alien status, §17-5-100.
Witness' or victim's immigration status not investigated, §17-5-100.
Extradition of criminals.
Arrest and delivery to authorities, §17-13-4.

ALIENS —Cont'd
Illegal aliens.
Criminal investigations.
Investigation of status, §17-5-100.
Witness' or victim's immigration status not investigated, §17-5-100.
Peace officers.
Enforcement of immigration laws.
Criminal investigations.
Investigation of illegal alien status, §17-5-100.
Investigation of illegal status.
Witness' or victim's immigration status not investigated, §17-5-100.

AMENDMENTS.
Bail and recognizance.
Amendments of bond, §17-6-18.

AMMUNITION.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.

ANAL INTERCOURSE.
Sodomy.
Bail and recognizance, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims, §§17-18-1, 17-18-2.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.

ANATOMICAL GIFTS.
Drivers' licenses.
Examination of license at scene of motor vehicle accident, §17-6-11.
Motor vehicle accidents.
Examination of driver's license at scene of accident, §17-6-11.

ANIMALS.
Law enforcement agencies.
Disposition of property in custody of agency, §17-5-54.

APPEALS.
Appeal bonds, §17-6-1.
Crime victims' bill of rights.
Failure to provide rights not to constitute basis for error, §17-17-15.

APPEALS —Cont'd
Crime victims' bill of rights —Cont'd
Notification to victim of accused's motion for appeal, §17-17-12.
Retention of rights on appeal, §17-17-12.
Criminal procedure.
Capital cases.
Death sentence, §17-10-35.
Mentally incompetent to be executed, §17-10-70.
Pretrial rulings.
Hearings to determine appropriateness of interim appellate review of pretrial rulings, §17-10-35.2.
Review of pretrial proceedings in cases in which death penalty sought, §17-10-35.1.
Unified review procedure.
Establishment by supreme court, §17-10-36.
Venue.
Denial of change, §17-7-150.
Pretrial proceedings.
Cases in which death penalty sought, §17-10-35.1.
Hearing to determine appropriateness of interim appellate review of pretrial rulings, §17-10-35.2.
Sentencing proceedings.
Victim impact statements.
Noncompliance with statutory provisions, §§17-10-1.1, 17-10-1.2.
Serious violent offenders.
State appeal where punishment not in conformance with provisions, §17-10-6.1.
State appeal or certiorari.
Serious violent offenders, §17-10-6.1.
Death penalty, §17-10-35.
Mentally incompetent to be executed.
Proceedings to establish incompetency, §17-10-70.
Pretrial proceedings.
Hearing to determine appropriateness of interim appellate review, §17-10-35.2.
Review of pretrial proceedings in cases in which death penalty sought, §17-10-35.1.
Unified review procedure.
Establishment by supreme court, §17-10-36.

APPEALS —Cont'd
Public defenders.
Circuit public defender.
Removal, §17-12-20.
Sentencing.
Serious violent offenders.
State appeal where sentence imposed not in conformance with provisions, §17-10-6.1.
Victim impact statements.
Noncompliance with statutory provisions, §§17-10-1.1, 17-10-1.2.
Victims of crimes.
Rights of victims.
Failure to provide rights not to constitute basis for error, §17-17-15.
Notification of accused's motion for appeal, §17-17-12.
Retention of rights on appeal, §17-17-12.

APPEARANCES.
Bail and recognizance.
Arraignment appearance.
Conditioning bail on appearance and proceedings upon failure to appear, §17-6-17.
Cash bonds for motor carriers, hazardous materials transportation and road taxes violation.
Proceedings upon failure to appear, §17-6-8.
Cash bonds for traffic, game, fish, boating or litter law violations.
Proceedings upon failure to appear, §17-6-8.
Cash bonds for violations of ordinances or other offenses against municipalities.
Effect of failure to appear in court, §17-6-10.
Driver's license display in lieu of bail, recognizance or incarceration, §17-6-11.
Forfeiture of bond on principal's failure to appear, §17-6-31.
Securing appearance by including address of principal and surety on bond or recognizance, §17-6-73.
Unsecured judicial release (release on own recognizance).
Effect of failure to appear, §17-6-12.

APPEARANCES —Cont'd
Bail and recognizance —Cont'd
Use of bail bond posted for preliminary hearing for trial appearance, §17-6-14.
Failure to appear.
Bail and recognizance.
Forfeiture of bond on principal's failure to appear, §17-6-31.
Unsecured judicial release (release on own recognizance).
Effect of failure to appear, §17-6-12.
Game fish or boating violation.
Failure to appear after giving cash bond, §17-6-8.
Litter violations.
Failure to appear after giving cash bond, §17-6-8.
Motor carriers, hazardous materials transportation, road taxes violations.
Failure to appear after giving cash bond, §17-6-8.
Traffic violations.
Failure to appear after giving cash bond, §17-6-8.
Game, fish or boating violations.
Failure to appear after giving cash bond, §17-6-8.
Litter violations.
Failure to appear after giving cash bond, §17-6-8.
Motor carriers, hazardous transportation and road taxes violations.
Failure to appear after giving cash bond, §17-6-8.
Ordinance or other municipal violation.
Failure to appear after giving cash bond, §17-6-10.
Traffic violations.
Failure to appear after giving cash bond.
Proceedings upon failure to appear, §17-6-8.

APPOINTMENT OF COUNSEL.
Indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.

ARMED ROBBERY.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ARRAIGNMENTS, §§17-7-90 to 17-7-97.
Appearance bonds and recognizances.
Conditioning bond and recognizances on appearance and proceedings upon failure to appear, §17-6-17.
Date, §17-7-91.
Notice and service of notice, §17-7-91.
Pleas, §17-7-93.
Entering plea on indictment or accusation, §17-7-96.
Failure of clerk to record plea.
Effect, §17-7-97.
Guilty pleas.
Recordation and pronouncement of judgment, §17-7-93.
Withdrawal, §17-7-93.
No contest pleas, §17-7-95.
Not guilty pleas.
Recordation and effect, §17-7-94.
Where demurrer or special plea denied, §17-7-111.
Receipt and entering of plea, §17-7-91.
Silence of accused.
Recordation and effect, §17-7-94.
Special pleas, §17-7-111.
Reading of indictment or accusation, §17-7-93.
Recordation.
Failure of clerk to record arraignment.
Effect, §17-7-97.
Not guilty plea and silence of accused, §17-7-94.

ARREST, §§17-4-1 to 17-4-62.
Acts constituting, §17-4-1.
Affidavits.
Contents, §17-4-41.
Form of affidavit for arrest warrant, §17-4-45.
Warrants issued by video conference, §17-4-47.

ARREST —Cont'd
Arrested persons, §§17-4-21 to 17-4-27, 17-4-40, 17-4-61.
Duty of arresting officer to take before judicial officer, §17-4-21.
County in which offense alleged to have been committed, §17-4-25.
Duty of person making arrest to take before judicial or peace officer, §17-4-61.
Time limitation, §17-4-26.
Duty to maintain information about persons arrested by law enforcement officers, §17-4-27.
Holding or imprisonment in county other than one in which offense committed, §17-4-25.
Medical facilities.
Transportation to, §17-4-25.1.
Notice of time and place of commitment hearing, §17-4-26.
Effect of failure to notify, §17-4-26.
Race, creed or national origin.
Impact on authority of peace officers to make arrest, §17-4-22.
Transportation outside county or municipality, §17-4-25.1.
Transportation to county in which offense is alleged to have been committed, §§17-4-25, 17-4-25.1.
Who may issue warrants for arrest of, §17-4-40.
Bench warrants, §17-7-90.
Bond to prosecute.
Warrants.
Required by judicial officer, §17-4-43.
By law enforcement officers.
Generally, §§17-4-20 to 17-4-29.
Citizen arrest.
Duty to take arrested person before judicial or peace officer, §17-4-61.
Time limitation, §17-4-62.
Grounds for arrest, §17-4-60.
Posse, §17-4-24.
Crime victims' bill of rights.
Notification to victim of accused's arrest, §§17-17-5, 17-17-7.
Deadly force.
Use, §17-4-20.
Deaf and hearing impaired persons.
Interpreters provided.
Duty of arresting agency, §17-4-30.

ARREST —Cont'd
Discrimination in making arrest.
Authority of peace officers not to be denied because of race, creed, etc., of officers or persons arrested, §17-4-22.
Extradition of criminals.
Aliens, §17-13-4.
Arresting officers.
Authority, §17-13-29.
Refusal to assist, §17-13-29.
Execution of warrants for arrest, §17-13-5.
Manner and place of execution of governor's warrant, §17-13-28.
Issuance of another warrant of arrest by governor, §17-13-41.
Issuance of governor's warrant of arrest, §17-13-27.
Persons charged with crimes in other states.
Arrest under warrant based upon oath or affidavit of another person, §17-13-33.
Arrest without warrant, §17-13-34.
Procedure where accused not arrested within time specified in warrant, §17-13-37.
Recall of warrant of arrest by governor, §17-13-41.
Recitals required in governor's warrant, §17-13-27.
Rights of accused, §17-13-30.
Waiver of warrant for arrest.
Execution and filing of written waiver by accused, §17-13-46.
False arrest.
By private person.
Liability of peace officer taking custody of arrested person, §17-4-61.
Family violence, §§17-4-20, 17-4-20.1.
Forcible entry into private dwellings.
Right of entry pursuant to execution of arrest warrant, §17-4-3.
Fugitives.
Extradition process, §§17-13-4, 17-13-5.
Arresting officers.
Authority, §17-13-29.
Refusal to assist, §17-13-29.
Execution of warrants, §§17-13-5, 17-13-28.
Issuance of another warrant by governor, §17-13-41.

ARREST —Cont'd
Fugitives —Cont'd
Extradition process —Cont'd
Issuance of governor's warrant, §17-13-27.
Persons charged with crimes in other states.
Arrest under warrant based upon oath or affidavit of another person, §17-13-33.
Arrest without warrant, §17-13-34.
Procedure where accused not arrested within time specified in warrant, §17-13-37.
Recall of warrant of arrest by governor, §17-13-41.
Recitals required in governor's warrant, §17-13-27.
Rights of accused, §17-13-30.
Waiver of issuance and service of warrant for arrest.
Execution and filing of written waiver by accused, §17-13-46.
Hearings.
Warrant application, §17-4-40.
Indorsements.
Arrest warrants, §17-4-44.
Interpreters for arrested hearing impaired person.
Duty of arresting agency to provide, §17-4-30.
Judicial officers.
Duty of arresting officer to take before judicial officer, §§17-4-21, 17-4-25.
Time limitation, §17-4-26.
Duty of private person making arrest to take arrested person before judicial officer, §17-4-61.
Time limitation, §17-4-62.
Issuance of warrants, §17-4-40.
Law enforcement agencies.
Duty to maintain information about persons arrested by law enforcement officers, §17-4-27.
Law enforcement officers.
Arrest of peace officer.
Persons who may issue warrants, §17-4-40.
Authority to make arrest, §17-4-20.
Counties of state, §17-4-25.
Denial because of race, creed or national origin, §17-4-22.
Collecting or receiving costs or other charges of prosecutor or defendant before warrant returned, §17-4-29.

ARREST —Cont'd
Law enforcement officers —Cont'd
Deadly force.
Use, §17-4-20.
Dismissal or settlement of warrant.
Advising, encouraging or procuring, §17-4-28.
Duty to take arrested person before judicial officer, §17-4-21.
County in which offense is alleged to have been committed, §17-4-25.
Time limitation, §17-4-26.
Execution of penal warrants.
Duty, §17-4-24.
Persons who may issue warrants, §17-4-40.
Private persons making arrest.
Duty and liability of peace officer taking custody of arrested person, §17-4-61.
Taking arrested person to peace officer, §17-4-61.
Time limitation, §17-4-62.
Searches pursuant to lawful arrest, §§17-5-1, 17-5-2.
Warrants generally, §§17-4-40 to 17-4-47.
Military personnel.
Active personnel.
Privilege from arrest, §17-4-2.
Motor vehicle violations.
Procedure, §17-4-23.
Ordinances.
Adoption or promulgation of conflicting ordinances, §17-4-20.
Policies.
Adoption or promulgation of conflicting policies, §17-4-20.
Private persons making arrest.
Duty to take arrested person before judicial or peace officer, §17-4-61.
Time limitation, §17-4-62.
Grounds for arrest, §17-4-60.
Posse, §17-4-24.
Privilege from arrest.
Active duty military personnel, §17-4-2.
Records.
Open for public inspection, §17-4-27.
Resolutions.
Adoption or promulgation of conflicting resolutions, §17-4-20.
Rules and regulations.
Adoption or promulgation of conflicting regulations, §17-4-20.

ARREST —Cont'd
Searches pursuant to lawful arrest.
Authorized, §17-5-1.
Inventory and return of items seized, §17-5-2.
Traffic offenses.
Violations of traffic laws, §17-4-23.
Transportation of arrested person, §§17-4-25, 17-4-25.1.
Victims of crimes.
Rights of victims.
Notification of accused's arrest, §§17-17-5, 17-17-7.
Video conference.
Issuance of warrants by, §17-4-47.
Vulnerable adults, §17-4-20.
Warrantless arrests.
Authority of law enforcement officer, §17-4-20.
Extradition process.
Persons charged with crimes in other states, §17-13-34.
Warrants, §§17-4-40 to 17-4-47.
Affidavits.
Contents, §17-4-41.
Form, §17-4-45.
Video conference, warrant issued by, §17-4-47.
Application hearings.
Application by persons other than law enforcement officers, §17-4-40.
Presentation of evidence, cross-examination of witnesses, §17-4-40.
Rules of evidence at commitment hearings.
Applicability, §17-4-40.
Authority of law enforcement officer to arrest, §17-4-20.
Bench warrants, §17-7-90.
Bond to prosecute.
Required by judicial officer, §17-4-43.
Contents, §17-4-41.
Dismissal advising, encouraging or procuring by arresting officer, §17-4-28.
Evidence.
Inapplicability of rules in proceedings for issuance, §17-4-40.
Execution.
Duty of law enforcement officers, §17-4-24.

ARREST —Cont'd
Warrants —Cont'd
Execution —Cont'd
Right of forcible entry into private dwellings pursuant to execution, §17-4-3.
Without backing or indorsement of judicial officer in county where warrant is executed, §17-4-44.
Extradition of fugitives, §17-13-5.
Execution of warrants, §§17-13-5, 17-13-28.
Issuance of another warrant by governor, §17-13-41.
Issuance of governor's warrant, §17-13-27.
Persons charged with crimes in other states.
Arrest under warrant based upon oath or affidavit of another person, §17-13-33.
Procedure where accused not arrested within time specified in warrant, §17-13-37.
Recall of warrant by governor, §17-13-41.
Recitals required in governor's warrant, §17-13-27.
Waiver of warrant for arrest.
Execution and filing of written waiver by accused, §17-13-46.
Form, §17-4-46.
Affidavit, §17-4-45.
Immediate issuance by judge.
Application by persons other than peace or law enforcement officers, §17-4-40.
Issuance.
Counties in which issuable, §17-4-44.
Special warrants, §17-4-42.
Who may issue, §17-4-40.
Law enforcement of peace officers.
Issuance for arrest of officer.
Alleged offense committed in performance of duties, §17-4-40.
Persons other than peace or law enforcement officers, §17-4-40.
Probable cause.
Issuance based on, §17-4-40.
Return of warrant.
Collecting or receiving costs or other charges of prosecutor or defendant by arresting officer before return, §17-4-29.

ARREST —Cont'd
Warrants —Cont'd
Rules of evidence.
Inapplicability of rules in proceedings for issuance, §17-4-40.
School administrators.
Issuance for arrest of administrator.
Alleged offense committed in performance of duties, §17-4-40.
Settlement.
Advising, encouraging or procuring by arresting officer, §17-4-28.
Special warrants, §17-4-42.
Teachers.
Issuance for arrest of teacher.
Alleged offense committed in performance of duties, §17-4-40.
Video conference, issuance by, §17-4-47.
What constitutes, §17-4-1.

ARREST OF JUDGMENT, §§17-9-60 to 17-9-63.
Grounds for motion.
Defects in pleadings or record aided by verdict or amendable, §17-9-62.
Generally, §17-9-61.
Matters not relating to merits of offense charged, §17-9-63.
Jurisdiction of motion, §17-9-60.
Notification of opposing parties, §17-9-60.
Time for motion.
Generally, §17-9-61.

ASPORTATION.
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Kidnapping.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ASSAULT.
Aggravated assault.
Bail and recognizance.
Where offense bailable, §17-6-1.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Sentencing certain juveniles, §17-10-14.

ASSAULT —Cont'd
Pregnant woman.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sexual assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Protocol.
Definitions, §17-5-70.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ASSIGNMENTS.
Wages.
Restitution, §17-14-14.

ASSISTED LIVING COMMUNITIES.
Battery by agent, employee or volunteer against patient.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ATTORNEY-CLIENT PRIVILEGE.
Crime victims' bill of rights.
Communications with victim assistance personnel privileged, §17-17-9.1.

ATTORNEY GENERAL.
Actions.
Plaintiff in penal action, §17-1-2.
Capital punishment.
Order of execution.
Copy to be sent to attorney general, §17-10-40.
Sentencing.
Imposition of death sentence.
Copy of sentence to be sent to attorney general, §17-10-33.
Continuances.
Grounds for continuance, §17-8-27.
Criminal cases.
Attorney general in attendance at general assembly, §17-8-27.
Criminal law and procedure.
Maintenance of criminal actions, §17-1-2.

ATTORNEY GENERAL —Cont'd
Extradition.
Uniform criminal extradition act.
Demand for extradition.
Investigation of case upon receipt of demand, §17-13-26.
Habeas corpus.
Defense of habeas corpus actions, §17-13-31.
General assembly.
Continuances.
Grounds for continuance.
Attorney general in attendance at general assembly, §17-8-27.
Habeas corpus.
Extradition.
Defense of habeas corpus actions, §17-13-31.
Plaintiff in penal action, §17-1-2.

ATTORNEYS.
Appointment of counsel.
Indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.
Circuit public defenders.
Generally, §§17-12-20 to 17-12-37.
Closing statements.
Criminal cases, §§17-8-71 to 17-8-74.
Court appointed counsel.
Indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.
Criminal procedure.
Argument of counsel, §§17-8-70 to 17-8-76.
Indigent defense programs.
Generally, §§17-12-1 to 17-12-80.
Indigent persons.
Indigent defense programs.
Generally, §§17-12-1 to 17-12-80.
Law students.
Third-year law students.
Assisting in defense of indigent defendants, §§17-12-40 to 17-12-45.
Practice of law.
Assistant public defenders.
Private practice of law prohibited, §17-12-33.
Circuit public defenders.
Private practice prohibited, §17-12-25.
Public defenders.
Legal defense for indigents.
Generally, §§17-12-1 to 17-12-80.

ATTORNEYS' FEES.
Public defenders.
Capital defender division.
Division unable to defend.
Appointment of private counsel to defend, §17-12-12.1.
Supplemental compensation, §17-12-12.1.
Recovery of attorney's fees, §§17-12-50 to 17-12-52.

AUDIENCE.
Trials.
Clearing courtroom of all or portion of audience.
Authorized in certain cases, §17-8-53.

AUDIO-VISUAL COMMUNICATIONS.
Criminal law and procedure.
Arrested persons taken before judicial officer.
Holding or imprisonment in county other than one in which offenses committed, §17-4-25.
Commitment hearings where offense committed in county which is member of regional jail authority, §17-7-20.

B

BAD CHECKS.
Trial upon accusations, §17-7-70.1.

BADGES.
Bail recovery agents.
Badges not to be worn, §17-6-58.

BAIL AND RECOGNIZANCE, §§17-6-1 to 17-6-73.
Amendment of bonds, §17-6-18.
Appeals.
Appeal bonds, §17-6-1.
Appearance of arrestee in court.
Arraignment appearance.
Conditioning bail on appearance and proceedings upon failure to appear, §17-6-17.
Cash bonds for traffic, motor carriers, hazardous materials transportation, road taxes, game, fish, boating or litter law violations.
Proceedings upon failure to appear in court without legal excuse, §17-6-8.

BAIL AND RECOGNIZANCE —Cont'd
Appearance of arrestee in court —Cont'd
Cash bonds for violations of ordinances or other offenses against municipalities.
Effect of failure to appear in court, §17-6-10.
Driver's license displayed in lieu of appearance, §17-6-11.
Forfeitures, §§17-6-70 to 17-6-73.
Securing by including address of principal and surety on bond or recognizance, §17-6-73.
Unsecured judicial release (release on own recognizance).
Effect of failure to appear, §17-6-12.
Use of bail bond posted for preliminary hearing for trial appearance, §17-6-14.
Arrest warrants.
Bench warrant arrest, §17-7-90.
Requirement by judicial officer of bond to prosecute, §17-4-43.
Bail recovery agents, §§17-6-56 to 17-6-58.
Defined, §17-6-56.
Identification cards, §17-6-57.
Notification to local sheriff, §17-6-57.
Out-of-state agents, proof of qualifications, §17-6-57.
Qualifications, §17-6-56.
Registration with local sheriff, §17-6-56.
Penalty for failure to register, §17-6-58.
Violations, penalties, §17-6-58.
Bail restricted offenses.
Unsecured judicial release.
Offenses not eligible for unsecured judicial release, §17-6-12.
Cash bonds.
Motor vehicle and traffic, motor carriers, hazardous materials transportation, road taxes, game, fish, boating or litter law violations, §§17-6-5 to 17-6-8.
Acceptance in lieu of statutory bond or recognizance, §17-6-5.
Arresting officer liability for failure to account for cash receipts or bonds, §17-6-7.
Authorization generally, §17-6-5.
Comprehensive litter prevention and abatement act of 2006.
Acceptance by officials authorized to enforce, §17-6-9.

BAIL AND RECOGNIZANCE —Cont'd
Cash bonds —Cont'd
Motor vehicle and traffic, motor carriers, hazardous materials transportation, road taxes, game, fish, boating or litter law violations —Cont'd
Comprehensive litter prevention and abatement act of 2006 —Cont'd
Procedures connected with acceptance, §17-6-9.
Disposition of bonds, §17-6-6.
Forfeiture of bonds.
Effect as bar to subsequent prosecutions, §17-6-8.
Proceedings upon failure of person arrested to appear in court without legal excuse, §17-6-8.
Receipts to persons posting bonds, §17-6-6.
Liability of arresting officer for failure to account for cash receipts, §17-6-7.
Ordinance violations or other offenses against municipalities, §17-6-10.
Posting authorized, §17-6-4.
Receipts to persons posting bonds, §17-6-4.
Commitment of arrestee.
After bail tendered and acceptance.
Necessity of, §17-6-15.
Commitment hearings.
Bail bond posted for.
Use for trial appearance, §17-6-14.
Granting of bail where hearing delayed, §17-7-24.
Tender of bail after waiver of hearing.
Entry of memorandum on warrant, §17-6-16.
Receipt of bail after, §17-6-15.
Crime victims' bill of rights.
Notification to victim of accused's release on bail or recognizance, §17-17-12.
Criminal gang activity.
Increase in bail and conditions of bail or pretrial release, §17-6-1.
Death of principal.
Equivalent to surrender by surety, §17-6-31.
Definitions.
Bail, §17-6-1.
Drivers' licenses.
Display of license in lieu of bail, recognizance or incarceration, §17-6-11.

BAIL AND RECOGNIZANCE —Cont'd
Electronic pretrial release and monitoring program.
Alternative to posting bail or as special condition of bond, §17-6-1.1.
Execution of bonds, §17-6-1.
Extradited persons.
Forfeiture of bail bond, §17-13-38.
Persons charged with crimes in other states.
Granting of bail, §17-13-36.
Fees of sureties, §17-6-30.
First bail for offense, §17-6-13.
Fish law violations.
Cash bonds, §§17-6-5 to 17-6-8.
Forfeitures, §§17-6-70 to 17-6-73.
Cash bonds for ordinance violations or other offenses against municipalities, §17-6-10.
Cash bonds for traffic, game, fish, boating or litter law violations, §17-6-8.
Effect of forfeiture as bar to subsequent prosecution, §17-6-8.
Cash bonds for traffic, motor carriers, hazardous material transportation, road taxes, game, fish, boating or litter law violations, §17-6-8.
Effect of forfeiture as bar to subsequent prosecution, §17-6-8.
Conditions not warranting forfeiture for failure to appear, §17-6-72.
Execution hearing on failure of principal to appear, §17-6-71.
Extradited persons, §17-13-38.
Judgment satisfied and writ of fieri facias canceled, §17-6-72.
Principal's failure to appear, §17-6-31.
Remission of forfeiture, §17-6-72.
When forfeiture occurs, §17-6-70.
Game law violations, §§17-6-5 to 17-6-8.
Gang activity.
Increase in bail and conditions of bail and pretrial release, §17-6-1.
Good behavior bonds, §§17-6-90 to 17-6-92.
Breach of bond.
Contempt proceedings, §17-6-92.
Extension by court, §17-6-91.
Issuance, §17-6-90.
Surrender of principal by surety, §17-6-91.

BAIL AND RECOGNIZANCE —Cont'd
Hazardous materials transportation violations.
Cash bonds, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
Imprisonment of arrestee, §§17-6-14 to 17-6-16, 17-7-24.
Jurisdiction.
Where offenses bailable, §17-6-1.
Law enforcement officers.
Acceptance of cash bonds for traffic, game, fish, boating or litter law violations.
Liability for failure to account for cash receipts and bonds, §17-6-7.
Giving advice as to services of professional bondsmen, §17-6-52.
Litter law violations.
Cash bonds, §§17-6-5 to 17-6-9.
Medical emergency.
Release by sheriff upon consent of judge, §17-6-1.
Military personnel.
Acceptance of recognizance bonds, §17-6-3.
Continuance of trial.
Party, leading attorney or material witness on active duty, §17-8-31.
Misdemeanor cases, §17-6-2.
When bail not to be refused, §17-6-1.
Motor carrier road taxes.
Cash bonds for violations of laws, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
Motor common carriers.
Cash bonds for violations of laws, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
Motor contract carriers.
Cash bonds for violations of laws, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
Motor vehicle violations.
Arrest of persons for failure to appear in court, §17-4-23.
Cash bonds, §§17-6-5 to 17-6-8.

BAIL AND RECOGNIZANCE —Cont'd
Motor vehicle violations —Cont'd
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
National guard members.
Continuance of trial.
Party, leading attorney or material witness on active duty, §17-8-31.
New security, §17-6-18.
Offenses against municipalities.
Cash bond, §17-6-10.
Offenses bailable, §17-6-1.
Opportunity to give bail.
Allowance of, §17-6-15.
Professional bonding companies, §17-6-15.
Ordinance violations.
Cash bond, §17-6-10.
Peace bonds, §§17-6-110 to 17-6-114.
Breach of bond, §17-6-112.
Effect of provoking, §17-6-113.
Discharge by court, §17-6-114.
Extension by court, §17-6-114.
Issuance, §17-6-110.
Spouse's right to obtain against spouse, §17-6-111.
Procedure in general, §17-6-1.
Professional bonding companies.
Regulations as an acceptable surety, §17-6-15.
Professional bondsmen, §§17-6-50 to 17-6-55.
Compensation after becoming surety, §17-6-54.
Contact information for purposes of receiving notices.
Duty to provide clerks of court, §17-6-50.
Continuing education, §17-6-50.1.
Giving advice or directions to defendants who are principals in bonds regarding defense or disposition of cases, §17-6-53.
Giving of advice by law enforcement officers as to services of, §17-6-52.
Persons deemed professional bondsmen, §17-6-50.
Rules and regulations, §17-6-15.
Soliciting business or loitering around jails or courts to solicit business, §17-6-52.
Suggesting employment of attorneys, §17-6-51.

BAIL AND RECOGNIZANCE —Cont'd
Professional bondsmen —Cont'd
Surrender of principal.
Right to surrender and to keep sum paid when principal forfeits, §17-6-54.
Violations of provisions, §17-6-55.
Receipts to persons posting bonds.
Cash bonds, §17-6-4.
Bonds for traffic, game, fish, boating or litter law violations, §17-6-6.
Liability of arresting officer for failure to account for cash receipts, §17-6-7.
Bonds for violations of ordinances or other offenses against municipalities, §17-6-10.
Recordation.
Receipt of cash bond on docket, §17-6-4.
Refusal of bail.
Right to grand jury hearing within 90 days, §17-7-50.
Right to have bail set absent hearing within 90 day period, §17-7-50.
Release of arrestee on own recognizance (unsecured judicial release).
Bail restricted offenses not eligible for unsecured judicial release, §17-6-12.
Discretion of court, §17-6-12.
Rules and regulations.
Display of driver's license for violations of laws pertaining to traffic, motor vehicles, etc., §17-6-11.
Professional bonding companies, §17-6-15.
Schedule of bails, §17-6-1.
Street gang activity.
Increase in bail and conditions of bail or pretrial release, §17-6-1.
Subsequent bails.
Discretion of court, §17-6-13.
Sureties.
Approval by county officer where individual arrested through bench warrant, §17-7-90.
Fees, §17-6-30.
Professional bondsmen, §§17-6-50 to 17-6-55.
Compensation after becoming surety, §17-6-54.

BAIL AND RECOGNIZANCE —Cont'd
Sureties —Cont'd
Professional bondsmen —Cont'd
Giving advice or directions to defendants who are principals in bonds regarding defense or disposition of cases, §17-6-53.
Giving of advice by law enforcement officers as to services of, §17-6-52.
Soliciting business or loitering around jails or courts to solicit business, §17-6-52.
Suggesting employment of attorneys, §17-6-51.
Surrender of defendant.
Right to surrender defendant and keep sum paid when defendant forfeits, §17-6-54.
Violations of provisions, §17-6-55.
Who are, §17-6-50.
Surrender of principal, §17-6-31.
Good behavior bonds, §17-6-91.
Professional bondsmen.
Right to surrender principal and to keep sum paid when principal forfeits, §17-6-54.
Surrender of principal, §17-6-31.
Good behavior bonds, §17-6-91.
Professional bondsmen.
Right to surrender and to keep sum paid when principal forfeits, §17-6-54.
Traffic law violations.
Cash bonds, §§17-6-5 to 17-6-8.
Display of drivers' licenses in lieu of bail, recognizance or incarceration, §17-6-11.
Unsecured judicial release (release on own recognizance).
Bail restricted offenses for which unsecured judicial release not available, §17-6-12.
Definition of unsecured judicial release, §17-6-12.
Victims of crimes.
Rights of victims.
Notification of accused's release on bail or recognizance, §17-17-12.
Video conference to conduct bond hearings, §17-4-47.
Where offenses bailable, §17-6-1.

BAIL BONDING.
Bail and recognizance generally, §§17-6-1 to 17-6-73.

BAIL BONDSMEN.
Professional bondsmen generally, §§17-6-50 to 17-6-55.

BAIL JUMPING.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.

BAIL RECOVERY AGENTS, §§17-6-56 to 17-6-58.
Continuing education, §17-6-56.1.
Defined, §17-6-56.
Identification cards, §17-6-57.
Notification to local police, §17-6-57.
Out-of-state bail recovery agents.
Proof of qualifications, §17-6-57.
Penalties for violations, §17-6-58.
Qualifications, §17-6-56.
Registration with local sheriff, §17-6-56.
Failure to register, penalty, §17-6-58.

BATTERY.
Criminal battery.
Aggravated battery.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Sexual battery.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sexual battery.
Aggravated sexual battery.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Pregnant women.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

BATTERY —Cont'd
Sexual battery.
Aggravated sexual battery.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Simple battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

BENCH WARRANTS, §17-7-90.
Bail and recognizance.
Failure of principal to appear.
Issuance of warrant and forfeiture of bond, §17-6-71.

BESTIALITY.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.

BIAS CRIME REPORTS, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

BIOMEDICAL WASTE.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.

BLACK PERSONS.
Arrest.
Authority of peace officers.
Denial of authority to arrest because of race, §17-4-22.

BLOOD SAMPLES.
DNA sampling, collection, analysis.
Sexual assault protocol.
Preservation of evidence, §17-5-71.

BOARDS.
Crime victims.
Georgia crime victims compensation board, §§17-15-3, 17-15-4.

BOATS AND OTHER WATERCRAFT.
Accusations in misdemeanor cases, §17-7-71.
Bonds, surety.
Cash bonds for violations of boating laws, §§17-6-5 to 17-6-8.
Cash bonds for violations of boating laws, §§17-6-5 to 17-6-8.

BONDS, SURETY.
Arrest warrants.
Bond to prosecute, §17-4-43.
Bail bonds.
Bail recovery agents, §§17-6-56 to 17-6-58.
Sureties, §§17-6-30 to 17-6-55.
Bonds for good behavior.
Good behavior bonds, §§17-6-90 to 17-6-92.
Bonds to keep the peace.
General provisions, §§17-6-110 to 17-6-114.
Good behavior bonds, §§17-6-90 to 17-6-92.
Cash bonds.
Motor vehicle and traffic, game, fish, boating or litter law violation, §§17-6-5 to 17-6-8.
Criminal bonds.
Bail recovery agents, §§17-6-56 to 17-6-58.
Fees, §17-6-30.
Sureties, §§17-6-30 to 17-6-55.
Fishing.
Cash bonds for violations, §§17-6-5 to 17-6-8.
Forfeitures.
Bail bonds.
Extradited persons, §17-13-38.
Good behavior bonds, §§17-6-90 to 17-6-92.
Witnesses.
Preliminary commitment hearings.
Securing appearance of witnesses, §§17-7-26, 17-7-27.

BONDS FOR GOOD BEHAVIOR.
Good behavior bonds, §§17-6-90 to 17-6-92.

BONDSMEN.
Professional bondsmen generally, §§17-6-50 to 17-6-55.

BONDS TO KEEP THE PEACE.
General provisions, §§17-6-110 to 17-6-114.
Good behavior bonds, §§17-6-90 to 17-6-92.

BOUNTY HUNTERS.
Bail recovery agents, §§17-6-56 to 17-6-58.

BUDGETS.
Public defender council, §17-12-26.
Director to propose, requirements, §17-12-5.

BURDEN OF PROOF.
Restitution.
Hearing to determine restitution, §17-14-7.

BURGLARY.
Bail and recognizance.
Where offense bailable, §17-6-1.
Motor vehicles.
Entering with intent to commit theft or felony.
Trial upon accusations, §17-7-70.1.

BUSES.
Assault in public transit vehicle or station.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery in public transit vehicle or station.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

BUSINESS CORPORATIONS.
Criminal responsibility, §17-7-92.

C

CAMPUS POLICE.
Discovery in criminal cases.
Work location and phone number of police officer, §17-16-8.
Search warrants.
Executed beyond arrest jurisdiction, §17-5-21.

CAPITAL DEFENDER DIVISION.
Indigents charged with capital felony.
Capital defender, §17-12-5.
Division unable to defend.
Appointment of private counsel, §17-12-12.1.
Duty to represent, §17-12-12.

CAPITAL FELONY EXPENSE ACT.
General provisions, §§17-11-20 to 17-11-24.
Short title, §17-11-20.

CAREER CRIMINALS.
Sentencing.
Felons, §17-10-7.

CARJACKING.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.

CARNAL KNOWLEDGE.
Rape.
Information for victims of rape, §§17-18-1, 17-18-2.

CARRYING WEAPONS.
Forfeitures.
Civil forfeitures, §§17-5-51, 17-5-52.
Disposition of weapons used in commission of crime, §17-5-52.

CASH BONDS.
Game fish or boating violation.
Failure to appear after giving cash bond, §17-6-8.
Generally, §§17-6-5 to 17-6-8.
Litter violations.
Failure to appear after giving cash bond, §17-6-8.
Generally, §§17-6-5 to 17-6-9.
Motor carrier, hazardous materials transportation and road taxes violations.
Failure to appear after giving cash bond, §17-6-8.
Generally, §§17-6-5 to 17-6-9.
Traffic violations.
Failure to appear after giving, §17-6-8.
Generally, §§17-6-5 to 17-6-8.

CERTIFICATES OF ATTORNEY.
Proof of service of pleadings, motions and other papers, §17-1-1.

CERTIFICATES OF EXECUTION.
Executioner and attending physician to certify fact of execution, §17-10-42.

CERTIFICATES OF GOVERNOR.
Extradition expenses.
Payment, §17-13-44.

CERTIFICATES OF IMMEDIATE REVIEW.
Change of venue in criminal cases.
Denial of motion, §17-7-150.
Review of pretrial proceedings in cases in which death penalty sought, §17-10-35.1.

CERTIFICATES OF PROBABLE CAUSE FOR APPEAL.
Mentally incompetent to be executed, §17-10-70.

CERTIORARI.
Appeal bonds.
Effectiveness as to petition or application for writ of certiorari, §17-6-1.

CHAIN OF CUSTODY.
Evidence introduced at trial.
Custody, storage and disposal, §17-5-55.

CHECKS.
Bad checks.
Trial upon accusations, §17-7-70.1.

CHILD ABANDONMENT.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.

CHILD ABUSE AND NEGLECT.
Criminal liability.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Criminal prosecution.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.

CHILD MOLESTATION.
Aggravated molestation.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
DNA testing.
Sexual assault protocol.
Preservation of evidence, §17-5-71.

CHILD MOLESTATION —Cont'd
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.

CHILD RAPE.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sodomy, §17-3-2.1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

CHILD SUPPORT.
Abandonment of dependent child.
Sentence modification, suspension or probation.
Payment of child support as condition, §17-10-1.
Sentence modification, suspension or probation.
Child abandonment cases.
Payment of child support as condition for suspension, modification or probation, §17-10-1.

CHILD WITNESSES.
Criminal cases.
Physical presence of accused, testimony outside of, §17-8-55.
Sex offense cases.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Presence of accused, testimony outside of, §17-8-55.

CIRCUIT PUBLIC DEFENDERS.
Defined, §17-12-2.
Generally, §§17-12-20 to 17-12-37.

CITATIONS.
Litter offenses.
Trial upon with or without accusation, §17-7-73.

CITIZENS' ARRESTS, §§17-4-60 to 17-4-62.
Posses, §17-4-24.

CITIZENSHIP.
Sentencing.
Status of convict, factoring into determination, §17-10-1.3.

CITY COURTS.
Judges.
Arrest warrants.
Issuance, §17-4-40.

CLEMENCY.
Argument of counsel.
Mention of possibility to or in front of jury, §17-8-76.

CLERKS OF COURT.
Bail bondsmen.
Contact information for purposes of receiving notices.
Duty of professional bondsmen to provide clerk, §17-6-50.
Criminal actions.
Effect of mistake or misprision of clerk, §17-1-3.
Custodian of property introduced into evidence.
Designation by court, §17-5-55.
Misprision.
Effect, §17-1-3.
Restitution payments, §17-14-14.
Duties of receivers of restitution payments, §17-14-8.

CLOSING STATEMENTS.
Criminal cases.
Allowance of additional time, §17-8-74.
Misdemeanors and cases for inferior judicatories, §17-8-72.
Noncapital and capital felony cases, §17-8-73.
Order of argument after evidence presented, §17-8-71.

COCAINE.
Trafficking in.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Voluntary surrender to county jail or correctional institution.
Inapplicability of provisions for crime involving, §17-10-9.1.

CODEFENDANTS.
Continuance by defendant.
Effect upon trial of codefendants, §17-8-35.

COERCION AND DURESS.
Pandering by compulsion.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

COLOR OF SKIN.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

COMMERCE AND TRADE.
Profits of accused.
Derived from entertainment media.
Distribution to victims or representatives, §§17-14-30 to 17-14-32.

COMMERCIAL DRIVERS' LICENSES.
Bail and recognizance.
Display of driver's license in lieu of bail or recognizance ordering incarceration, §17-6-11.

COMMERCIAL MOTOR VEHICLES.
Bail and recognizance.
Display of driver's license in lieu of bail or recognizance ordering incarceration, §17-6-11.
Driving under the influence.
Appeal bonds, §17-6-1.

COMMITMENT HEARINGS, §§17-7-20 to 17-7-34.

COMMON LAW.
Bail.
Commitment where bail tended and accepted.
Effect of provisions upon common law authority of court, §17-6-15.

COMMUNITY SERVICE, §17-10-1.
Felony sentences.
Community service in lieu of fine, §17-10-1.
Misdemeanor sentences.
Community service in lieu of fine, §17-10-1.

COMMUNITY SUPERVISION AND TRANSITION.
Restitution.
Remand of sentence.
Copies of restitution order to be provided to department, §17-14-16.
Split sentence.
Supervision post-incarceration.
Role of department in supervision, §17-10-1.4.

COMMUNITY SUPERVISION DEPARTMENT.
Restitution.
Remand of sentence.
Copies of restitution order to be provided to department, §17-14-16.
Split sentence.
Supervision post-incarceration.
Role of department in supervision, §17-10-1.4.

COMMUNITY SUPERVISION OFFICERS.
Probation.
Restitution.
Payments.
Receivers of payments, duties, §17-14-8.
Remand of sentence.
Copies of restitution order to be provided to department, §17-14-16.
Split sentence.
Supervision post-incarceration.
Community supervision department role in supervision, §17-10-1.4.
Restitution.
Payments.
Receivers of payments, duties, §17-14-8.
Remand of sentence.
Copies of restitution order provided to department, §17-14-8.

COMMUTATIONS.
Crime victims' bill of rights.
Death sentence.
Notice to victim of hearing on request for commutation, §17-17-13.

COMPETENCY AT TIME OF CRIME.
Proceedings upon plea, §17-7-131.

COMPETENCY TO STAND TRIAL.
Accused found mentally incompetent to stand trial, §17-7-130.
Bona fide doubt as competency.
Court's duty to inquired into competency, §17-7-129.
Civil commitment or release.
Accused found mentally incompetent to stand trial, §17-7-130.
Continued treatment.
Substantial possibility competency attained, §17-7-130.
Court's duty to inquired into competency, §17-7-129.
Definitions, §17-7-130.
Evaluation of accused's competency.
Accused found mentally incompetent to stand trial, §17-7-130.
Court order, §17-7-129.
Motion by accused requesting, §17-7-130.
Report, sealing, submission to accused's attorney, release to prosecuting attorney, §§17-7-129, 17-7-130.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-11.
Proceedings upon plea of incompetence, §17-7-130.
Returning accused to custody of sheriff.
Accused determined competent, §17-7-130.
Special plea filed by accused.
Procedure upon, §17-7-130.
Speedy trial, demand.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Trial on issue of competency.
Court determining, §17-7-129.
Procedures, §17-7-130.

COMPLAINTS.
Harassment of victim or witness in criminal case.
Temporary restraining orders, §17-17-16.

CONCEALED WEAPONS.
Carrying weapons generally.
Forfeitures.
Civil forfeitures, §§17-5-51, 17-5-52.

CONCEALED WEAPONS —Cont'd
Carrying weapons generally —Cont'd
Forfeitures —Cont'd
Disposition of weapons used in commission of crime, §17-5-52.

CONCURRENT SENTENCES.
Sentences to be served concurrently unless otherwise specified, §17-10-10.

CONFIDENTIALITY OF INFORMATION.
Crime victims compensation board, §17-15-6.

CONFLICTS OF INTEREST.
Public defenders.
Capital defender division.
Division unable to defend.
Appointment of private counsel to defend, §17-12-12.1.
Circuit public defender.
Appointment of attorneys to represent indigents, §17-12-22.

CONTEMPT.
Bonds to keep the peace.
Actions constituting violations of bond.
Additional penalty for contempt, §17-6-112.
Costs.
Assessment and payment, §17-11-4.
Good behavior bonds.
Violation, §17-6-92.

CONTINUANCES.
Admissions.
Criminal trials.
Admission by opposing party of facts to be proved.
Effect upon allowance of continuance, §17-8-32.
Criminal trials, §§17-8-20 to 17-8-38.
Admission by opposing party of facts to be proved.
Effect upon allowance of continuance, §17-8-32.
Announcement of continuance in open court, §17-8-36.
Applications.
Consideration by court, §17-8-22.
Counter-showings.
Allowance by court, §17-8-22.
Due diligence requirement, §17-8-20.
When showing required of state, §17-8-21.
Case not reached at trial term continued, §17-8-38.

CONTINUANCES —Cont'd
Criminal trials —Cont'd
Codefendants.
Effect of continuance by defendant upon trial of codefendants, §17-8-35.
Consideration by court, §17-8-22.
Date of continuance.
Entry upon court docket, §17-8-36.
Duration of continuance, §17-8-37.
General assembly members and staff.
General assembly in session, presence elsewhere required by general assembly duties, §17-8-26.
Witness in attendance at general assembly, §17-8-28.
Granting of continuances.
Cases returned by appellate court for trial, §17-8-34.
Where indictment found or accusation made, §17-8-33.
Where material witness unavailable, §17-8-33.
Where postponement possible to later date in term, §17-8-33.
Where required by principles of justice, §17-8-33.
Grounds for granting of continuances.
Absence of party.
Generally, §17-8-23.
Absence of witness.
Generally, §17-8-25.
Absence or illness of counsel for party.
Generally, §17-8-24.
Active duty with national guard or component of armed forces.
Party, leading attorney or material witness on, §17-8-31.
Attorney general in attendance at general assembly, §17-8-27.
Board of human services or board of behavioral health and developmental disabilities.
Party or party's counsel in attendance at meeting, §17-8-30.
Board of regents of the university system of Georgia.
Party or party's counsel in attendance at meeting, §17-8-29.

CONTINUANCES —Cont'd
Criminal trials —Cont'd
Grounds for granting of continuances —Cont'd
General assembly members and staff.
General assembly in session, presence elsewhere required by general assembly duties, §17-8-26.
Witness in attendance at general assembly, §17-8-28.
No witness, no subpoena, §17-7-192.
Party or attorney in attendance at general assembly, §17-8-26.
Witnesses not subpoenaed by defendant.
Nonattendance, §17-7-192.
Docketing.
Criminal cases.
Entry of date of continuance upon docket of courts, §17-8-36.
General assembly members and staff.
General assembly in session, presence elsewhere required by general assembly duties.
Criminal trials, §17-8-26.
Witness in attendance at general assembly.
Criminal trials, §17-8-28.
Grounds.
Active duty with national guard or component of armed forces.
Party, leading attorney or material witness on.
Criminal trials, §17-8-31.
Criminal trials.
Absence of party.
Generally, §17-8-23.
Absence of witness.
Generally, §17-8-25.
Absence or illness of counsel for party.
Generally, §17-8-24.
Active duty with national guard or component of armed forces.
Party, leading attorney or material witness on, §17-8-31.
Attorney general in attendance at general assembly, §17-8-27.
Board of behavioral health and developmental disabilities.
Party or party's counsel in attendance, §17-8-30.

CONTINUANCES —Cont'd
Grounds —Cont'd
Criminal trials —Cont'd
Board of human services meetings.
Party or party's counsel in attendance, §17-8-30.
Board of regents of the university system of Georgia meetings.
Party or party's counsel in attendance, §17-8-29.
General assembly members and staff.
Party or attorney in attendance at general assembly, §17-8-26.
Witness in attendance at general assembly, §17-8-28.
Nonattendance.
Witnesses not subpoenaed by defendant, §17-7-192.
No witness, no subpoena, §17-7-192.
General assembly members and staff.
Party or attorney in attendance at general assembly.
Criminal trials, §17-8-26.

CONTINUING EDUCATION.
Bail and recognizance.
Professional bondsmen, §17-6-50.1.
Bail recovery agents, §17-6-56.1.
Public defenders.
Continuing legal education for public defenders and staff.
Council, approval for credit or reimbursement, §17-12-9.

CONTRABAND.
Evidence custody, storage and disposal, §17-5-55.
Weapons.
Use in commission of crime or illegally concealed, §17-5-51.

CONTRACTS.
Criminal reenactments.
Distribution of profits to victims or legal representatives, §17-14-31.
Public defenders.
Capital defender division.
Appointment of private counsel to defend, §17-12-12.1.

CONTROLLED SUBSTANCES.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for.
Certain trafficking offenses, §17-6-12.

CONVERSION.
Limitation on prosecutions.
Excluded periods, §17-3-2.

CORONERS.
Death investigations.
Inquest.
Cost of inquests, §17-11-3.
Fugitive.
Execution of warrants, §17-13-5.
Inquest.
Cost of inquests, §17-11-3.

CORPORATIONS.
Criminal responsibility, §17-7-92.
Execution against property.
Criminal responsibility, §17-7-92.
Indictments, §17-7-92.
Notice.
Filing of indictment, special presentment or accusation.
Service of notice, §17-7-92.
Service of process.
Indictments, special presentments or accusations.
Notice of filing, §17-7-92.

CORPSES.
Executed persons.
Disposition of body, §17-10-43.
Search warrants.
Grounds for issuance, §17-5-21.

CORRUPTION.
Judgments, verdicts, rules or orders obtained by perjury.
Vacation, §17-1-4.

COSTS.
Acquittal.
When costs imposed upon prosecutor, §17-11-4.
Capital felony expense act.
Short title, §17-11-20.
Extradition of criminals.
Payment of expenses, §17-13-44.
Forensic medical examination.
Responsibility for costs, §17-5-72.
Sexual assault investigations.
Free exams, victims' right, §17-5-72.
Malicious prosecution, §17-11-4.
Sexual assault.
Investigating sexual assault.
Right to free forensic medical examination, §17-5-72.
Witnesses.
Criminal proceedings.
Defendant's liability, §17-11-2.

COUNCILS.
Georgia public defender council, §§17-12-1 to 17-12-12.1.
Public defender council, §§17-12-1 to 17-12-12.1.

COUNTIES.
Capital felony prosecutions.
Reimbursement of costs and expenses, §§17-11-20 to 17-11-24.
Criminal proceedings.
Indigent persons, legal representation provided.
Additional personnel provided circuit public defenders.
Contracting with council for, §17-12-32.
Alternative delivery system for representing indigent defendants.
Judicial circuit composed of single county, §17-12-36.
Contracting with circuit public defender to provide, §17-12-23.
Expenses of circuit public defender's office.
Pro rata sharing by counties in district, §17-12-34.
Generally, §§17-12-1 to 17-12-80.
Supplementation of circuit public defender's salary, §17-12-25.
Supplementation of salary of state paid personnel.
Personnel employed in circuit public defender's office, §17-12-30.
Indigent persons.
Legal representation for ordinance or state law violations.
Additional personnel provided circuit public defenders.
Contracting with council for, §17-12-32.
Alternative delivery system for representing indigent defendants.
Judicial circuit composed of single county, §17-12-36.
Contracting with circuit public defender to provide, §17-12-23.
Expenses of circuit public defender's office.
Pro rata sharing by counties in district, §17-12-34.
Generally, §§17-12-1 to 17-12-80.

COUNTIES —Cont'd
Indigent persons —Cont'd
Legal representation for ordinance or state law violations —Cont'd
Supplementation of circuit public defender's salary, §17-12-25.
Supplementation of salary of state paid personnel.
Personnel employed in circuit public defender's office, §17-12-30.
Jails.
Fees and costs.
Taxation.
Authority to levy and collect tax, §17-7-1.
Public defenders.
Additional personnel provided circuit public defenders.
Contracting with council for, §17-12-32.
Alternative delivery system for representing indigent defendants.
Judicial circuit composed of single county, §17-12-36.
Contracting with circuit public defender.
Providing legal representation to indigents for ordinance or state law violations, §17-12-23.
Expenses of circuit public defender's office.
Pro rata sharing by counties in district, §17-12-34.
Generally, §§17-12-1 to 17-12-80.
Recovery of payment or reimbursement.
From persons receiving legal services from public defender, §17-12-52.
Supplementation of circuit public defender's salary, §17-12-25.
Supplementation of salary of state paid personnel.
Personnel employed in circuit public defender's office, §17-12-30.
Taxation.
Jail fees and costs.
Authority to levy and collect tax, §17-7-1.

COUNTY POLICE.
Discovery in criminal cases.
Work location and phone number of police witnesses, §17-16-8.

COURT APPOINTED COUNSEL.
Indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.

COURT OF APPEALS.
Continuances.
Cases returned by public court for trial, §17-8-34.
Panels.
Three-judge panel.
Disposition of cases currently under review of defunct panel, §17-10-6.3.
Three judge panel.
Disposition of cases currently under review of defunct panel, §17-10-6.3.

COURT REPORTS.
Custodian of property introduced into evidence.
Designation by court, §17-5-55.

COURTS.
Administrative office of the courts.
Public defenders.
Administrative support, §17-12-26.

CREDIT CARDS.
Fraud.
Trial upon accusations, §17-7-70.1.
Theft.
Trial upon accusations, §17-7-70.1.
Unauthorized use.
Trial upon accusations, §17-7-70.1.

CREED.
Peace officers' authority to make arrest not denied because of creed, §17-4-22.

CRIMES AND OFFENSES.
Theft.
Robbery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

CRIME VICTIMS' BILL OF RIGHTS, §§17-17-1 to 17-17-16.
Address of victim not disclosed to accused, §17-17-10.
Address of victim provided notifying parties, §17-17-14.
Appeals.
Failure to provide rights not basis for error, §17-17-15.
Notification when accused files motion for appeal, §17-17-12.

CRIME VICTIMS' BILL OF RIGHTS —Cont'd
Appeals —Cont'd
Retention of victim's rights on appeal, §17-17-2.
Attendance at criminal proceedings, §17-17-9.
Bail, release of accused, notice to victim, §17-17-12.
Behavioral health and developmental disabilities department.
Notification from department to victim, §17-17-5.1.
Blocking of communications from offender, §17-17-12.1.
Citation of provisions, §17-17-2.
Communications with victim assistance personnel privileged, §17-17-9.1.
Compensation.
Availability of victim's compensation, notice, §17-17-6.
Defined, §17-17-3.
Notice of availability, §17-17-6.
Coordinating agency.
Criminal justice coordinating council, §17-17-6.
Damages, §17-17-15.
Death sentence.
Commutation, notice to victim of hearing on request, §17-17-13.
Defense counsel not to disclose victim information.
Court requiring, §17-17-3.
Definitions, §17-17-3.
Disabled victim.
Family member designated to act in place of, §17-17-4.
Disposition of case, expressing opinion, §17-17-11.
Effect of provisions, §17-17-15.
Enumeration of rights, §17-17-1.
Exclusion of victim from criminal proceedings, §17-17-9.
Expressing opinion as to disposition of case, §17-17-11.
Expressing opinion as to pending proceedings, §17-17-7.
Failure to provide required notices, §17-17-15.
Family member designated to act in place of disabled victim, §17-17-4.
Harassment, temporary restraining orders or protective orders, §17-17-16.

CRIME VICTIMS' BILL OF RIGHTS —Cont'd
Information concerning victim not disclosed to accused.
Court requiring, §17-17-10.
Interview with accused or attorney or agent of accused.
Rights regarding, including right to refuse, §17-17-8.1.
Legal procedures and victim's rights, notice, §17-17-8.
Legislative declaration, §17-17-1.
Mail or other communications from offender.
Requests not to receive, §17-17-12.1.
New trial.
Notice to victim when accused files motion, §17-17-12.
Retention of victim's rights on new trial, §17-17-12.
Notice defined, §17-17-3.
Notice to victim, when required, §17-17-5.
Pardon.
Consideration of pardon.
Advance notification to victim of consideration of pardon, §17-17-13.
Parole proceedings, notice to victim, §17-17-13.
Pretrial release, notice to victim, §17-17-6.
Prompt advance notice, §17-17-8.
Prosecuting attorney.
Defined, §17-17-3.
Duties, §§17-17-5, 17-17-7, 17-17-8.
Offering victim right to express opinion, §17-17-11.
Protective orders, §17-17-16.
Release, notice to victim, §§17-17-4, 17-17-6, 17-17-7.
Extended release (more than 60 days).
Advance notification to victim of consideration of release, §17-17-13.
Requests not to receive mail or other communications from offender, §17-17-12.1.
Restitution sought by victim.
Information to be provided to prosecuting attorney, §17-17-8.
Separate victims' waiting area, §17-17-9.
Telephone number not disclosed to accused, §17-17-10.

CRIME VICTIMS' BILL OF RIGHTS —Cont'd
Telephone number provided notifying parties, §17-17-14.
Title of provisions, §17-17-2.
Victim trafficked for labor or sexual servitude.
Compensation through federal government, notification, §17-17-6.
Waiting area for victims, §17-17-9.
Waiver of rights, §17-17-15.

CRIMINAL EXTRADITION ACT.
General provisions, §§17-13-20 to 17-13-49.
Short title, §17-13-20.

CRIMINAL JUSTICE COORDINATING COUNCIL.
Crime victim's compensation board.
Council serving as board, §17-15-3.

CRIMINAL LAW AND PROCEDURE.
Abandonment of child.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.
Accusations, §§17-7-70 to 17-7-73.
Against corporations, §17-7-92.
Formal exceptions, §17-7-113.
Aged persons.
Limitation on prosecutions.
Victim 65 or older, §17-3-2.2.
Aggravated assault.
Sentencing certain juveniles, §17-10-14.
Aggravated sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
AIDS.
Transmitting crimes.
Requiring defendant to submit to HIV test and report of results, §17-10-15.
Aircraft.
Hijacking.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Death penalty, §17-10-30.

CRIMINAL LAW AND PROCEDURE —Cont'd
Aliens.
Illegal alien status.
Investigation during investigation of criminal suspect, §17-5-100.
Witness' or victim's immigration status not investigated, §17-5-100.
Appeals.
Death penalty, §17-10-35.
Interim appellate review of pretrial rulings.
Hearing to determine appropriateness, §17-10-35.2.
Mental incompetent to be executed.
Proceedings to establish incompetency, §17-10-70.
Pretrial proceedings.
Review of pretrial proceedings in cases in which death penalty sought, §17-10-35.1.
Pretrial proceedings.
Cases in which death penalty sought, §17-10-35.1.
Hearing to determine appropriateness of interim appellate review of pretrial rulings, §17-10-35.2.
Supreme court.
Unified review procedure.
Establishment by supreme court, §17-10-36.
Venue.
Denial of change, §17-7-150.
Victim impact statements.
Noncompliance with statutory provisions, §§17-10-1.1, 17-10-1.2.
Appearances.
First appearance.
No warrant, §§17-4-21, 17-4-62.
Warrant, §17-4-26.
Appointment of counsel for indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.
Argument of counsel.
Closing arguments.
Allowance of additional time, §17-8-74.

CRIMINAL LAW AND PROCEDURE —Cont'd
Argument of counsel —Cont'd
Closing arguments —Cont'd
Time limits.
Additional time, §17-8-74.
Misdemeanors and cases from inferior judicatories, §17-8-72.
Noncapital and capital felony cases, §17-8-73.
Improper statements by counsel, §17-8-75.
Mention of possibility of clemency, pardon or parole, §17-8-76.
Number of counsel permitted to argue case, §17-8-70.
Order of argument after evidence presented, §17-8-71.
Possibility of clemency, §17-8-76.
Presentence hearings in felony cases, §17-10-2.
Armed robbery.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Arraignments, §§17-7-90 to 17-7-97.
Appearance bonds or recognizances.
Conditioning of bonds or recognizances on appearance and proceedings upon failure to appear, §17-6-17.
Date, §17-7-91.
Notice and service of notice, §17-7-91.
Pleas, §17-7-93.
Entering plea on indictment or accusation, §17-7-96.
Failure of clerk to record plea, §17-7-97.
Guilty pleas.
Recordation and pronouncement of judgment, §17-7-93.
Withdrawal, §17-7-93.
Not guilty pleas.
Recordation and effect, §17-7-94.
Where demurrer or special plea denied, §17-7-111.
Receipt and entering, §17-7-91.
Silence of accused.
Recordation and effect, §17-7-94.
Special pleas, §17-7-111.
Reading of indictment or accusation, §17-7-93.

CRIMINAL LAW AND PROCEDURE —Cont'd
Arraignments —Cont'd
Recordation.
Failure of clerk to record arraignment.
Effect, §17-7-97.
Arrest of judgment.
Grounds for motion.
Generally, §17-9-61.
Matters not relating to merits of offense charged, §17-9-63.
Jurisdiction of motion, §17-9-60.
Time for motion.
Generally, §17-9-61.
Assessment and payment of costs of criminal proceedings.
General provisions, §§17-11-1 to 17-11-5.
Reimbursement of counties for expenses of capital felony prosecutions, §§17-11-20 to 17-11-24.
Attorneys.
Argument of counsel, §§17-8-70 to 17-8-76.
Indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.
Number permitted to argue case, §17-8-70.
Bad checks.
Trial upon accusations, §17-7-70.1.
Bail.
Bail recovery agents, §§17-6-56 to 17-6-58.
Bail recovery agents, §17-6-58.
Bench warrants, §17-7-90.
Biological material evidence.
Maintenance and preservation, §17-5-56.
Bonds and recognizance.
Bonds for good behavior and to keep the peace.
Bonds for good behavior, §§17-6-90 to 17-6-92.
Bonds to keep the peace, §§17-6-110 to 17-6-114.
Excessive fees of sureties, §17-6-30.
General provisions, §§17-6-1 to 17-6-18.
Proceedings for forfeiture of bonds or recognizance, §§17-6-70 to 17-6-73.
Sureties.
General provisions, §§17-6-30, 17-6-31.

CRIMINAL LAW AND PROCEDURE —Cont'd
Bonds and recognizance —Cont'd
Sureties —Cont'd
Professional bondsmen, §§17-6-50 to 17-6-55.
Calling cases by order on docket, §17-8-1.
Capital punishment.
General provisions, §§17-10-30 to 17-10-44.
Mental incompetency to be executed, §§17-10-60 to 17-10-71.
Child abandonment.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.
Child molestation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Circuit public defenders.
Generally, §§17-12-20 to 17-12-37.
Clemency.
Argument to or in front of jury as to possibility of, §17-8-76.
Clerks of court.
Mistake or misprision effect, §17-1-3.
Codefendants.
Continuances.
Effect of continuance by defendant upon trial of codefendants, §17-8-35.
Trials, §17-8-4.
Commercial motor vehicle drivers.
Driving under the influence.
Appeal bonds, §17-6-1.
Commitment hearings, §§17-7-20 to 17-7-34.
Accused wishing to testify.
Examination and cross-examination, §17-7-28.
Bail and recognizance.
Bail after waiver of hearing.
Entry of memorandum on warrant, §17-6-16.
Bail bond posted for hearing.
Use for trial appearance, §17-6-14.
Granting of bail where hearing delayed, §17-7-24.
Commitment of accused for offense other than that stated in warrant, §17-7-29.

CRIMINAL LAW AND PROCEDURE —Cont'd
Commitment hearings —Cont'd
Court of municipal corporation.
Powers of presiding officer to bind over or commit criminal offenders to jail, §17-7-22.
Delayed hearings.
Granting of bail, §17-7-24.
Delivery of accused to person in charge of jail, §17-7-32.
Disposition of commitment form, warrant and other papers, §17-7-32.
Duties of courts of inquiry, §17-7-23.
Evidence, §17-7-28.
Applicability of rules, hearsay admissible, §§17-4-40, 17-7-28.
Failure of accused to testify.
No presumption, no comment allowed, §17-7-28.
Form of commitment, §17-7-30.
Disposition, §17-7-32.
Hearsay admissible, §17-7-28.
Informalities in proceedings.
Effect, §17-7-34.
Jurisdiction.
Preclusion of certain courts from trying certain charges, §17-7-23.
Persons who may hold courts of inquiry, §17-7-20.
Holding by several judicial officers, §17-7-21.
Procedure for deciding questions, §17-7-21.
Rules of evidence.
Applicability, hearsay admissible, §§17-4-40, 17-7-28.
Silence of accused.
Effect of failure of accused to testify, §17-7-28.
Time granted parties to prepare case and to secure counsel, §17-7-24.
Witnesses.
Bonds to secure appearance, §§17-7-26, 17-7-27.
Power of court to compel attendance, §17-7-25.
Commitment of accused for offense other than stated in warrant, §17-7-29.
Competency at time of crime.
Proceedings upon plea, §17-7-131.
Competency to stand trial.
Accused found mentally incompetent to stand trial, §17-7-130.

CRIMINAL LAW AND PROCEDURE —Cont'd
Competency to stand trial —Cont'd
Bona fide doubt as to competency.
Court's duty to inquired into competency, §17-7-129.
Civil commitment or release.
Accused found mentally incompetent to stand trial, §17-7-130.
Continued treatment.
Substantial possibility competency attained, §17-7-130.
Court's duty to inquired into competency, §17-7-129.
Definitions, §17-7-130.
Evaluation of accused's competency.
Accused found mentally incompetent to stand trial, §17-7-130.
Court order, §17-7-129.
Motion by accused requesting, §17-7-130.
Report, sealing, submission to accused's attorney, release to prosecuting attorney, §§17-7-129, 17-7-130.
Mental health advocacy division.
Duty to represent indigents, §17-12-11.
Mental health advocate, §17-12-11.
Proceedings upon plea of incompetence, §17-7-130.
Returning accused to custody of sheriff.
Accused determined competent, §17-7-130.
Special plea filed by accused.
Procedure upon, §17-7-130.
Speedy trial, demand.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Trial on issue of competency.
Court determining, §17-7-129.
Procedures, §17-7-130.
Continuances, §§17-8-20 to 17-8-38.
Admission by opposing party of facts to be proved.
Effect upon allowance of continuance, §17-8-32.
Announcement in open court, §17-8-36.
Applications.
Consideration by court, §17-8-22.
Counter-showings.
Allowance by court, §17-8-22.

CRIMINAL LAW AND PROCEDURE —Cont'd
Continuances —Cont'd
Applications —Cont'd
Due diligence requirement, §17-8-20.
When showing required of state, §17-8-21.
Cases not reached at trial term, §17-8-38.
Codefendants.
Effect of continuance by defendant upon trial of codefendants, §17-8-35.
Consideration by court, §17-8-22.
Duration, §17-8-37.
Entry of date upon court docket, §17-8-36.
Granting.
Cases returned by appellate court for trial, §17-8-34.
Where indictment found or accusation made, §17-8-33.
Where material witness unavailable, §17-8-33.
Where postponement possible to later date in term, §17-8-33.
Where required by principles of justice, §17-8-33.
Grounds for granting.
Absence of party.
Generally, §17-8-23.
Absence of witness.
Generally, §17-8-25.
Absence or illness of counsel for party.
Generally, §17-8-24.
Active duty with national guard or component of armed forces.
Party, leading attorney or material witness on, §17-8-31.
Attorney general in attendance at general assembly, §17-8-27.
Bard of regents of the university system of Georgia meetings.
Party or attorney in attendance, §17-8-29.
Board of behavioral health and developmental disabilities.
Party or attorney in attendance, §17-8-30.
Board of human services meetings.
Party or attorney in attendance, §17-8-30.
General assembly members and staff.
Party or attorney in attendance at general assembly, §17-8-26.

CRIMINAL LAW AND PROCEDURE —Cont'd
Continuances —Cont'd
Grounds for granting —Cont'd
General assembly members and staff —Cont'd
Witness in attendance at general assembly, §17-8-28.
Witnesses not subpoenaed by defendant.
Continuance for nonattendance, §17-7-192.
Contract regarding reenactment of crime.
Distribution of profits to victims or legal representatives, §17-14-31.
Conversion.
Limitation on prosecution.
Excluded periods, §17-3-2.
Costs and expenses.
Felony cases.
Capital felony prosecutions.
Reimbursement of counties, §§17-11-20 to 17-11-24.
Basis for expenses, §17-11-22.
Capital felony expense act, §17-11-20.
Commissioner of community affairs to administer article, §17-11-24.
Commissioner of community affairs to adopt rules, §17-11-24.
Definitions, §17-11-21.
Records of capital felony expenses, §17-11-24.
Short title, §17-11-20.
When payments to be made, §17-11-23.
When requests exceed funds appropriated, §17-11-23.
Imposition upon county when venue changed, §17-11-5.
Imposition upon defendant.
Costs of inquest, §17-11-3.
Costs of prosecution, §17-11-1.
Costs of witnesses, §17-11-2.
Imposition upon prosecutor or complainant, §17-11-4.
Judgment entered against defendant, lien, §17-11-1.
Lien upon property of convicted offenders, §17-11-1.
Court appointed counsel for indigent defendants.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.

CRIMINAL LAW AND PROCEDURE —Cont'd
Crimes against the person.
Kidnapping, false imprisonment and related offenses.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Criminal actions.
Maintenance, §17-1-2.
Criminal extradition.
General provisions, §§17-13-1 to 17-13-5.
Uniform criminal extradition act, §§17-13-20 to 17-13-49.
Cruelty to children.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Damage to and intrusion upon property.
Graffiti.
Removal by inmates, §§17-15A-1 to 17-15A-4.
Death penalty.
General provisions, §§17-10-30 to 17-10-44.
Mentally incompetent to be executed, §§17-10-60 to 17-10-71.
Defenses.
Insanity.
Expert witnesses, §17-7-130.1.
Definitions.
Bail, §17-6-1.
Bench warrant, §17-7-90.
Costs of capital felony prosecutions.
Reimbursement of counties, §17-11-21.
Documentary evidence.
Search and seizure, §17-5-32.
Penal actions.
Maintenance, §17-1-2.
Possession, custody or control of the state or prosecution.
Felony discovery, §17-16-1.
Restitution, §17-14-2.
Son of Sam law, §17-14-30.
Statement of a witness.
Felony discovery, §17-16-1.
Victim compensation, §17-15-2.
Demurrer to indictment, §17-7-111.

CRIMINAL LAW AND PROCEDURE —Cont'd
Discharge of accused.
Lack of prosecution after demand for trial, §17-7-170.
Capital cases and cases in which death penalty is sought, §17-7-171.
Discovery.
Felonies, §§17-16-1 to 17-16-10.
Additional evidence or material previously requested discovered, §17-16-4.
Alibi witnesses, §17-16-5.
Application of provisions, §17-16-2.
Continuing duty to disclose, §17-16-4.
Costs.
Reimbursement for costs, §17-16-9.
Criminal history.
Prosecution's duty to furnish defendant, §17-16-4.
Defendant as a witness, §17-16-1.
Evidence in aggravation of punishment.
Notice to defendant, §17-16-4.
Failure to comply with requirements, §17-16-6.
Forensic sciences division or other laboratories.
Testing or analyzing evidence in custody of, §17-16-4.
Indictment or accusation, §17-16-3.
Inspection and copying of materials, §17-16-4.
Materials or information already furnished, §17-16-10.
Oral reports reduced to writing, §17-16-4.
Physical or mental examination results.
Inspection and copying, §17-16-4.
Possession, custody, or control of the state or prosecution.
Defined, §17-16-1.
Required disclosure, §17-16-4.
Scientific test or experiment results.
Inspection and copying, §17-16-4.
Statement of a witness.
Defined, §17-16-1.
Statements, §17-16-4.
Threat of physical or economic harm.
Discovery creating, §17-16-4.

CRIMINAL LAW AND PROCEDURE —Cont'd
Discovery —Cont'd
Felonies —Cont'd
Time for making required disclosures, §17-16-4.
Witnesses, §17-16-7.
Alibi witnesses, §17-16-5.
Defendant as a witness, §17-16-1.
List of witnesses, §17-16-3.
Lists of names and information concerning, §17-16-8.
Statements, §17-16-7.
Defined, §17-16-1.
Who may be called as witness, §17-16-10.
Written or recorded statements made by defendant.
Prosecution's duty to disclose, §17-16-4.
Misdemeanors, §§17-16-20 to 17-16-23.
Application of provisions, §17-16-20.
Copy of indictment or accusation, §17-16-21.
Defendant's right to copies, §§17-16-21, 17-16-23.
List of witnesses, §17-16-21.
Scientific reports, §17-16-23.
Statement given while in police custody, §17-16-22.
DNA sampling, collection, analysis.
Biological material evidence.
Maintenance and preservation, §17-5-56.
Double jeopardy.
Bail and recognizance.
Cash bonds for motor carrier, hazardous material transportation and road taxes violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Cash bonds for traffic, game, fish, etc., law violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Grand jury returns.
Operation of two returns of "no bill" on charge, §17-7-53.
Quashing of second grand jury indictment or presentment, §17-7-53.1.
No contest pleas.
Imposition of sentence upon plea, §17-7-95.

CRIMINAL LAW AND PROCEDURE —Cont'd
Drag racing.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Drivers' licenses.
Habitually negligent or dangerous drivers.
Trial upon accusations, §17-7-70.1.
Habitual violators.
Operating motor vehicles with revoked driver's license.
Trial upon accusations, §17-7-70.1.
Probationary licensee.
Trial upon accusations, §17-7-70.1.
Probationary licensee violating conditions.
Trial upon accusations, §17-7-70.1.
Dynamite caps.
Restitution, §17-14-5.
Evidence in criminal proceedings.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Extradition, §§17-13-1 to 17-13-49.
Family violence.
Appeal bonds, §17-6-1.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Violating civil or criminal family violence order.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Fleeing or attempting to elude police officer.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Forensic medical examination.
Free examination, victim's right, §17-5-72.
Responsibility for costs, §17-15-15.
Former jeopardy.
Bail and recognizance.
Cash bonds for motor carrier, hazardous materials transportation and road taxes violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.

CRIMINAL LAW AND PROCEDURE —Cont'd
Former jeopardy —Cont'd
Bail and recognizance —Cont'd
Cash bonds for traffic, game, fish, etc., law violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Grand jury returns.
Operation of two returns of "no bill" on charge, §17-7-53.
Quashing of second grand jury indictment or presentment, §17-7-53.1.
No contest pleas.
Imposition of sentence upon plea, §17-7-95.
General assembly.
Continuance of criminal trial.
Member party to case or attorney for party to case, §17-8-26.
Witness in attendance at general assembly, §17-8-28.
Good behavior bonds, §§17-6-90 to 17-6-92.
Graffiti.
Compensation for criminally inflicted property, §§17-15A-1 to 17-15A-4.
Graffiti defined, §17-15A-2.
Legislative authority for enacting provisions, §17-15A-1.
Legislative findings, §17-15A-3.
Removal of graffiti by inmates, §17-15A-4.
Guilty but mentally ill or with intellectual disability at time of crime, §17-7-131.
Harassment of victim or witness.
Temporary restraining order or protective order, §17-17-16.
Hijacking.
Aircraft.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Death penalty, §17-10-30.
Hit and run.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Human trafficking.
Labor or sexual servitude, trafficking of persons for.
Compensation through federal government.
Notification to victim, §17-17-6.

CRIMINAL LAW AND PROCEDURE —Cont'd
Human trafficking —Cont'd
Labor or sexual servitude, trafficking of persons for —Cont'd
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Court consideration of failure to comply with provisions, §17-20-3.
Definitions, §17-20-1.
Exclusion of identification evidence.
Court consideration of failure to comply with provisions, §17-20-3.
Fillers.
Defined, §17-20-1.
Written policies by law enforcement agency, §17-20-2.
Law enforcement agency.
Defined, §17-20-1.
Live lineups.
Defined, §17-20-1.
Written policies by law enforcement agency, §17-20-2.
Noncompliance with requirements.
Court consideration of failure to comply with provisions, §17-20-3.
Photo lineups.
Defined, §17-20-1.
Written policies by law enforcement agency, §17-20-2.
Showups.
Defined, §17-20-1.
Written policies by law enforcement agency, §17-20-2.
Suspects.
Defined, §17-20-1.
Witnesses.
Defined, §17-20-1.
Written policies by law enforcement agency, §17-20-2.
Illegal alien status.
Investigation during investigation of criminal suspect, §17-5-100.
Witness' or victim's immigration status not investigated, §17-5-100.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
CRIMINAL LAW AND PROCEDURE —Cont'd
Incest —Cont'd
Victim under sixteen years of age, §17-3-2.1.
Indecency.
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Indigent defense programs.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.
Information for victims of rape or sodomy, §§17-18-1, 17-18-2.
Inquests.
Cost of inquests, §17-11-3.
Insanity.
Insanity defense.
Charges to jury, §17-7-131.
Commitment to department of human services.
Defendant found not guilty by reason of insanity.
Defendant meeting inpatient commitment criteria, §17-7-131.
Conditional release.
Defendant found not guilty by reason of insanity.
Defendant meets criteria for outpatient involuntary treatment, §17-7-131.
Definitions, §17-7-131.
Discharge of defendant from custody.
Defendant found not guilty by reason of insanity.
Defendant not meeting inpatient commitment criteria, §17-7-131.
Evaluation of defendant's present mental condition.
Defendant found not guilty by reason of insanity, §17-7-131.
Examination of defendant by psychologist or psychiatrist.
Required before plea accepted, §17-7-131.
Findings by jury, §17-7-131.

CRIMINAL LAW AND PROCEDURE —Cont'd
Insanity —Cont'd
Insanity defense —Cont'd
Inpatient commitment criteria.
Hearing to determine if defendant meets.
Defendant found not guilty by reason of insanity, §17-7-131.
Instructions to jury, §17-7-131.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-5.
Proceedings upon plea, §17-7-131.
Release of defendant from commitment, §17-7-131.
Retention of jurisdiction by court.
Defendant found not guilty by reason of insanity, §17-7-131.
Not guilty by reason of insanity, §17-7-131.
Judgments.
Arrest of judgment, §§17-9-60 to 17-9-63.
Vacation because of perjury, §17-1-4.
Validity where court lacks jurisdiction, §17-9-4.
Jurisdiction, §§17-2-1, 17-2-3.
Arrest of judgment proceedings, §17-9-60.
Commitment hearings.
Persons who may hold courts of inquiry.
Generally, §17-7-20.
Preclusion of certain courts from trying certain charges, §17-7-23.
Escapees from correctional institutions.
Trials, §17-8-50.
Judgment of court without jurisdiction.
Effect, §17-9-4.
Sentencing proceedings.
Punishment for misdemeanors of a high and aggravated nature, §17-10-4.
Jury.
Charges to jury, §17-8-56.
Death penalty, §§17-10-30, 17-10-31.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.

CRIMINAL LAW AND PROCEDURE —Cont'd
Jury —Cont'd
Charges to jury —Cont'd
Objections to jury charges prior to deliberation, §17-8-58.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Judges of law and facts, §17-9-2.
Objections.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Private knowledge.
Juror not to act on, §17-9-20.
Striking jurors where codefendants tried jointly, §17-8-4.
Law enforcement officers.
Fleeing or attempting to elude police officer while using motor vehicle.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Law students.
Third-year laws students or staff instructors.
Assisting in defense of indigent defendants, §§17-12-40 to 17-12-45.
Legal defense for indigents.
Generally, §§17-12-1 to 17-12-80.
Limitation on prosecutions.
Excluded periods, §17-3-2.
Extension of periods, §17-3-3.
Generally, §17-3-1.
Victim 65 or older, §17-3-2.2.
Lineups.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Live lineups.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Mental competency at time of crime.
Proceedings upon plea, §17-7-131.
Mental competency to stand trial.
Accused found mentally incompetent to stand trial, §17-7-130.
Bona fide doubt as to competency.
Court's duty to inquired into competency, §17-7-129.
Civil commitment or release.
Accused found mentally incompetent to stand trial, §17-7-130.

CRIMINAL LAW AND PROCEDURE —Cont'd
Mental competency to stand trial —Cont'd
Continued treatment.
Substantial possibility competency attained, §17-7-130.
Court's duty to inquired into competency, §17-7-129.
Definitions, §17-7-130.
Evaluation of accused's competency.
Accused found mentally incompetent to stand trial, §17-7-130.
Court order, §17-7-129.
Motion by accused requesting, §17-7-130.
Report, sealing, submission to accused's attorney, release to prosecuting attorney, §§17-7-129, 17-7-130.
Mental health advocacy division.
Duty to represent indigents, §17-12-11.
Mental health advocate, §17-12-11.
Proceedings upon plea of incompetence, §17-7-130.
Returning accused to custody of sheriff.
Accused determined competent, §17-7-130.
Special plea filed by accused.
Procedure upon, §17-7-130.
Speedy trial, demand.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Trial on issue of competency.
Court determining, §17-7-129.
Procedures, §17-7-130.
Mental health.
Accused's mental competency at time of crime.
Proceedings upon plea, §17-7-131.
Accused's mental competency to stand trial.
Bona fide doubt as competency.
Court's duty to inquired into competency, §17-7-129.
Court's duty to inquired into competency, §17-7-129.
Evaluation of accused's competency.
Court order, §17-7-129.
Report, sealing, submission to accused's attorney, release to prosecuting attorney, §17-7-129.

CRIMINAL LAW AND PROCEDURE —Cont'd
Mental health —Cont'd
Accused's mental competency to stand trial —Cont'd
Proceedings upon plea of incompetence, §17-7-130.
Trial on issue of competency.
Court determining, §17-7-129.
Procedures, §17-7-130.
Accused's sanity at time of offense, §17-7-130.1.
Bail and recognizance.
Forfeiture of bond for failure to appear.
Mental disability not warranting, §17-6-72.
Execution of mental incompetents, §§17-10-60 to 17-10-71.
Guilty but mentally ill or with intellectual disability at time of crime, §17-7-131.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Mental health advocacy division.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-5.
Insanity defense.
Accused's sanity at time of offense, §17-7-130.1.
Proceedings upon plea, §17-7-131.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-5.
Mentally incompetent to be executed, §§17-10-60 to 17-10-71.
Not guilty by reason of insanity, §17-7-131.
Plea of insanity.
Proceedings upon, §17-7-131.
Ministerial officers.
Effect of mistake or misprision, §17-1-3.
Minors.
Driving under the influence.
Appeal bonds, §17-6-1.
Grand jury.
Time for presentment of child's case, §17-7-50.1.
Failure to timely present, transfer to juvenile court, §17-7-50.1.

CRIMINAL LAW AND PROCEDURE —Cont'd
Minors —Cont'd
List of children in detention pending trial.
Provided chief judges and prosecuting attorneys, §17-7-3.
Mistrial.
Argument of counsel.
Improper statements, §17-8-75.
Mention of possibility of clemency, §17-8-76.
Transcript of testimony where mistrial results in felony case, §17-8-5.
Motor vehicle accidents.
Hit and run.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Leaving scene of accident.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Mutinous conduct by prisoners.
Admissibility of testimony of inmates, §17-8-51.
Nolle prosequi.
Discharge and acquittal of accused.
Lack of prosecution after demand for trial, §17-7-170.
Capital cases and cases in which death penalty is sought, §17-7-171.
Entry, §17-8-3.
Extension of period for limitation on prosecutions, §17-3-3.
Not guilty by reason of insanity, §17-7-131.
Nuclear power facilities.
Refusal to submit search or vacate premises upon request by security officers, §17-4-20.
Pandering.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Peace bonds, §§17-6-110 to 17-6-114.
Photo lineups.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Pimping.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Pleadings, motions and other papers.
Defects.
Arrest of judgment, §17-9-62.

CRIMINAL LAW AND PROCEDURE —Cont'd
Pleadings, motions and other papers —Cont'd
Filing and service, §17-1-1.
Pretrial motions, filing, §17-7-110.
Pleas.
Arraignments.
Generally, §17-7-93.
Entering plea on indictment or accusation, §17-7-96.
Failure of clerk to record plea, §17-7-97.
Guilty but mentally ill or with intellectual disability at time of crime, §17-7-131.
Guilty pleas.
Recordation and pronouncement of judgment, §17-7-93.
Trial upon, §17-7-70.1.
Withdrawal, §17-7-93.
Mental incompetency to stand trial.
Proceedings upon plea, §17-7-130.
No contest pleas, §17-7-95.
Trial upon, §17-7-70.1.
Not guilty for reason of insanity, §17-7-131.
Not guilty pleas.
Recordation and effect, §17-7-94.
Where demurrer or special plea denied, §17-7-111.
Plea of misnomer, §17-7-112.
Receipt and entering of plea, §17-7-91.
Silence of accused.
Recordation and effect, §17-7-94.
Special pleas, §17-7-111.
Prefer accusation.
Authority of district attorney and trial on accusation, §17-7-70.1.
Preliminary hearings.
Generally, §§17-7-20 to 17-7-34.
Pretrial motions, filing, §17-7-110.
Pretrial proceedings.
Appeals.
Cases in which death penalty sought, §17-10-35.1.
Hearing to determine appropriateness of interim appellate review of pretrial rulings, §17-10-35.2.
Arraignment, §§17-7-90 to 17-7-97.
Change of venue, §§17-7-150 to 17-7-152.
Commitment hearings, §§17-7-20 to 17-7-34.

CRIMINAL LAW AND PROCEDURE —Cont'd
Pretrial proceedings —Cont'd
Subpoenas.
Securing attendance of witnesses generally, §§17-7-190 to 17-7-192.
Profits from crimes.
Search pursuant to lawful arrest.
When authorized, §17-5-1.
Son of Sam law, §§17-14-30 to 17-14-32.
Property damage.
Graffiti.
Removal by inmates, §§17-15A-1 to 17-15A-4.
Protective orders.
Harassment of victim or witness, §17-17-16.
Public defenders.
Legal defense for indigents.
Generally, §§17-12-1 to 17-12-80.
Recordation.
Testimony in felony cases, §17-8-5.
Records.
Capital felony expenses.
Maintenance by clerks of superior courts, §17-11-24.
Death sentence.
To whom copies sent, §17-10-33.
Defects.
Grounds for motions in arrest of judgment, §17-9-62.
Municipal courts.
Authority to seal criminal records, §17-8-6.
Restitution and distribution of profits to victims of crimes.
Distribution of profits of crimes, §§17-14-30 to 17-14-32.
Restitution generally, §§17-14-1 to 17-14-19.
Sentence and punishment.
Death penalty generally, §§17-10-30 to 17-10-44.
Mentally incompetent to be executed, §§17-10-60 to 17-10-71.
Procedure for sentencing and imposition of punishment, §§17-10-1 to 17-10-21.
Service of process, §17-1-1.
Shoplifting.
Trial upon accusations, §17-7-70.1.
Showups.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
CRIMINAL LAW AND PROCEDURE —Cont'd
Silence of accused.
At arraignments.
Recordation and effect, §17-7-94.
Commitment hearings.
Effect of failure of accused to testify, §17-7-28.
Preliminary commitment hearings.
Effect of failure of accused to testify, §17-7-28.
Son of Sam law.
Violations, §17-14-32.
Special presentments.
Presentation to jury, §17-8-2.
Prosecutions upon, §17-7-51.
Stalking.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Subpoenas.
Witnesses.
Grand jury or trial proceedings generally, §§17-7-190 to 17-7-192.
Subpoenaing upon change of venue, §17-7-151.
Sureties.
Bail bondsmen.
Violations, §§17-6-30, 17-6-55.
Temporary restraining orders.
Harassment of victim or witness, §17-17-16.
Theft.
Robbery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Treason.
Bail and recognizance.
Where offense bailable, §17-6-1.
Death penalty, §17-10-30.
Trials, §§17-8-1 to 17-8-76.
Accusations in felony cases, §17-7-70.
Generally, §§17-7-70 to 17-7-73.
Trial upon, §17-7-70.1.
Accusations in misdemeanor cases, §17-7-70.
Announcement by state of readiness for trial.
Required prior to announcement by defendant, §17-7-172.

CRIMINAL LAW AND PROCEDURE —Cont'd
Trials —Cont'd
Argument of counsel, §§17-8-70 to 17-8-76.
Bail bond posted for preliminary hearing.
Use for trial appearance, §17-6-14.
Calling cases in order in which they stand on docket, §17-8-1.
Charges to jury, §17-8-56.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Objections to jury charges prior to deliberation, §17-8-58.
Codefendants, §17-8-4.
Continuances, §§17-8-20 to 17-8-38.
Demand for speedy trial, §§17-7-170, 17-7-171.
Tolling of demand for trial.
Party, leading attorney or material witness on National Guard duty or active duty with armed forces, §17-8-31.
Escapees from correctional institutions, §17-8-50.
Extradited persons.
Persons charged with crimes in Georgia.
Trial for other criminal prosecutions while in state, §17-13-48.
Persons charged with crimes in other states.
Effect of provisions as to right, power or privilege of state to try demanded person, §17-13-47.
Guilty plea.
Trial upon, §17-7-70.1.
Indictments to be presented to jury, §17-8-2.
Joint trials, §17-8-4.
Judge's expression or intimation of opinion as to matters proved or guilt of accused.
Jury trial, §17-8-57.
Mental incompetency to stand trial.
Proceedings upon plea of mental incompetency, §17-7-130.
Mistrial.
Argument of counsel.
Improper statements, §17-8-75.
Mention of possibility of clemency, §17-8-76.

CRIMINAL LAW AND PROCEDURE —Cont'd
Trials —Cont'd
Mistrial —Cont'd
Transcript where mistrial results in felony case, §17-8-5.
No contest plea.
Trial upon, §17-7-70.1.
Objections.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Order of trial, §17-8-1.
Preferred scheduling.
Disabled adult or elder victim, §17-8-1.
Public's right to be at trial.
Exclusion of public from courtroom when evidence vulgar, etc., §17-8-53.
Readiness for trial.
Requirement of announcement by state prior to announcement by defendant, §17-7-172.
Separate trials.
Codefendants, §17-8-4.
Special presentments to be presented to jury, §17-8-2.
Speedy trial.
Capital cases.
Demand, filing, §17-7-171.
Discharge for lack of timely prosecution, §17-7-171.
Time for trial when demand filed, §17-7-171.
Competency of defendant proceedings.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Demand, filing, §17-7-170.
Capital cases, §17-7-171.
Discharge and acquittal for lack of prosecution after demand made for trial, §17-7-170.
Capital cases including cases in which death penalty is sought, §17-7-171.
Expiration of demand, §17-7-170.
Mistrial.
Time of trial, §17-7-170.
Party, leading attorney or material witness on active duty with national guard or armed forces.
Continuance granted, tolling of demand, §17-8-31.

CRIMINAL LAW AND PROCEDURE —Cont'd
Trials —Cont'd
Speedy trial —Cont'd
Reversal of case.
New demand required, §17-7-170.
Time for trial when demand filed, §17-7-170.
Capital cases, §17-7-171.
Vandalism.
Graffiti.
Removal by inmates, §§17-15A-1 to 17-15A-4.
Venue, §§17-2-2, 17-2-3.
Change.
Costs and expenses, §17-11-5.
Defendant arrested, held or present in county other than that in which indictment or accusation is pending, §17-2-4.
Issuance of subpoenas, §17-7-151.
Procedures, §17-7-150.
Subsequent changes, §17-7-152.
Transfer of evidence, list of witnesses and papers, §17-7-151.
Defendant arrested, held or present in county other than that in which indictment or accusation is pending, §17-2-4.
Verdicts.
Acquittal of accused.
Directed verdict, §17-9-1.
Action by juror on private knowledge as to facts, witnesses, etc., §17-9-20.
Amendment after dispersion of jury, §17-9-40.
Construction, §17-9-2.
Death penalty, §17-10-30.
Jury instructions, §17-10-31.
Requirement of jury finding of aggravating circumstance and recommendation of death penalty, §17-10-31.
Directed verdict, §17-9-1.
Duty to impose, §17-9-2.
Guilty verdicts.
Recommendations for mercy in capital cases, §17-9-3.
Effect of no recommendation, §17-9-3.
Where defendant under age of 17 at time of commission of offense, §17-9-3.

CRIMINAL LAW AND PROCEDURE —Cont'd
Verdicts —Cont'd
Judge's expression of approval or disapproval, §17-9-22.
Commending or complimenting of jury, §17-9-23.
Life without parole.
Jury instructions, §17-10-31.
Province of jury, §17-9-2.
Receipt, §17-9-21.
Witnesses.
Absence of witness.
Continuances.
Grounds for granting of continuance, §17-8-25.
Accused's witnesses.
Subpoenaing, §§17-7-191, 17-7-192.
Accused wishing to testify.
Commitment hearings, §17-7-28.
Aliens acting as witnesses to crime.
Immigration status not investigated, §17-5-100.
Child witnesses.
Exclusion of persons from courtroom when person under age of 16 testifies concerning sex offense, §17-8-54.
Presence of accused, testimony outside of, §17-8-55.
Codefendants.
Right to testify for or against one another, §17-8-4.
Commitment hearings.
Accused wishing to testify, §17-7-28.
Bonds to secure appearance, §§17-7-26, 17-7-27.
Failure of accused to testify.
No presumption, no comment, §17-7-28.
Indorsement of names of state's witnesses on warrant, §17-7-31.
Power of court to compel attendance, §17-7-25.
Death penalty cases.
Transcript of testimony, §17-8-5.
Escapees from correctional institutions.
Testimony of other inmates at trial of, §17-8-50.
Failure of accused to testify.
No presumption, no comment.
Commitment hearings, §17-7-28.
Felony cases.
Recordation of testimony, §17-8-5.

CRIMINAL LAW AND PROCEDURE —Cont'd
Witnesses —Cont'd
Harassment of victim or witness.
Temporary restraining order or protective order, §17-17-16.
Material witnesses for state before grand jury.
Subpoena, list of persons subpoenaed furnished prosecuting officers, §17-7-190.
Mutiny of inmates.
Testimony of inmates in trials for, §17-8-51.
Oath to be administered, §17-8-52.
Protective orders.
Harassment of victim or witness, §17-17-16.
Securing attendance of witnesses, §§17-7-190 to 17-7-192.
Sex offense cases.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Subpoenas.
Change of venue, §17-7-151.
Grand jury or trial proceedings, §§17-7-190 to 17-7-192.
Temporary restraining orders.
Harassment of victim or witness, §17-17-16.

CRIMINAL PROCEDURE.
Arrest of persons.
Arrest by law enforcement officers generally, §§17-4-20 to 17-4-29.
Arrest by private persons, §§17-4-60 to 17-4-62.
General provisions, §§17-4-1 to 17-4-3.
Warrants for arrest, §§17-4-40 to 17-4-47.
Bonds and recognizance.
Bonds for good behavior, §§17-6-90 to 17-6-92.
Bonds to keep the peace, §§17-6-110 to 17-6-114.
General provisions, §§17-6-1 to 17-6-18.
Proceedings for forfeiture of bonds or recognizance, §§17-6-70 to 17-6-73.
Sureties.
General provisions, §17-6-31.

CRIMINAL PROCEDURE —Cont'd
Bonds and recognizance —Cont'd
Sureties —Cont'd
Professional bondsmen, §§17-6-50 to 17-6-55.
General provisions, §§17-1-1 to 17-1-4.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Jurisdiction and venue, §§17-2-1 to 17-2-4.
Limitations on prosecution, §§17-3-1 to 17-3-3.
Pretrial proceedings.
Accusations, §§17-7-70 to 17-7-73.
Announcement of readiness for trial, §17-7-172.
Arraignment and pleas generally, §§17-7-90 to 17-7-97.
Commitment hearings, §§17-7-20 to 17-7-34.
Demand for speedy trial, §§17-7-170, 17-7-171.
Demurrers, motions and special pleas and exceptions.
Change of venue, §§17-7-150 to 17-7-152.
General provisions, §§17-7-111 to 17-7-113.
Insanity and mental incompetency, §§17-7-130 to 17-7-131.
General provisions, §§17-7-1, 17-7-2.
Indictments, §§17-7-50 to 17-7-55.
Procedure for securing attendance of witnesses at grand jury or trial proceedings, §§17-7-190 to 17-7-192.
Searches and seizures.
Disposition of property seized, §§17-5-50 to 17-5-56.
Searches without warrants, §§17-5-1, 17-5-2.
Searches with warrants, §§17-5-20 to 17-5-32.
Sentence and punishment.
Death penalty generally, §§17-10-30 to 17-10-44.
Mentally incompetent to be executed, §§17-10-60 to 17-10-71.
Procedure for sentencing and imposition of punishment, §§17-10-1 to 17-10-21.
Trial.
Conduct and argument of counsel, §§17-8-70 to 17-8-76.
Conduct of proceedings, §§17-8-50 to 17-8-58.

CRIMINAL PROCEDURE —Cont'd
Trial —Cont'd
Continuances, §§17-8-20 to 17-8-38.
General provisions, §§17-8-1 to 17-8-6.
Verdict and judgment generally.
Amendment and impeachment of verdict, §17-9-40.
General provisions, §§17-9-1 to 17-9-4.
Motions in arrest, §§17-9-60 to 17-9-63.
Rendition and receipt of verdict, §§17-9-20 to 17-9-23.

CRIMINAL STREET GANGS.
Bail and pretrial release.
Probable cause showing pattern of criminal gang activity, §17-6-1.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Criminal gang activity defined.
Unlawful participation in street gang activity.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Participation in criminal gang activity.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

CRIMINAL TRESPASS.
Arrest by citation, §17-4-23.
Graffiti.
Compensation for criminally inflicted property, §§17-15A-1 to 17-15A-4.
Graffiti defined, §17-15A-2.
Legislative authority for enacting provisions, §17-15A-1.
Legislative findings, §17-15A-3.
Removal of graffiti by inmates, §17-15A-4.

CRUEL OR EXCESSIVE PHYSICAL OR MENTAL PAIN.
Cruelty to children in the first degree.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

CRUELTY TO CHILDREN.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

CRUELTY TO CHILDREN —Cont'd
Limitation of actions.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.

CUNNILINGUS.
Bail and recognizance, §17-6-1.
Sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims, §§17-18-1, 17-18-2.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.

CURTILAGE.
Searches and seizures.
Command of search warrant, §17-5-23.

D

DAMAGES.
Bail recovery agents.
Entry on wrong property.
Liability for damages, §17-6-58.
Restitution.
Amount limited by amount of victim's damages, §17-14-9.
Victims of crimes.
Rights of victims.
Failure to provide notice not rendering responsible person liable for damages, §17-17-15.

DAMAGE TO PROPERTY.
Criminal trespass.
Arrest by citation, §17-4-23.
Graffiti.
Compensation for criminally inflicted property, §§17-15A-1 to 17-15A-4.
Graffiti defined, §17-15A-2.
Legislative authority for enacting provisions, §17-15A-1.
Legislative findings, §17-15A-3.
Removal of graffiti by inmates, §17-15A-4.

DEAD DOCKETING.
Release of surety on bond, §17-6-31.

DEADLY FORCE.
Apprehension of suspected felons, §17-4-20.
Arrest.
Use, §17-4-20.

DEAF AND HEARING IMPAIRED PERSONS.
Arrest.
Interpreters provided.
Arresting officer to comply with provisions, §17-4-30.
Interpreters.
Arresting law enforcement agency.
Arresting officer to comply with provisions, §17-4-30.

DEATH CHAMBER, §17-10-44.
Provision by department of corrections, §17-10-44.

DEATH PENALTY.
Acquittal of accused.
Lack of prosecution after demand made for trial, §17-7-171.
Aggravating circumstances.
Consideration in imposing penalty, §17-10-30.
Jury finding required prior to imposition of penalty, §17-10-31.
Alternative sentencing, §17-10-32.
Appeals, §17-10-35.
Interim appellate review of pretrial rulings, §17-10-35.2.
Mentally incompetent to be executed.
Proceedings to establish incompetency, §17-10-70.
Review of pretrial proceedings in cases in which death penalty sought, §17-10-35.1.
Unified review procedure.
Establishment by supreme court, §17-10-36.
Argument of counsel.
Closing arguments in capital felony cases, §17-8-73.
Assistant to supreme court.
Review of death sentences, §17-10-37.
Attorney general.
Order of execution.
Copy to be sent to attorney general, §17-10-40.
Sentencing.
Imposition of death sentence.
Copy of sentence to be sent to attorney general, §17-10-33.
Biological material evidence in death penalty case.
Preservation until sentence carried out, §17-5-56.
Capital defender division.
Indigents charged with capital felony.
Capital defender, §17-12-5.

DEATH PENALTY —Cont'd
Capital defender division —Cont'd
Indigents charged with capital felony —Cont'd
Division unable to defend.
Appointment of private counsel, §17-12-12.1.
Duty to represent, §17-12-12.
Closing arguments in capital felony cases, §17-8-73.
Commutation of death sentence.
Crime victims' bill of rights.
Notice to victim of hearing on request for commutation, §17-17-13.
Corpses of executed persons.
Disposition, §17-10-43.
Costs of imposition.
Capital felony expense act.
General provisions, §§17-11-20 to 17-11-24.
Definitions.
Mentally incompetent to be executed, §17-10-60.
Delivery to Department of Corrections for execution.
Duty of trial judge in passing sentence, §17-10-38.
Developmental disabilities.
Defendant guilty but developmentally disabled, §17-7-131.
Discharge of accused.
Lack of prosecution after demand made for trial, §17-7-171.
DNA.
Biological material evidence in death penalty case.
Preservation until sentence carried out, §17-5-56.
Electrocution.
Death chamber apparatus, etc.
Furnishing by department of corrections, §17-10-44.
Evidence in death penalty cases.
Biological material evidence.
Preservation until sentence carried out, §17-5-56.
Executioners.
Number required to be present at executions, §17-10-41.
Preparation and filing of certificate of execution, §17-10-42.
Grand jury.
Extension of time required for grand jury hearing, §17-7-50.

DEATH PENALTY —Cont'd
Habeas corpus.
Unified review procedure.
Establishment by supreme court.
Effect on habeas corpus, §17-10-36.
Indigents charged with capital felony.
Capital defender division.
Capital defender, §17-12-5.
Division unable to defend.
Appointment of private counsel, §17-12-12.1.
Duty to represent, §17-12-12.
Jointly indicted defendants for capital offense.
Procedure for trial, §17-8-4.
Judges.
Duties, §17-10-33.
Jury instructions.
Verdict, §17-10-31.
Lethal injection.
Method of execution, §17-10-38.
Life imprisonment.
Guilty plea.
Sentencing of person indicted for capital offense, §17-10-32.
Limitation on prosecutions.
Crimes punishable by death, §17-3-1.
Medical professionals.
Participation in executions.
Not subject to licensure challenge, suspension or revocation, §17-10-42.1.
Mentally incompetent to be executed, §§17-10-60 to 17-10-71.
Appeals, §17-10-70.
Defined terms, §17-10-60.
Determination of incompetency.
Effect, §17-10-61.
Presumption of mental competency.
Prior adjudication, §17-10-69.
Procedure to establish.
Applications.
Answer by respondent, §17-10-65.
Contents, §17-10-63.
Filing, §17-10-63.
When, §17-10-67.
Service, §17-10-64.
Evidence, §17-10-68.
Prior adjudication as presumption of mental competency, §17-10-69.
Examination of applicant, §17-10-66.
Exclusivity of procedure, §17-10-62.

DEATH PENALTY —Cont'd
Mentally incompetent to be executed —Cont'd
Procedure to establish —Cont'd
Order of court, §17-10-69.
Procedure upon convicted person's regaining mental competency, §17-10-71.
Minors, §17-9-3.
Mitigating circumstances.
Consideration in imposing penalty, §17-10-30.
Persons required to be present, §17-10-41.
Physicians and surgeons.
Not to be compelled to participate in execution, §17-10-38.
Number required to be present at execution, §17-10-41.
Preparation and filing of certificate of execution, §17-10-42.
Physicians not to be compelled to participate in execution, §17-10-38.
Place of execution.
Specification in sentence, §17-10-34.
Pregnant females, §17-10-39.
Time period for execution, §17-10-34.
Presentence hearings, §17-10-2.
Presumptions.
Mental incompetents to be executed.
Prior adjudication of mental competence, §17-10-69.
Record of sentence.
To whom copies sent, §17-10-33.
Separate trial for jointly indicted defendants for capital offense, §17-8-4.
Speedy trial in capital cases.
Demand, filing, §17-7-171.
Discharge, lack of timely prosecution, §17-7-171.
Time for trial after demand, §17-7-171.
Statute of limitations, §17-3-1.
Time period for execution.
Changing where period is elapsed, §17-10-40.
Length of and time limitation for new time period, §17-10-40.
Setting of day and time for execution by department of corrections, §17-10-40.
Specification in sentence, §17-10-34.
Transcripts of testimony, §17-8-5.
Treason.
Imposition authorized, §17-10-30.

DEATH PENALTY —Cont'd
Verdicts, §17-10-30.
Jury instructions, §17-10-31.
Requirement of jury finding of aggravating circumstance, §17-10-31.
Where jury does not recommend mercy in verdict, §17-9-3.
Witnesses.
Persons required to be present at executions, §17-10-41.

DEATH ROW INMATES.
Transporting to prison, §17-10-33.

DEBAUCHERY.
Vulgar or obscene evidence.
Closed trials, §17-8-53.

DEBTORS AND CREDITORS.
Probation.
Payment of debt owed to state as condition, §17-15-13.

DEBTS OWED TO STATE.
Probation.
Payment as condition, §17-15-13.

DEFINED TERMS.
Accused.
Crime victims' bill of rights, §17-17-3.
Active probation supervision.
Sentencing, probation or suspension, §17-10-1.
Administrative probation supervision.
Sentencing, probation or suspension, §17-10-1.
Arrest.
Crime victims' bill of rights, §17-17-3.
Arresting law enforcement agency.
Crime victims' bill of rights, §17-17-3.
Assistant public defender, §17-12-2.
Bail, §17-6-1.
Bail recovery agent, §17-6-56.
Bail restricted offense, §17-6-12.
Bench warrant, §17-7-90.
Capital felony case.
Reimbursement of counties for expenses, §17-11-21.
Capital felony expenses.
Reimbursement of counties, §17-11-21.
Child.
Competency to stand trial, §17-7-130.
Criminal procedure, testimony outside physical presence of accused, §17-8-55.

DEFINED TERMS —Cont'd
Circuit public defender, §17-12-2.
Third-year law students assisting in defense of indigent defendants, §17-12-40.
Circuit public defender office, §17-12-2.
Civil commitment.
Competency to stand trial, §17-7-130.
Civil forfeiture proceeding.
Personal property subject of crime or abandoned in custody of law enforcement, disposition, §17-5-54.
Claimant.
Victim compensation, §17-15-2.
Compensation.
Crime victims' bill of rights, §17-17-3.
Convicted person.
Son of Sam law, §17-14-30.
Conviction.
Restitution, §17-14-2.
Council.
Public defender council, §17-12-2.
County.
Bail, good behavior bonds, §17-6-90.
County revenue.
Reimbursement of counties in capital felony prosecutions, §17-11-21.
Course of conduct.
Crime victims' bill of rights, §17-17-16.
Court.
Competency to stand trial, §17-7-130.
Crime.
Crime victims' bill of rights, §17-17-3.
Victim compensation, §17-15-2.
Criminal justice agency.
Crime victims' bill of rights, §17-17-3.
Criminally injurious conduct.
Crime victims compensation, §17-15-7.
Criminal proceeding.
Third-year law students assisting in defense of indigent defendants, §17-12-40.
Criminal violation.
Investigation of illegal alien status, §17-5-100.
Custodial authority.
Crime victims' bill of rights, §17-17-3.
Damages.
Restitution, §17-14-2.
Designated misdemeanors.
Crimes involving bias or prejudice, sentencing, §17-10-17.
Developmental disability.
Competency to stand trial, §17-7-130.

DEFINED TERMS —Cont'd
Developmental disability —Cont'd
Sentencing, §17-10-1.
Director.
Public defender council, §17-12-2.
Direct service provider.
Victim compensation, §17-15-2.
Disabled adult.
Criminal trials, sequence for calling cases, §17-8-1.
Documentary evidence.
Search and seizure, §17-5-32.
Elder person.
Criminal trials, sequence for calling cases, §17-8-1.
Executive authority.
Criminal extradition, §17-13-21.
Fillers.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.
Firearm.
Personal property subject of crime or abandoned in custody of law enforcement, disposition, §17-5-54.
Forensic medical examination.
Sexual assault protocol, §17-5-70.
Victim compensation, §17-15-2.
Funds.
Victim compensation, §17-15-2.
Governor.
Criminal extradition, §17-13-21.
Graffiti.
Compensation for criminally inflicted property, §17-15A-2.
Harassment.
Crime victims' bill of rights, §17-17-16.
Illegal alien.
Investigation of illegal alien status, §17-5-100.
Indigent person.
Public defender, §17-12-2.
Inpatient.
Competency to stand trial, §17-7-130.
Insane at time of crime, §17-7-131.
Intellectual disability.
Proceedings upon plea of insanity or mental competency at time of crime, §17-7-131.
Investigating law enforcement agency.
Crime victims' bill of rights, §17-17-3.
Sexual assault protocol, §17-5-70.
Investigator.
Victim compensation, §17-15-2.

DEFINED TERMS —Cont'd
Law enforcement agency.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.
Personal property subject of crime or abandoned in custody of law enforcement, disposition, §17-5-54.
Law school.
Third-year law students assisting in defense of indigent defendants, §17-12-40.
Legislative oversight committee.
Public defender, §17-12-2.
Live lineups.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.
Mail.
Crime victims' bill of rights, §17-17-12.1.
Mentally ill.
Proceedings upon plea of insanity or mental competency at time of crime, §17-7-131.
Mentally incompetent to be executed, §17-10-60.
Nonserious traffic offense.
Law enforcement officers, indictment or special presentment, §17-7-52.
Nonviolent offense.
Competency to stand trial, §17-7-130.
Notice.
Crime victims' bill of rights, §17-17-3.
Notification.
Crime victims' bill of rights, §17-17-3.
Notify.
Crime victims' bill of rights, §17-17-3.
Offender.
Restitution, §17-14-2.
Ordering authority.
Restitution, §17-14-2.
Outpatient.
Competency to stand trial, §17-7-130.
Paid in part.
Public defender.
Recovery of attorney's fees, §17-12-50.
Parents.
Restitution, §17-14-2.
Penal actions, §17-1-2.
Person.
Crime victims' bill of rights, §17-17-3.
Photo lineups.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.

DEFINED TERMS —Cont'd
Possession, custody or control of the state or prosecution.
Felony discovery, §17-16-1.
Predominant aggressors.
Family violence complaints, §17-4-20.1.
Promptly notify.
Crime victims' bill of rights, §17-17-3.
Prompt notice.
Crime victims' bill of rights, §17-17-3.
Prompt notification.
Crime victims' bill of rights, §17-17-3.
Prosecuting attorney.
Crime victims' bill of rights, §17-17-3.
Public defender, §17-12-2.
Recovery of attorney's fees, §17-12-50.
Relief.
Restitution, §17-14-2.
Restitution, §17-14-2.
Restitution order, §17-14-2.
Rightful owners.
Personal property subject of crime or abandoned in custody of law enforcement, disposition, §17-5-54.
Serious mental or emotional trauma.
Victim compensation, §17-15-2.
Serious violent felony, §17-10-6.1.
Competency to stand trial, §17-7-130.
Repeat offenders, sentence and punishment, §17-10-7.
Sexual assault.
Sexual assault protocol, §17-5-70.
Sexual offense.
Competency to stand trial, §17-7-130.
Punishment for sexual offenders, §17-10-6.2.
Showups.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.
Significant exposure.
AIDS transmitting crimes, §17-10-15.
Significant financial hardship.
Sentencing, §17-10-1.
Split sentence.
Community supervision department post-incarceration supervision, §17-10-1.4.
Staff instructor.
Third-year law students assisting in defense of indigent defendants, §17-12-40.
State.
Criminal extradition, §17-13-21.

DEFINED TERMS —Cont'd
Statement of a witness.
Felony discovery, §17-16-1.
Suspects.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.
Third-year law student.
Third-year law students assisting in defense of indigent defendants, §17-12-40.
Totally and permanently disabled.
Sentencing, §17-10-1.
Unsecured judicial release.
Bail and recognizance, §17-6-12.
Victim, §17-14-2.
Compensation, §17-15-2.
Crime victims' bill of rights, §17-17-3.
Violent offense.
Competency to stand trial, §17-7-130.
Witnesses.
Identification procedures for lineups and showups, criminal procedure, §17-20-1.

DEMAND FOR TRIAL.
Criminal procedure.
Capital cases, §17-7-171.

DEMURRERS.
Indictments, §17-7-111.
Quashing indictment as bar to further prosecution, §17-7-53.1.

DEPORTATION.
Bail and recognizance.
Forfeitures.
Conditions not warranting forfeiture for failure to appear, §17-6-72.

DEPRAVITY OF MIND.
Death penalty for offenses involving, §17-10-30.

DEPUTIES.
Correctional institution superintendents.
Presence at execution of convicted person, §17-10-41.
Public defenders.
Circuit public defender.
Employment of deputy circuit defenders, §17-12-31.

DESERTION.
Abandonment of spouse or child.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.

DESERTION —Cont'd
Child support.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.

DESTITUTE PERSONS.
Legal defense of indigent defendants.
Generally, §§17-12-1 to 17-12-80.

DETAINERS.
Appearance bonds.
Conditions not warranting forfeiture.
Request that detainer be placed on principal, §17-6-72.

DIRECTED VERDICT.
Acquittal of accused, §17-9-1.

DISABLED PERSONS.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Protection of disabled adults and elder persons.
Arrest by law enforcement officers, §17-4-20.

DISCOVERY.
Alibi defense.
Alibi witnesses, §17-16-5.
Criminal proceedings.
Felonies, §§17-16-1 to 17-16-10.
Alibi witnesses, §17-16-5.
Application of provisions, §17-16-2.
Continuing duty to disclose, §17-16-4.
Costs.
Reimbursement for costs, §17-16-9.
Criminal history.
Prosecution's duty to furnish defendant, §17-16-4.
Defendant as witness, §17-16-1.
Evidence in aggravation of punishment.
Notice to defendant, §17-16-4.
Failure to comply with requirements, §17-16-6.

DISCOVERY —Cont'd
Criminal proceedings —Cont'd
Felonies —Cont'd
Forensic sciences division or other laboratories.
Testing or analyzing evidence in custody of, §17-16-4.
Indictment or accusation, §17-16-3.
Inspection and copying of materials, §17-16-4.
Material or information already furnished, §17-16-10.
Oral reports reduced to writing, §17-16-4.
Physical or mental examination results.
Inspection and copying, §17-16-4.
Possession, custody or control of the state or prosecution.
Defined, §17-16-1.
Required disclosure, §17-16-4.
Scientific test or experiment results.
Inspection and copying, §17-16-4.
Statements, §17-16-4.
Witnesses, §§17-16-1, 17-16-7.
Threat or physical or economic harm.
Discovery creating, §17-16-4.
Time for making required disclosures, §17-16-4.
Witnesses.
Alibi witnesses, §17-16-5.
Defendant as a witness, §17-16-1.
List of witnesses, §17-16-3.
Lists of names and information concerning, §17-6-8.
Statements, §§17-16-1, 17-16-7.
Who may be called as witness, §17-16-10.
Written or recorded statements made by defendant.
Prosecution's duty to disclose, §17-16-4.
Misdemeanors, §§17-16-20 to 17-16-23.
Application of provisions, §17-16-20.
Defendant's right to copies of information, §§17-16-21, 17-16-23.
Indictment or accusation, §17-16-21.
List of witnesses, §17-16-21.
Scientific reports, §17-16-23.
Statement given while in police custody, §17-16-22.
Felonies, §§17-16-1 to 17-16-10.
Misdemeanors, §§17-16-20 to 17-16-23.

DISCRIMINATION.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Peace officers.
Authority of officers to make arrest not to be denied because of race, creed, etc., §17-4-22.

DISFIGUREMENT.
Bailability of certain offenses.
Offenses involving serious injury, §17-6-1.

DISTRIBUTING CONTROLLED SUBSTANCES OR MARIJUANA.
Trial upon accusations, §17-7-70.1.

DISTRICT ATTORNEYS.
Children in detention pending trial.
List provided chief judges and prosecuting attorneys, §17-7-3.
Maintenance of penal actions, §17-1-2.

DNA.
Biological material evidence.
Maintenance and preservation, §§17-5-56, 17-5-71.
Sex offenses.
Sexual assault protocol.
Preservation of evidence, §17-5-71.

DOCKETS.
Cash bonds.
Recordation of receipt on docket, §17-6-4.
Continuances.
Criminal cases.
Entry of date of continuance upon docket of courts, §17-8-36.
Criminal dockets.
Cases called in order in which they stand on docket, §17-8-1.
Entry of date of continuance, §17-8-36.
Searches and seizures.
Maintenance of docket record of warrants issued, §17-5-22.

DOGS.
Police dogs.
Simple battery upon.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

DOMESTIC TERRORISM.
Death penalty.
Imposition authorized, §17-10-30.
Penalties.
Death penalty.
Imposition authorized, §17-10-30.

DOUBLE JEOPARDY.
Bail and recognizance.
Cash bonds for motor carriers, hazardous materials transportation and road taxes violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Cash bonds for traffic, game, fish, etc., violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Grand jury returns.
Operation of two returns of "no bill" on charge, §17-7-53.
Quashing of second grand jury indictment or presentment, §17-7-53.1.
No contest pleas.
Imposition of sentence upon plea, §17-7-95.

DRAFTS.
Sales contracts.
Trial upon accusations, §17-7-70.1.

DRIVERS' LICENSES.
Anatomical gifts.
Examination of license at scene of motor vehicle accident, §17-6-11.
Bail collateral, §17-6-2.
Display of license in lieu of bail, recognizance or incarceration, §17-6-11.
Motor vehicle accidents.
Organ donations.
Examination of license at scene of fatal accident, §17-6-11.
Organ donations.
Examination of license at scene of motor vehicle accident, §17-6-11.

DRIVING UNDER THE INFLUENCE.
Appeal bonds, §17-6-1.

DRIVING UNDER THE INFLUENCE —Cont'd
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Compensation to victims.
Deceased victim of homicide by vehicle in violation of drunk driving statute.
Memorial erected on state highway, §17-15-8.
Memorial sign erected on state highway.
Crime victims compensation.
Compensation where deceased victim of homicide by vehicle in violation of drunk driving statute, §17-15-8.
Victim of homicide by vehicle in violation of drunk driving statute.
Memorial erected on state highway, §17-15-8.

DRUG COURT DIVISIONS.
Public defenders.
Circuit public defender.
Compensation.
Accountability court salary supplement, §§17-12-25, 17-12-25.1.

DRUGS.
Administering.
Bail and recognizance.
Where offense bailable, §17-6-1.
Controlled substances.
Trial upon accusation, §17-7-70.1.
Bail and recognizance.
Administering.
Where offense bailable, §17-6-1.
Cocaine.
Trafficking in.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Controlled substances.
Administering.
Trial upon accusation, §17-7-70.1.
Arrest by citation for violations, §17-4-23.
Cocaine.
Trafficking in.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.

DRUGS —Cont'd
Controlled substances —Cont'd
Delivery.
Trial upon accusation, §17-7-70.1.
Dispensing.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Distributing.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Manufacture.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial by accusation, §17-7-70.1.
Minors.
Hiring, soliciting, etc., minor for purpose of manufacturing, distributing, etc.
Trial by accusation, §17-7-70.1.
Possession.
Marijuana.
Trial upon summons or citation without accusation, §17-7-72.
Trial by accusation, §17-7-70.1.
Sale.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Delivery.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Dispensing.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Distributing.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.
Manufacture.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Marijuana.
Driving under the influence.
Appeal bonds, §17-6-1.
Manufacturing, distributing, etc.
Trial upon accusation, §17-7-70.1.
Possession.
Trial upon accusation, §17-7-70.1.

DRUGS —Cont'd
Marijuana —Cont'd
Possession —Cont'd
Trial upon summons or citation without accusation, §17-7-72.
School system educators.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trafficking in.
Bail and recognizance.
Appeal bonds, §17-6-1.
Minors.
Hiring, soliciting, etc., minor for purpose of manufacturing, distributing, etc.
Trial upon accusation, §17-7-70.1.
Possession.
Marijuana.
Trial upon accusation, §17-7-70.1.
Trial upon summons or citation without accusation, §17-7-72.
Trial upon accusation, §17-7-70.1.
Sale.
Bail and recognizance.
Where offense bailable, §17-6-1.
Trial upon accusation, §17-7-70.1.
Theft.
Taking from pharmacy in course of committing armed robbery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

E

EARNED-TIME ALLOWANCES.
Persons sentenced for misdemeanors of a high and aggravated nature, §17-10-4.
Restitution as condition, §17-14-3.

ELDERLY PERSONS.
Vulnerable adults.
Arrest by law enforcement officer, §17-4-20.

ELECTROCUTION.
Death penalty.
Death chamber apparatus, etc.
Furnishing by department of corrections, §17-10-44.

ELECTRONIC MONITORING.
Electronic pretrial release and monitoring program.
Alternative to posting bail or as special condition of bond, §17-6-1.1.

EMBEZZLEMENT.
Trial upon accusations, §17-7-70.1.

EMERGENCIES.
Bail and recognizance.
Medical emergency.
Release by sheriff upon consent of judge, §17-6-1.

ENCAMPMENTS.
Organized militia.
Privilege from arrest during attendance at encampments, §17-4-2.

ENTICING CHILD FOR INDECENT PURPOSES.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.

ESCAPE.
Arrest of persons escaping or attempting to escape, §17-4-20.
By private persons, §17-4-60.
Search pursuant to lawful arrest, §17-5-1.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Trials of inmates escaping from justice, §17-8-50.
Trial upon accusations, §17-7-70.1.

EVIDENCE.
Accused wishing to testify.
Commitment hearings, §17-7-28.
Biological material evidence.
Maintenance and preservation, §17-5-56.
Criminal commitment or preliminary hearings.
Applicability, hearsay admissible, §§17-4-40, 17-7-28.
Custodian of evidence introduced at trial, §17-5-55.
Dangerous evidence or contraband.
Securing, §17-5-55.
Death penalty.
Mentally competent to be executed.
Prior adjudication of competence as presumption of competence, §17-10-69.

EVIDENCE —Cont'd
Death penalty —Cont'd
Mentally competent to be executed —Cont'd
Procedure to establish, §17-10-68.
Disposal of unclaimed evidence after trial, §17-5-55.
DNA sampling, analysis, collection.
Preservation of evidence, §17-5-71.
Evidence log.
Custodian of evidence to create, §17-5-55.
Exclusion, suppression.
Illegally seized evidence.
Documentary evidence in possession of attorney, §17-5-32.
Motion to suppress, §17-5-30.
Technical irregularities in search warrants, §17-5-31.
Exhibits at trial.
Tagging and custody of evidence, §17-5-55.
Failure of accused to testify.
No presumption, no comment.
Commitment hearings, §17-7-28.
Hearsay.
Criminal commitment or preliminary hearing.
Admissibility, §§17-4-40, 17-7-28.
Inventory of evidence after verdict and judgment.
Custodian of evidence, §17-5-55.
Mental health.
Examination admissibility, §17-7-130.1.
Execution of mental incompetents.
Presumption of mental competency.
Prior adjudication of competence to be executed, §17-10-69.
Procedure to establish mental incompetency, §17-10-68.
Motions.
Illegally seized evidence.
Motion to suppress, §17-5-30.
Mutiny.
Testimony of inmates in trials for crime of mutiny, §17-8-51.
Photographs.
Seized items unlawfully obtained.
Admissibility of photographs in lieu of original property, §17-5-50.
Preservation.
Biological material evidence, §17-5-56.
Restitution orders or payments.
Setoffs against judgments in civil actions, §17-14-11.

EVIDENCE —Cont'd
Searches and seizures.
Documentary evidence in possession of attorney, §17-5-32.
Illegally seized evidence.
Motion to suppress, §17-5-30.
Property unlawfully obtained.
Admissibility of photographs in lieu of original property, §17-5-50.
Use of statements made by defendant or agent at trial, §17-5-50.
Suppressing evidence because of technicalities, §17-5-31.
Self-incrimination.
Privilege against.
Accused.
No presumption, no comment on failure to testify, §17-7-28.
Sexual offenses.
Investigating sexual assault.
Preservation of evidence, §17-5-71.
Storage and disposal, §17-5-55.
Biological material evidence, §17-5-56.
Suppression of evidence.
Illegally seized evidence.
Documentary evidence in possession of attorney, §17-5-32.
Motion to suppress, §17-5-30.
Technical irregularities in search warrants, §17-5-31.
Vulgar evidence.
Closed trial, §17-8-53.
Witnesses.
Accused wishing to testify.
Commitment hearings, §17-7-28.
Failure of accused to testify.
No presumption, no comment.
Commitment hearings, §17-7-28.
Self-incrimination.
Privilege against.
Accused.
Commitment hearings, §17-7-28.

EVIDENCE LOG.
Creation by custodian of evidence, requirements, §17-5-55.

EXECUTIONS.
Corporate property.
Criminal responsibility, §17-7-92.
Exemptions.
Victim compensation, §17-15-8.
Restitution order.
Manner of enforcement, §17-14-13.
Victim compensation.
Exemptions, §17-15-8.

EXHIBITS.
Evidence tagged with exhibit number, §17-5-55.

EXPERT WITNESSES.
Accused's sanity at time of offense, §17-7-130.1.
Public defenders.
Capital defender division.
Appointment of private counsel to defend.
Establishment of guidelines for payment of expenses, §17-12-12.1.

EXPLOSIVES AND EXPLOSIONS.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.

EXTENSION OF TIME.
Victims of crime.
Compensation.
Claims, filing deadline, §17-15-5.

EXTRADITION.
Aliens.
Arrest and delivery to authorities, §17-13-4.
Applications for requisitions.
Governor's duty to make requisitions, §17-13-2.
Requirements as to fugitives from state of Georgia, §17-13-1.
Arrest of fugitives, §§17-13-4 to 17-13-46.
Aliens, §17-13-4.
Arresting officers.
Authority, §17-13-29.
Refusal to assist, §17-13-29.
Execution of warrants, §17-13-5.
Manner and place of execution of governor's warrant, §17-13-28.
Issuance of another warrant by governor, §17-13-41.
Issuance of governor's warrant, §17-13-27.
Persons charged with crimes in other states.
Arrest under warrant based upon oath or affidavit of another person, §17-13-33.
Arrest without warrant, §17-13-34.
Procedure where accused not arrested within time specified in warrant, §17-13-37.
Recall of warrant of arrest by governor, §17-13-41.

EXTRADITION —Cont'd
Arrest of fugitives —Cont'd
Recitals required in governor's warrant, §17-13-27.
Rights of accused, §17-13-30.
Waiver of warrant for arrest.
Execution and filing of written waiver by accused, §17-13-46.
Attorney general.
Uniform criminal extradition act.
Demand for extradition.
Investigation of case upon receipt of demand, §17-13-26.
Habeas corpus.
Defense of habeas corpus actions, §17-13-31.
Bail bonds.
Forfeiture, §17-13-38.
Granting of bail, §17-13-36.
Costs.
Payment of expenses, §17-13-44.
Definitions.
Uniform criminal extradition act, §17-13-21.
Delivery of persons to demanding states.
Persons charged with crimes in other states.
Delivery after accused's written waiver of issuance and service of warrant for arrest, §17-13-46.
Demand for extradition.
Investigation of case upon receipt of demand, §17-13-26.
Persons charged with crimes in other states.
Form of demand, §17-13-23.
Demand for return of fugitives in other states, §17-13-42.
Application for issuance of demand, §17-13-43.
Expense of returning fugitives from state.
First to be authorized by county governing authority, §17-13-3.
Governor's duty to make requisitions, §17-13-2.
Uniform criminal extradition act, §§17-13-21, 17-13-22.
Guilt of accused.
Conducting inquiry, §17-13-40.
Habeas corpus.
Arrested fugitives, §§17-13-30, 17-13-31.

EXTRADITION —Cont'd
Immunity of extradited persons.
Persons brought into Georgia.
Immunity from service of process as to civil actions based on facts in criminal charge, §17-13-45.
Innocence of accused.
Conducting inquiry, §17-13-40.
Investigation of case upon receipt of demand, §17-13-26.
Conducting inquiry as to guilt or innocence of accused, §17-13-40.
Jailing of persons being extradited to another state, §17-13-32.
Pending receipt of demand from other state, §17-13-35.
Persons charged with crimes in Georgia.
Applications for requisitions, §§17-13-1, 17-13-2.
Criminal charge, §17-13-45.
Demand for return of fugitives in other states, §17-13-42.
Application for issuance of demand, §17-13-43.
Expense of returning fugitives.
First to be authorized by county governing authority, §17-13-3.
Surrender to demanding state, §17-13-39.
Trial of demanded persons.
Trial of person for other criminal prosecutions while in state, §17-13-48.
Persons charged with crimes in other states.
Arrest under warrant based upon oath or affidavit of another person, §17-13-33.
Arrest without warrant, §17-13-34.
Bail and recognizance.
Granting of bail, §17-13-36.
Commitment to county jail pending receipt of demand from other states, §17-13-35.
Delivery of persons to demanding states.
Delivery after accused's written waiver of issuance and service of warrant for arrest, §17-13-46.
Demand for extradition.
Form of demand, §17-13-23.
Persons not present in demanding state at time of commission of crime, §17-13-25.

EXTRADITION —Cont'd
Persons charged with crimes in other states —Cont'd
Trial of demanded persons.
Effect of provisions as to right, power or privilege of state to try demanded person, §17-13-47.
Written waiver of extradition proceedings.
Execution and filing, §17-13-46.
Persons imprisoned in Georgia.
Surrender to demanding state, §17-13-39.
Persons not present in demanding state at time of commission of crime, §17-13-25.
Persons who left demanding state under compulsion, §17-13-24.
Prisoners or persons awaiting trial in another state, §17-13-24.
Trial of demanded persons.
Persons charged with crimes in Georgia.
Trial of person for other criminal prosecutions while in state, §17-13-48.
Persons charged with crimes in other states.
Effect of provisions as to right, power or privilege of state to try demanded person, §17-13-47.
Uniform criminal extradition act, §§17-13-20 to 17-13-49.
Effect on right, power or privilege of state to try demanded person, §17-13-47.
Interpretation and construction, §17-13-49.
Short title, §17-13-20.

F

FAILURE TO APPEAR.
Bail and recognizance.
Forfeiture of bond on principal's failure to appear, §17-6-31.
Unsecured judicial release.
Effect of failure to appear, §17-6-12.
Game fish or boating violation.
Failure to appear after giving cash bond, §17-6-8.
Litter violations.
Failure to appear after giving cash bond, §17-6-8.

FAILURE TO APPEAR —Cont'd
Motor carriers, hazardous material transportation and road taxes violations.
Failure to appear after giving cash bond, §17-6-8.
Traffic violations.
Failure to appear after giving cash bond, §17-6-8.

FAKE ID'S.
Alcoholic beverages.
Misrepresentation of age to purchase.
Arrest by citation, §17-4-23.

FALSE ARREST.
Peace officer's liability.
Persons arrested by private persons, §17-4-61.

FALSE CLAIMS.
Victims of crime.
Victim compensation, §17-15-11.

FALSE IMPRISONMENT.
Peace officer's liability.
Private persons making arrest, §17-4-61.

FAMILY LAW.
Abandonment of dependent spouse or child.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.

FAMILY VIOLENCE.
Appeal bonds, §17-6-1.
Arrests, §17-4-20.
Investigation and preparation of written report of disposition, §17-4-20.1.
Bail eligibility of person charged with offense, §17-6-1.
Battery.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Complaints.
Predominant aggressor.
Evaluation by officer, §17-4-20.1.
Criminal family violence orders.
Bail eligibility of person charged with violation, §17-6-1.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

FAMILY VIOLENCE —Cont'd
Investigations, §17-4-20.1.
Offense of violating family violence order.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Predominant aggressor.
Defined, §17-4-20.1.
Evaluation by officer, §17-4-20.1.
Protective orders.
Offense of violating family violence order.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Reports.
Investigative report by law enforcement officer, §17-4-20.1.
Statistics.
Compilation, analyses and publication, §17-4-20.1.

FAMILY VIOLENCE BATTERY.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

FEES.
Bail bonds.
Professional bonding companies, §17-6-15.
Sureties' fees, §17-6-30.
Bonds, surety.
Sureties' fees.
Criminal bonds, §17-6-30.
Pretrial release and diversion programs.
Electronic pretrial release and monitoring program.
Alternative to posting bail or as special condition of bond, §17-6-1.1.
Probation.
Supervision fee, §17-15-13.
Professional bonding companies.
Bail and recognizance, §17-6-15.
Sureties.
Criminal bonds, §17-6-30.

FELLATIO.
Bail and recognizance, §17-6-1.
Sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims, §§17-18-1, 17-18-2.

FELLATIO —Cont'd
Sodomy —Cont'd
Time of prosecution where victim under sixteen years of age, §17-3-2.1.

FELONIES.
Accusations in felony cases, §17-7-70.
Bail recovery agents, §17-6-58.
Closing arguments of counsel.
Time limits, §17-8-73.
Community service in lieu of fine, §17-10-1.
Controlled substances.
Possession, manufacture, distribution, etc.
Trial upon accusation, §17-7-70.1.
Discovery.
Criminal proceedings, §§17-16-1 to 17-16-10.
Limitation on prosecutions, §17-3-1.
Presentence hearings, §17-10-2.
Statute of limitations.
Prosecutions, §17-3-1.

FELONY MURDER.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

FIERI FACIAS.
Bail forfeitures.
Judgment satisfied and writ of fieri facias canceled, §17-6-72.
Fines.
Collection of fines in criminal cases, §17-10-20.
Restitution.
Collection of restitution in criminal cases, §17-10-20.
Sentencing.
Collection of fines and restitution in criminal cases, §17-10-20.

FINANCIAL TRANSACTION CARDS.
Fraud.
Trial upon accusations, §17-7-70.1.
Theft.
Trial upon accusations, §17-7-70.1.
Unauthorized use.
Trial upon accusations, §17-7-70.1.

FINES.
Bail recovery agents, §17-6-58.

FINES —Cont'd
Community service.
Criminal conviction.
Community service in lieu of fine, §17-10-1.
Felonies.
Imposition of misdemeanor punishment for felonies punishable by imprisonment for term of ten years or less, §17-10-5.
Fieri facias.
Collection of fines in criminal cases, §17-10-20.
Guilt adjudication.
Required, §17-10-13.
Misdemeanors.
Community service in lieu of fine, §17-10-1.
Generally, §17-10-3.
Misdemeanors of a high and aggravated nature, §17-10-4.
Probation.
Revocation of probation, no refund of fine paid, §17-10-8.
Restitution.
Apportionment of payments for fines and restitution, §17-14-8.
Sentencing.
Collection of fines in criminal cases, §17-10-20.
Felony cases, maximum amount of fine, §17-10-8.

FIRST DEGREE CRUELTY TO CHILDREN.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

FISH.
Bonds for violations of fish laws.
Cash bonds, §§17-6-5 to 17-6-8.
Violation of provisions.
Trials, §17-7-71.

FISHING.
Bonds, surety.
Bonds for violations of laws.
Cash bonds, §§17-6-5 to 17-6-8.
Cash bonds.
Violations of laws, §§17-6-5 to 17-6-8.

FORCIBLE ENTRY.
Arrest warrants.
Right of entry into private dwellings pursuant to execution of, §17-4-3.

FORENSIC INTERVIEWS.
Victims of crimes.
Compensation, §17-15-16.

FORENSIC MEDICAL EXAMINATIONS.
Defined, §17-15-2.
Free examinations, victims' right, §17-5-72.
Responsibility for costs, §17-15-15.

FORENSIC SCIENCES DIVISION.
Discovery in criminal cases.
Felonies.
Testing or analyzing evidence in custody of, §17-16-4.

FORFEITURES.
Bail and recognizance, §§17-6-70 to 17-6-73.
Cash bonds for motor carrier, hazardous materials transportation and road taxes violations, §17-6-8.
Effect of forfeiture as bar to subsequent prosecution, §17-6-8.
Cash bonds for ordinance violations or other offenses against municipalities, §17-6-10.
Cash bonds for traffic, game, fish, boating or litter law violations, §17-6-8.
Effect of forfeiture as bar to subsequent prosecution, §17-6-8.
Conditions not warranting forfeiture for failure to appear, §17-6-72.
Execution hearing on failure of principal to appear, §17-6-71.
Extradited persons, §17-13-38.
Principal's failure to appear, §17-6-31.
Remission of forfeiture, §17-6-72.
When forfeiture occurs, §17-6-70.
Historical items seized, §17-5-53.
Instructional items seized, §17-5-53.
Profits from crime.
Search pursuant to lawful arrest.
When authorized, §17-5-1.
Son of Sam law, §§17-14-30 to 17-14-32.
Weapons.
Possession constituting crime or delinquent act.
Civil forfeitures, §17-5-51.
When used in commission of crime or illegally concealed.
Civil forfeitures, §§17-5-51, 17-5-52.
Disposition of weapon used in commission of crime, §17-5-52.

FORGERY.
Trial upon accusations, §17-7-70.1.

FORMER JEOPARDY.
Bail and recognizance.
Cash bonds for motor carriers, hazardous materials transportation and road taxes violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Cash bonds for traffic, game, fish, etc., violations.
Forfeiture of bond as bar to subsequent prosecution, §17-6-8.
Grand jury returns.
Operation of two returns of "no bill" on charge, §17-7-53.
Quashing of second grand jury indictment or presentment, §17-7-53.1.
No contest pleas.
Imposition of sentence upon plea, §17-7-95.

FORMS.
Accusations in criminal proceedings, §17-7-71.
Arrest warrants, §17-4-46.
Affidavit, §17-4-45.
Commitment of accused, §17-7-30.
Indictments, §17-7-54.

FOSTER CARE.
Assault.
Simple assault committed between foster parents and foster children.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

FRAUD AND DECEIT.
Credit cards.
Trial upon accusations, §17-7-70.1.
Refunds.
Crime of refund fraud.
Arrest by citation, §17-4-23.

FRAUDULENT TRANSFERS.
Restitution.
Action to set aside deceptive transfers under voidable transactions act, §17-14-17.

FREEDOM OF INFORMATION.
Discovery.
Criminal proceedings.
Felonies, §§17-16-1 to 17-16-10.
Misdemeanors, §§17-16-20 to 17-16-23.

FUGITIVES.
Extradition.
General provisions, §§17-13-1 to 17-13-49.
Trials, §17-8-50.

FUNDS.
Victim compensation.
Georgia crime victims emergency fund, §17-15-14.
Victims of crimes.
Georgia crime victims emergency fund, §§17-15-9, 17-15-10, 17-15-14.

G

GAME AND FISH CODE.
Accusations in misdemeanor cases, §17-7-71.
Bonds for violations of laws.
Cash bonds, §§17-6-5 to 17-6-8.
Cash bonds.
Violations of laws, §§17-6-5 to 17-6-8.

GANGS.
Bail and pretrial release.
Probable cause showing pattern of criminal gang activity, §17-6-1.

GARNISHMENT.
Exemption.
Victim compensation, §17-15-8.
Victim compensation.
Exemptions, §17-15-8.

GENDER.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

GENERAL ASSEMBLY.
Attorney general.
Continuances.
Grounds for continuance.
Attorney general in attendance at general assembly, §17-8-27.

GENERAL ASSEMBLY —Cont'd
Committees.
Public defender council.
Legislative oversight committee, §17-12-10.1.
Continuance of case granted member or staff.
Party or counsel in attendance at general assembly.
Criminal trials, §17-8-26.
Witness in attendance at general assembly.
Criminal trials, §17-8-28.
Courts.
Attendance by member during session of general assembly, §§17-8-26, 17-8-28.
Stay of case granted member or staff.
Assembly in session, presence elsewhere required by duties.
Criminal trials, §17-8-26.
Witnesses.
Continuance of case granted member or staff.
Criminal trials.
In attendance at general assembly, §17-8-28.

GENERAL VERDICT.
Criminal procedure, §17-9-2.

GENITALS.
Oral sex.
Sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims, §§17-18-1, 17-18-2.

GEORGIA BUREAU OF INVESTIGATION.
Bias crime reports.
Submission to GBI, §17-4-20.2.

GEORGIA INDIGENT DEFENSE ACT.
Generally, §§17-12-1 to 17-12-80.
Short title, §17-12-1.

GEORGIA INDIGENT DEFENSE COUNCIL.
Public defender council.
Generally, §§17-12-1 to 17-12-12.1.

GEORGIA PUBLIC DEFENDER COUNCIL.
Generally, §§17-12-1 to 17-12-12.1.
Legal defense of indigents generally, §§17-12-1 to 17-12-80.

GOOD BEHAVIOR BONDS, §§17-6-90 to 17-6-92.
Breach of bond.
Contempt proceedings, §17-7-94.
Extension by court, §17-6-91.
Issuance, §17-6-90.
Surrender of principal by surety, §17-6-91.

GOOD FAITH.
Arrest.
Law enforcement officers.
Private persons making arrest, §17-4-61.
Law enforcement officers.
Arrest.
Private persons making arrest, §17-4-61.
Search warrants.
Use of force in execution, §17-5-27.

GOVERNOR.
Actions.
Plaintiff in penal action, §17-1-2.
Criminal actions.
Maintenance, §17-1-2.
Extradition of criminals.
Duty to make requisitions, §17-13-2.
Uniform criminal extradition act, §§17-13-21, 17-13-22.

GRAFFITI.
Compensation for criminally inflicted property, §§17-15A-1 to 17-15A-4.
Graffiti defined, §17-15A-2.
Legislative authority for enacting provisions, §17-15A-1.
Legislative findings, §17-15A-3.
Removal of graffiti by inmates, §17-15A-4.

GRANDCHILDREN.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

GRANDCHILDREN —Cont'd
Incest —Cont'd
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.

GRAND JURY.
Child's case.
Time for presentment to grand jury, §17-7-50.1.
Transfer to juvenile court.
Failure to timely present to grand jury, §17-7-50.1.
Concurrent grand juries.
Impaneling authorized, §17-7-55.
Death penalty.
Extension of time required for grand jury hearing, §17-7-50.
Impaneling jury.
Concurrent grand juries, §17-7-55.
No bill returns.
Operation of two such returns on charge as bar to future prosecution for same charge, §17-7-53.
Right to hearing within 90 days where bail used, §17-7-50.
Subpoenas.
Material witnesses for state, §17-7-190.
Terms of court.
Impaneling of concurrent grand juries, §17-7-55.
True bill returns.
Quashing of second grand jury indictment or presentment as bar to further prosecution, §17-7-53.1.
Witnesses.
Law enforcement officers.
Indictment or special presentment of peace officer for crime in performance of duties.
Right of officer to testify, §§17-7-52, 17-7-70.1.
Material witnesses for state.
Subpoena, list of witnesses subpoenaed, §17-7-190.
Public officials.
Right to appear at grand jury, §17-7-70.1.
Securing attendance at proceedings, §§17-7-190 to 17-7-192.

GRANTS.
Public defenders.
Circuit public defender.
Funds and grants from public or private source.
Accepting, §17-12-35.

GUARDIANS.
Conversion of property.
Limitation on prosecutions.
Excluded periods, §17-3-2.
Cruelty to children.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Limitation on prosecutions.
Conversion of property.
Excluded periods, §17-3-2.

H

HABEAS CORPUS.
Attorney general.
Extradition.
Defense of habeas corpus actions, §17-13-31.
Commitment or prior proceedings.
Discharge due to informalities in, §17-7-34.
Death penalty.
Unified review procedure.
Establishment by supreme court.
Effect on habeas corpus, §17-10-36.
Extradition of criminals.
Arrested fugitives, §§17-13-30, 17-13-31.

HABITUAL OFFENDERS.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Sentencing felons, §17-10-7.
Traffic law violators, §17-7-70.1.

HARASSMENT.
Stalking.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Victim or witness.
Temporary restraining order or protective order, §17-17-16.

HATE CRIMES.
Sentencing of defendants guilty of crimes involving bias or prejudice.
Designated misdemeanors.
Defined, §17-10-17.
Enhanced penalties, §17-10-17.
Felonies and designated misdemeanors, §17-10-17.
Notification of intention to seek, §17-10-18.
Recommencement of trial for determination, §17-10-19.

HAZARDOUS MATERIALS AND WASTE.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.
Transportation of hazardous materials.
Bail and recognizance.
Cash bond for violations, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail or recognizance ordering incarceration, §17-6-11.

HEARINGS.
Arrest warrant application, §17-4-40.
Death penalty cases.
Presentence hearings, §17-10-2.
Harassment of victim or witness in criminal case.
Temporary restraining order or protective order, §17-17-16.
Seized items unlawfully obtained.
Hearing to determine ownership, §17-5-50.
Sentencing.
Presentence hearings in felony cases, §17-10-2.

HIGH SCHOOL DIPLOMA OR EQUIVALENT.
Sentencing.
Minor defendant without, §17-10-1.

HIGHWAYS, ROADS AND STREETS.
Department of transportation.
Memorial erected on state highway.
Crime victim compensation.
Victim of homicide by vehicle in violation of drunk driving statute, §17-15-8.

HIGHWAYS, ROADS AND STREETS —Cont'd
Memorial erected on state highway.
Crime victim compensation.
Victim of homicide by vehicle in violation of drunk driving statute, §17-15-8.

HIJACKING.
Aircraft.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Death penalty.
Imposition authorized, §17-10-30.
Motor vehicles.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.

HOME HEALTH AGENCIES.
Battery by agent, employee or volunteer against patient.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

HOME INVASION.
Bail and recognizance.
Appeal bonds.
Unavailability, §17-6-1.
Where offense bailable.
First degree.
Offenses bailable only before superior court judge, §17-6-1.

HOMELESS PEOPLE.
Legal defense of indigent defendants generally, §§17-12-1 to 17-12-80.

HOMICIDE.
Vehicular homicide.
Bail or other release from custody, §17-6-1.
Trial upon accusations, §17-7-70.1.

HOSPITALS.
Arrested persons.
Transportation to facility by law enforcement officer, §17-4-25.1.
Sexual assault against patient in hospitals.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Investigating sexual assault, §§17-5-70 to 17-5-73.

HUMAN TRAFFICKING.
Labor or sexual servitude.
Trafficking of persons for.
Compensation to victim through federal government.
Notification, §17-17-6.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.

HUNTING.
Cash bonds.
Violations of laws, §§17-6-5 to 17-6-8.

HUSBAND AND WIFE.
Assault.
Simple assault committed between spouse, punishment.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

I

IDENTIFICATION CARDS.
Public defenders.
Issuance to, §17-12-27.

IDENTIFICATION OF CRIMINAL SUSPECTS.
Lineups and showups, procedures, §§17-20-1 to 17-20-3.

ILLEGAL ALIENS.
Criminal investigation.
Investigation of illegal alien status, §17-5-100.
Witness' or victim's immigration status not investigated, §17-5-100.

IMMUNITY.
Extradited persons.
Persons brought into Georgia.
Immunity from service of process as to civil actions based on facts in criminal charge, §17-13-45.

IMMUNITY —Cont'd
Service of process.
Extradited persons, §17-13-45.

INCEST.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.

INCOME TAXES.
Exemptions.
Victim compensation, §17-15-8.
Victim compensation.
Exemptions, §17-15-8.

INCOMPETENCY TO STAND TRIAL, §§17-7-129, 17-7-130.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.

INDECENCY.
Child molestation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.

INDICTMENTS, §§17-7-50 to 17-7-55.
Corporations, §17-7-92.
Demurrers, §17-7-111.
Quashing indictment as bar to further prosecution, §17-7-53.1.
Formal exceptions, §17-7-113.
Forms, §17-7-54.
Peace officers, §17-7-52.
Plea at arraignment.
Entering on indictment, §17-7-96.
Presentation to jury, §17-8-2.
Quashing indictments.
First indictments.
Limitation on prosecutions.
Extension of period, §17-3-3.

INDICTMENTS —Cont'd
Quashing indictments —Cont'd
Second grand jury indictment.
Effect on further prosecution for same offense, §17-7-53.1.
Special presentments treated as, §17-7-51.

INDIGENT DEFENDANTS.
Legal defense for indigents generally, §§17-12-1 to 17-12-80.

INDIGENT DEFENSE ACT.
Generally, §§17-12-1 to 17-12-80.
Short title, §17-12-1.

INDIGENT DEFENSE COUNCIL.
Public defender council.
Generally, §§17-12-1 to 17-12-12.1.

INDIGENT PERSONS.
Attorneys.
Legal defense for indigent defendants generally, §§17-12-1 to 17-12-80.
Counties.
Legal representation for ordinance or state law violations.
Additional personnel provided circuit public defenders.
Contracting with council for, §17-12-32.
Alternative delivery system for representing indigent defendants.
Judicial circuit composed of single county, §17-12-36.
Contracting with circuit public defender to provide, §17-12-23.
Expenses of circuit public defender's office.
Pro rata sharing by counties in district, §17-12-34.
Generally, §§17-12-1 to 17-12-80.
Supplementation of circuit public defender's salary, §17-12-25.
Supplementation of salary of state paid personnel.
Personnel employed in circuit public defender's office, §17-12-30.
Criminal proceedings.
Legal defense for indigent defendants generally, §§17-12-1 to 17-12-80.
Law students assisting representation in criminal proceedings.
Third-year law students or staff instructors, §§17-12-40 to 17-12-45.

INDIGENT PERSONS —Cont'd
Public defenders.
Legal defense for indigent defendants generally, §§17-12-1 to 17-12-80.
Restitution payments, §17-14-15.

INDORSEMENTS.
Arrest.
Arrest warrants, §17-4-44.

INJUNCTIONS.
Harassment of victim or witness.
Temporary restraining orders, §17-17-16.
Victims of crime.
Harassment, temporary restraining orders, §17-17-16.
Witnesses.
Harassment, temporary restraining orders, §17-17-16.

INSANITY DEFENSE.
Accused's sanity at time of offense, §17-7-130.1.
Charges to jury, §17-7-131.
Commitment to department of human services.
Defendant found not guilty by reason of insanity.
Defendant meeting inpatient commitment criteria, §17-7-131.
Conditional release.
Defendant found not guilty by reason of insanity.
Defendant meets criteria for outpatient involuntary treatment, §17-7-131.
Definitions, §17-7-131.
Discharge of defendant from custody.
Defendant found not guilty by reason of insanity.
Defendant not meeting inpatient commitment criteria, §17-7-131.
Evaluation of defendant's present mental condition.
Defendant found not guilty by reason of insanity, §17-7-131.
Examination of defendant by psychologist or psychiatrist.
Required before plea accepted, §17-7-131.
Findings by jury, §17-7-131.
Inpatient commitment criteria.
Hearing to determine if defendant meets.
Defendant found not guilty by reason of insanity, §17-7-131.

INSANITY DEFENSE —Cont'd
Instructions to jury, §17-7-131.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-11.
Proceedings upon plea of insanity or mental incompetency, §17-7-131.
Release of defendant from commitment, §17-7-131.
Retention of jurisdiction by court.
Defendant found not guilty by reason of insanity, §17-7-131.

INTELLECTUAL AND OTHER DEVELOPMENTAL DISABILITIES.
Criminal law and procedure.
Proceedings upon plea of insanity or mental incompetency at time of crime, §17-7-131.
Death penalty.
Defendant guilty but developmentally disabled, §17-7-131.
Human trafficking.
Trafficking of persons for labor or sexual servitude.
Victims, vacating of sentence.
Petition, §17-10-21.
Trafficking of persons for labor or sexual servitude.
Victims, vacating of sentence.
Petition, §17-10-21.
Victims of crime.
Forensic interviews.
Reimbursement of costs.
Grounds for reimbursement, §17-15-16.

INTERPRETATION AND CONSTRUCTION.
Uniform criminal extradition act, §17-13-49.
Effect of article on right, power or privilege of state to try demanded person, §17-13-47.
Verdicts.
Criminal proceedings, §17-9-2.

INTERPRETERS.
Deaf and hearing impaired persons.
Arresting law enforcement agency.
Duty to provide qualified interpreters.
Arresting officer to comply with provisions, §17-4-30.

INTIMIDATION.
Stalking.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

INVENTORIES.
Evidence after verdict and judgment.
Custodian of evidence, §17-5-55.
Seized items in searches pursuant to warrants, §17-5-29.
Seized items in warrantless searches, §17-5-2.
Seized items unlawfully obtained, §17-5-50.

INVESTIGATIONS.
Extradition cases.
Conducting inquiry as to guilt or innocence of accused, §17-13-40.
Demands, §17-13-26.
Family violence, §17-4-20.1.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Victims of crimes.
Compensation.
Claims, investigation, §17-15-6.

J

JAILS.
Children in detention pending trial.
List provided chief judges and prosecuting attorneys.
Responsibility of official in charge of facility in which child detained, §17-7-3.
County other than where offense committed.
Jailing of prisoners where no jail in county where offense committed, §17-7-1.
Jail fees and costs, §17-7-1.
Sheriff's duty to receive prisoner from another county before payment of fees and costs, §17-7-2.
Extradited persons, §§17-13-32, 17-13-35.
Fees.
Imposition upon prosecutor or complainant, §17-11-4.

JAILS —Cont'd
Preliminary commitments.
Delivery of accused to person in charge of jail, §17-7-32.
Regional jail authorities.
Child in detention pending trial.
List provided chief judges of courts and prosecuting attorneys.
Responsibility of official in charge of facility in which children detained, §17-7-3.
Commitment hearings.
Offense committed in county which is member of regional jail authority, §17-7-20.
Transportation of prisoners to regional jail, §17-4-25.
Release pending voluntary surrender, §17-10-9.1.

JUDGES.
Arrest warrants.
Issuance, §17-4-40.
Bench warrants, §17-7-90.
Children in detention pending trial.
List provided chief judges, §17-7-3.
Death penalty.
Duty to impose sentence, §17-10-33.
Disqualification.
Death sentence reviews.
Recusal reviewable issue, §17-10-35.1.
Judges emeritus.
Arrest warrants.
Authority to issue, §17-4-40.
Search warrants.
Authority to issue, §17-5-21.
Pardons and paroles.
Judge's authority, §17-10-1.
Probation of convicted persons.
Authority, §17-10-1.
Public defenders.
Assistant public defenders.
Concurrent service as judicial officer prohibited, §17-12-33.
Recusal.
Death sentence reviews.
Grounds, §17-10-35.1.
Retired judges.
Search warrants.
Authorized to issue, §17-5-21.
Sentencing.
Authority and responsibility.
Generally, §17-10-1.

JUDGES —Cont'd
Sentencing —Cont'd
Duty to impose sentence, §17-9-2.
Verdicts.
Criminal proceedings.
Expression of approval or disapproval of verdict, §17-9-22.
Commending or complimenting of jury by judge, §17-9-23.

JUDGMENT LIENS.
Cost of criminal prosecution.
Judgment entered against defendant for costs, §17-11-1.

JUDGMENTS.
Arrest of judgment, §§17-9-60 to 17-9-63.
Criminal proceedings.
Arrest of judgment, §§17-9-60 to 17-9-63.
Costs of prosecution.
Imposition against defendant, §17-11-1.
Vacation.
Effect of perjury, §17-1-4.
Validity where court lacks jurisdiction, §17-9-4.
Motions.
Arrest of judgment, §§17-9-60 to 17-9-63.
Setting aside.
Criminal actions.
Effect of perjury, §17-1-4.

JUDICIAL CIRCUITS.
Circuit public defenders.
Generally, §§17-12-20 to 17-12-37.

JUDICIAL COUNCIL OF GEORGIA.
Public defender council.
Submission of budget to judicial council, §17-12-26.

JURISDICTION.
Arrest of judgment motions, §17-9-60.
Bailable offenses, §17-6-1.
Criminal proceedings, §§17-2-1, 17-2-3.
Arrest of judgment proceedings, §17-9-60.
Fugitives from justice.
Trials of inmates, §17-8-50.
Preliminary commitment hearings.
Persons who may hold courts of inquiry, §17-7-20.
Preclusion of certain courts from trying certain charges, §17-7-23.

JURISDICTION —Cont'd
Criminal proceedings —Cont'd
Sentencing proceedings.
Punishment for misdemeanors of a high and aggravated nature, §17-10-4.
Sentencing proceedings.
Punishment for misdemeanors of a high and aggravated nature, §17-10-4.
Superior courts.
Bailable offenses, §17-6-1.
Fugitives from justice.
Trials of inmates, §17-8-50.

JURY AND JURY TRIAL.
Charges to jury.
Criminal cases, §17-8-56.
Death penalty cases, §§17-10-30, 17-10-31.
Defense of insanity interposed, §17-7-131.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Objections to jury charges prior to deliberation, §17-8-58.
Insanity defense interposed, §17-7-131.
Criminal proceedings.
Trials generally, §§17-8-1 to 17-8-76.
Verdicts, §§17-9-1 to 17-9-63.
Defense of insanity interposed.
Charges to jury, §17-7-131.
Insanity defense interposed.
Charges to jury, §17-7-131.
Instructions.
Charges to jury.
Criminal cases, §17-8-56.
Death penalty cases, §§17-10-30, 17-10-31.
Defense of insanity interposed, §17-7-131.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Insanity defense interposed, §17-7-131.
Objections.
Prior to deliberation, §17-8-58.
Private knowledge.
Acting on.
Criminal proceedings, §17-9-20.
Speedy trial.
Discharge and acquittal for lack of prosecution after demand made, §§17-7-170, 17-7-171.

JURY AND JURY TRIAL —Cont'd
Verdicts.
Criminal proceedings, §§17-9-1 to 17-9-63.

JUVENILE COURTS.
Children in detention pending trial.
List provided chief judge.
Responsibility of official in charge of facility in which child detained, §17-7-3.
Deprived children.
Defined, §17-11-2.
Grand jury, presentment of case to, time.
Transfer to juvenile courts.
Failure to timely present, §17-7-50.1.
Probation.
Restitution as condition, §17-14-5.
Restitution, §17-14-5.
Transfer of case from superior court to juvenile court.
Failure to timely present case to grand jury, §17-7-50.1.

JUVENILE DETENTION FACILITIES.
Arrested persons.
Transportation to facility by law enforcement officer, §17-4-25.1.
Children in detention pending trial.
List provided chief judges and prosecuting attorneys.
Responsibility of official in charge of facility in which child detained, §17-7-3.

JUVENILE JUSTICE.
Department of juvenile justice.
Children in detention pending trial.
List provided chief judge and prosecuting attorneys.
Responsibility of official in charge of facility in which child detained, §17-7-3.
Restitution.
Remand of sentence.
Copies of restitution order to be provided to department, §17-14-16.
Detention facilities.
Arrested person.
Transportation to facility, §17-4-25.1.

JUVENILE JUSTICE —Cont'd
Detention facilities —Cont'd
Children in detention pending trial.
List provided to chief judges and prosecuting attorneys, §17-7-3.

K

KIDNAPPING.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

L

LABOR AND INDUSTRIAL RELATIONS.
Trafficking of persons for labor or sexual servitude.
Compensation through federal government.
Notification to victim, §17-17-6.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.

LAW ENFORCEMENT AGENCIES.
Personal property in custody of agency.
Property subject of crime or abandoned.
Disposition, §17-5-54.
Return of personal property in custody of law enforcement to owner.
Custody of property subject of crime or abandoned, §17-5-54.
Sale of personal property.
Custody of property subject of crime or abandoned, §17-5-54.

LAW ENFORCEMENT OFFICERS.
Aliens.
Illegal alien status.
Investigation during investigation of criminal suspect, §17-5-100.
Arrest.
False arrest.
Officer's liability, §17-4-61.

LAW ENFORCEMENT OFFICERS —Cont'd
Arrest —Cont'd
Warrant for arrest of officer.
Alleged offense committed in performance of duties, §17-4-40.
Bail and recognizance.
Acceptance of cash bonds for traffic, game, fish, boating or litter law violations.
Liability for failure to account for cash receipts and bonds, §17-6-7.
Giving advice as to services of professional bondsmen, §17-6-52.
Bias crime reports.
Submission to GBI, §17-4-20.2.
Deaf or hearing impaired persons.
Arrest.
Interpreters provided.
Duty of arresting law enforcement agency.
Arresting officer to comply with provisions, §17-4-30.
Discrimination.
Authority of peace officers to make arrest not to be denied because of race, creed, etc., §17-4-22.
Extradition of criminals.
Authority of arresting officers, §17-13-29.
Refusal to assist arresting officers, §17-13-29.
Illegal aliens.
Status investigated during investigation of criminal suspect, §17-5-100.
Indictment of peace officers, §17-7-52.
Presentments.
Special presentments.
Indictment or special presentment of peace officer for crime in performance of duties, §17-7-52.
Witnesses.
Discovery in criminal cases.
Work location and phone number of officer, §17-16-8.

LAW SCHOOLS.
Legal defense of indigent defendants.
Third-year law students and staff instructors assisting, §§17-12-40 to 17-12-45.

LAW STUDENTS.
Legal defense of indigent defendants.
Third-year law students and staff instructors assisting, §§17-12-40 to 17-12-45.

LEGAL DEFENSE FOR INDIGENT DEFENDANTS.
Generally, §§17-12-1 to 17-12-80.

LETHAL INJECTION.
Death penalty.
Method of execution, §17-10-38.

LIFE IMPRISONMENT.
Capital cases.
When defendant under age of 17 at time of commission of crime, §17-9-3.
Where jury does not recommend mercy in verdict, §17-9-3.
Where jury recommends mercy in verdict, §17-9-3.
Without parole, §17-10-16.
Death penalty.
Sentencing of person indicted for capital offense to life imprisonment upon plea of guilty, §17-10-32.
Life without parole.
Capital cases, §17-10-16.
Jury instructions, §17-10-31.
Sentencing without seeking death penalty, §17-10-16.1.
Limitation on prosecutions.
Crimes punishable by life imprisonment, §17-3-1.
Minors.
Committal of person under 17, §17-10-14.
Without parole.
Capital cases, §17-10-16.
Sentencing without seeking death penalty, §17-10-16.1.

LIMITATION OF ACTIONS.
Criminal prosecutions.
Excluded periods, §17-3-2.
Extension of periods, §17-3-3.
Generally, §17-3-1.
Victim 65 or older, §17-3-2.2.
Victim of certain offenses under sixteen years of age, §17-3-2.1.
Cruelty to children.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.

LIMITATION OF ACTIONS —Cont'd
Death penalty cases, §17-3-1.
Felonies, §17-3-1.
Misdemeanors, §17-3-1.
Murder, §17-3-1.
Rape, §17-3-1.
Prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Restitution.
Fraudulent transfers.
Action to set aside, §17-14-17.
Sexual offenses.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Sodomy.
Prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Statutory rape.
Prosecution where victim under sixteen years of age, §17-3-2.1.
Trusts and trustees.
Conversion of property.
Criminal prosecutions.
Excluded periods, §17-3-2.
Victims of crimes.
Compensation.
Claims.
Time to file, §17-15-5.

LIMITATIONS ON PROSECUTIONS, §§17-3-1 to 17-3-3.
Excluded periods, §17-3-2.
Extension of period, §17-3-3.
Generally, §17-3-1.
Victim 65 or older, §17-3-2.2.
Victim of certain offenses under sixteen years of age, §17-3-2.1.

LINEUPS.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.

LITTERING.
Bonds for violations of litter laws.
Cash bonds, §§17-6-5 to 17-6-9.
Cash bonds for violations of litter laws, §§17-6-5 to 17-6-9.
Summons or citation with or without accusation.
Trial of litter offenses upon, §17-7-73.

LIVE LINEUPS.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.

LONG-TERM HEALTH CARE.
Battery by employee, agents or volunteer against patient, punishment.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

M

MAGISTRATE COURTS.
Litter.
Trial of offenses upon summons or citation, §17-7-73.
Magistrates.
Arrest warrants.
Issuance, §17-4-40.
Preliminary commitment hearings.
Persons who may hold, §17-7-20.

MALICIOUS PROSECUTION.
Costs and fees, §17-11-4.

MALNUTRITION.
Cruelty to children in the first degree.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

MANSLAUGHTER.
Motor vehicles.
Bail or other release from custody, §17-6-1.

MANUFACTURING CONTROLLED SUBSTANCE OR MARIJUANA.
Trial upon accusation, §17-7-70.1.

MARIJUANA.
Driving under the influence.
Appeal bonds, §17-6-1.
Manufacture, distribution, etc.
Trial upon accusation, §17-7-70.1.
Possession.
Trial upon accusation, §17-7-70.1.
Trial upon summons or citation without accusation, §17-7-72.
Trafficking in.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.

MASTURBATION.
Masturbation for hire.
Trafficking of persons for labor or sexual servitude.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.

MASTURBATION —Cont'd
Masturbation for hire —Cont'd
Trafficking of persons for labor or sexual servitude —Cont'd
Victims, vacating of sentence.
Petition, §17-10-21.

MAYOR.
Criminal procedure.
Authority to bind over or commit to jail offenders against criminal law, §17-7-22.
Extradition.
Requisition.
Who application for requisition made by, §17-13-1.

MEDICAL EXAMINATIONS.
Forensic medical examination.
Free examinations, victims' right, §17-5-72.
Responsibility for cost, §17-15-15.
Rape.
Sexual assault protocol.
Right to free forensic medical examination, §17-5-72.
Sexual assault protocol.
Right to free forensic medical examination, §17-5-72.
Sodomy.
Sexual assault protocol.
Right to free forensic medical examination, §17-5-72.

MEDICAL EXAMINERS.
Death investigations.
Inquest.
Cost of inquests, §17-11-3.

MEDICAL WASTE.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.

MEMORANDA.
Bail and recognizance.
Commitment of arrestee.
Commitment hearings.
Tender of bail after waiver of hearing.
Entry of memorandum on warrant, §17-6-16.

MEMORIALS.
Highway memorial sign.
Crime victims compensation.
Victim of homicide by vehicle in violation of drunk driving statute, §17-15-3.

MENTAL COMPETENCY AT TIME OF CRIME.
Proceedings upon plea, §17-7-131.

MENTAL COMPETENCY TO STAND TRIAL.
Accused found mentally incompetent to stand trial, §17-7-130.
Bona fide doubt as competency.
Court's duty to inquired into competency, §17-7-129.
Civil commitment or release.
Accused found mentally incompetent to stand trial, §17-7-130.
Continued treatment.
Substantial possibility competency attained, §17-7-130.
Court's duty to inquire into competency, §17-7-129.
Definitions, §17-7-130.
Evaluation of accused's competency.
Accused found mentally incompetent to stand trial, §17-7-130.
Court order, §17-7-129.
Motion by accused requesting, §17-7-130.
Report, sealing, submission to accused's attorney, release to prosecuting attorney, §§17-7-129, 17-7-130.
Mental health advocacy division.
Duty to represent indigents, §17-12-11.
Mental health advocate, §17-12-11.
Proceedings upon plea of incompetence, §17-7-130.
Returning accused to custody of sheriff.
Accused determined competent, §17-7-130.
Special pea filed by accused.
Procedure upon, §17-7-130.
Speedy trial, demand.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Trial on issue of competency.
Court determining, §17-7-129.
Procedures, §17-7-130.

MENTAL EXAMINATIONS.
Criminal discovery.
Inspection and copying of results, §17-16-4.

MENTAL HEALTH.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Accused's mental incompetence at time of crime.
Proceedings upon plea, §17-7-131.
Accused's mental incompetency to stand trial.
Bona fide doubt as to competency.
Court's duty to inquire into competency, §17-7-129.
Court's duty to inquire into competency, §17-7-129.
Evaluation of accused's competency.
Court order, §17-7-129.
Report, sealing, submission to accused's attorney, release to prosecuting attorney, §17-7-129.
Proceedings upon plea of incompetency, §17-7-130.
Trial on issue of competency.
Court determining, §17-7-129.
Procedures, §17-7-130.
Accused's sanity at time of offense, §17-7-130.1.
Bail and recognizance.
Conditions not warranting forfeiture of bond for failure to appear.
Mental disability, §17-6-72.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Execution of mental incompetents, §§17-10-60 to 17-10-71.
Guilty but mentally ill or with intellectual disability at time of crime, §17-7-131.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Mental health advocacy division.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-5.
Insanity defense.
Accused's sanity at time of offense, §17-7-130.1.
Proceedings upon plea, §17-7-131.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.

MENTAL HEALTH —Cont'd
Criminal law and procedure —Cont'd
Mental health advocacy division —Cont'd
Indigents found not guilty by reason of insanity or incompetent to stand trial —Cont'd
Mental health advocate, §17-12-5.
Mentally incompetent to be executed, §§17-10-60 to 17-10-71.
Not guilty by reason of insanity, §17-7-131.
Plea of insanity.
Proceedings upon, §17-7-131.
Death penalty.
Generally, §§17-10-60 to 17-10-71.
Department of behavioral health and developmental disabilities.
Crime victims' bill of rights.
Notifications from department to victim, §17-17-5.1.
Victims of crime.
Notifications from department to victim, §17-17-5.1.
Discrimination.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Evidence.
Execution of mental incompetents.
Presumption of mental competency.
Prior adjudication of competence to be executed, §17-10-69.
Procedure to establish mental incompetency, §17-10-68.
Execution of mental incompetents, §§17-10-60 to 17-10-71.
Appeal of proceedings to establish mental incompetency, §17-10-70.
Defined terms.
Mentally incompetent to be executed, §17-10-60.
Determination of mental incompetency.
Effect, §17-10-61.
Presumption of mental competency.
Prior adjudication, §17-10-69.
Procedure to establish mental incompetency.
Applications.
Answer by respondent, §17-10-65.
Contents, §17-10-63.
Filing, §17-10-63.
When, §17-10-67.

MENTAL HEALTH —Cont'd
Execution of mental incompetents —Cont'd
Procedure to establish mental incompetency —Cont'd
Applications —Cont'd
Service, §17-10-64.
Evidence, §17-10-68.
Prior adjudication as presumption of mental competency, §17-10-69.
Examination of applicant, §17-10-66.
Exclusivity of procedure, §17-10-62.
Order of court, §17-10-68.
Procedure upon convicted person's regaining mental competency, §17-10-71.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Presumptions.
Execution of mental incompetents.
Prior adjudication of competence as presumption of competency, §17-10-69.

MENTAL HEALTH ADVOCACY DIVISION.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.
Mental health advocate, §17-12-5.

MENTAL HEALTH COURT DIVISIONS.
Public defenders.
Circuit public defender.
Compensation.
Accountability court salary supplement, §§17-12-25, 17-12-25.1.

MENTALLY INCOMPETENT TO STAND TRIAL, §§17-7-129, 17-7-130.
Mental health advocacy division.
Representation of indigents found, §17-12-11.

MERCY.
Capital cases.
"Guilty" verdicts.
Recommendations for mercy, §17-9-3.

MILITARY AFFAIRS.
Arrest.
Privilege from arrest for active personnel, §17-4-2.
Continuance of trial.
Active duty with national guard or armed forces.
Party, leading attorney or material witness on, §17-8-31.
Criminal proceedings.
Continuance.
Active duty with national guard or armed forces.
Party, leading attorney or material witness on, §17-8-31.

MILITIA.
Bail in criminal cases.
Acceptance of recognizance bond, §17-6-3.
Recognizance bonds in criminal cases.
Acceptance, §17-6-3.

MINISTERS.
Presence of clergyman at executions, §17-10-41.

MINORS.
Abandonment.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.
Allowing to witness commission of forcible felony.
Cruelty to children in the second degree.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Children in detention pending trial.
List provided chief judges and prosecuting attorneys, §17-7-3.
Cruelty to children.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Driving under the influence.
Appeal bonds, §17-6-1.

MINORS —Cont'd
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time for prosecution where victim under sixteen years of age, §17-3-2.1.
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Grand jury.
Time for presenting child's case to, §17-7-73.
Failure, transfer to juvenile courts, §17-7-73.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Life imprisonment.
Committal of person under 17, §17-10-14.
Malnutrition.
Cruelty to children in the first degree.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Motor vehicles and traffic laws.
Driving under the influence.
Appeal bonds, §17-6-1.
Parole.
Conditions of parole.
High school education or equivalent, §17-10-1.
Rape.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Restitution by juveniles, §17-14-5.
Sentencing.
Misdemeanors committed by minors generally, §17-10-3.
Person under 17 convicted of felony, §17-10-14.

MINORS —Cont'd
Sentencing —Cont'd
Sentencing certain juveniles, §17-10-14.
Suspension of sentences.
Condition on acquiring high school education or equivalent, §17-10-1.
Sexual offenses.
Child molestation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution for certain offenses where victim under sixteen years of age, §17-3-2.1.
Sodomy.
Aggravated child molestation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Victims of crime.
Forensic interviews.
Reimbursement of costs.
Grounds for reimbursement, §17-15-16.
Time of prosecution of offense involving a victim under sixteen years of age, §17-3-2.1.
Witnesses.
Child victim of or witness to crime.
Physical presence of accused, testimony outside of, §17-8-55.

MISDEMEANORS.
Accusations in misdemeanor cases, §§17-7-70, 17-7-71.

MISDEMEANORS —Cont'd
Arrest warrants.
Law enforcement officers.
Advising, encouraging or procuring dismissal or settlement of warrant, §17-4-28.
Collecting or receiving costs or other charges of prosecutor or defendant before warrant returned, §17-4-29.
Bail bondsmen.
Professional bondsmen.
Violations of provisions, §17-6-55.
Bail in misdemeanor cases, §17-6-2.
When bail not to be refused, §17-6-1.
Bail recovery agents, §17-6-58.
Bonds, surety.
Criminal bonds.
Excessive fees of sureties, §17-6-30.
Closing arguments of counsel.
Time limits, §17-8-72.
Community service.
In lieu of fine, §17-10-1.
Controlled substances.
Marijuana possession of one ounce or less.
Trial upon summons or citation without accusation, §17-7-72.
Cruelty to children in the second degree.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Discovery.
Criminal proceedings, §§17-16-20 to 17-16-23.
High and aggravated nature.
Punishment for generally, §17-10-4.
Law enforcement officers.
Arrest warrants.
Advising, encouraging or procuring dismissal or settlement of warrant, §17-4-28.
Collecting or receiving costs or other charges of prosecutor or defendant before warrant returned, §17-4-29.
Limitation on prosecutions, §17-3-1.
Nuclear power facilities.
Refusal to submit to search or vacate premises upon request by security officers, §17-4-20.
Profits from crimes.
Profits derived from entertainment media.
Violation of provisions, §17-14-32.

MISDEMEANORS —Cont'd
Punishment.
Generally, §17-10-3.
High and aggravated nature, §17-10-4.
Sentencing, §§17-10-3, 17-10-4.
High and aggravated nature.
Punishment, §17-10-4.
Punishment generally, §17-10-3.
Weekend in nonworking hour confinement, §17-10-3.1.
Son of Sam law.
Violation of provisions, §17-14-32.
Statute of limitations, §17-3-1.
Sureties.
Bail bondsmen.
Violations of provisions, §17-6-55.
Criminal bonds.
Excessive fees of sureties, §17-6-30.
Victims of crime.
Victim compensation.
False claims, §17-15-11.

MISNOMER.
Plea of misnomer, §17-7-112.

MISPRISION OF CLERK OR MINISTERIAL OFFICER.
Effect, §17-1-3.

MISTRIAL.
Criminal trials.
Argument of counsel.
Improper statements, §17-8-75.
Mention of possibility of clemency, §17-8-76.
Preparation of transcript where mistrial results in felony case, §17-8-5.

MITIGATING CIRCUMSTANCES.
Death penalty.
Consideration in imposing penalty, §17-10-30.

MOTIONS.
Arrest of judgment, §§17-9-60 to 17-9-63.
Criminal motions.
Filing and service, §17-1-1.
Time for filing pretrial motions, §17-7-110.
Directed verdict.
Criminal proceedings.
Acquittal of accused, §17-9-1.
Evidence.
Illegally seized evidence.
Motion to suppress, §17-5-30.

MOTIONS —Cont'd
Judgments.
Arrest of judgment, §§17-9-60 to 17-9-63.

MOTIONS IN ARREST.
Criminal procedure.
Judgments and decrees, §§17-9-60 to 17-9-63.

MOTOR CARRIERS.
Accusations in misdemeanor cases, §17-7-71.
Bonds for violations of laws.
Cash bonds, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.

MOTOR CARRIERS' ROAD TAX.
Accusations in misdemeanor cases, §17-7-71.
Bonds, surety.
Cash bonds for violations, §§17-6-5 to 17-6-8.
Bonds for violations of laws.
Cash bonds, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.

MOTOR VEHICLE ACCIDENTS.
Drivers' licenses.
Organ donations.
Examination of license at scene of fatal accident, §17-6-11.
Organ donations.
Examination of driver's license at scene of fatal accident, §17-6-11.

MOTOR VEHICLES.
Accusations in misdemeanor cases, §17-7-71.
Arrest for violations, §17-4-23.
Bonds for violations of laws.
Arrest of persons for failure to appear, §17-4-23.
Cash bonds, §§17-6-5 to 17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
Burglary.
Entering with intent to commit theft or felony.
Trial upon accusations, §17-7-70.1.
Carjacking.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.

MOTOR VEHICLES —Cont'd
Commercial motor vehicles.
Driving under the influence.
Appeal bonds, §17-6-1.
Criminal offenses.
Entering with intent to commit theft or felony.
Trial upon accusations, §17-7-70.1.
Habitual violators.
Operating motor vehicle with revoked license.
Trial upon accusations, §17-7-70.1.
Entering with intent to commit theft or felony.
Trial upon accusations, §17-7-70.1.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Hijacking of motor vehicle.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Homicide.
Homicide by vehicle.
Bail or other release from custody, §17-6-1.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Law enforcement agencies.
Disposition of property in custody of agency, §17-5-54.
Minors.
Driving under the influence.
Appeal bonds, §17-6-1.
Sentencing traffic offenders, §17-10-3.
Stolen motor vehicles.
Law enforcement agencies.
Disposition of property in custody of agency.
Determining if vehicle in custody of agency was stolen, §17-5-54.
Theft.
Voluntary surrender program, §17-10-9.1.
Vehicular homicide.
Bail or other release from custody, §17-6-1.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Warrants.
Failure to appear in court, §17-4-23.

MUNICIPAL CORPORATIONS.
Arrest warrants.
Issuance by certain municipal officers, §17-4-40.
Indigent persons.
Providing legal representation to indigents for ordinance or state law violations.
Contracting with circuit public defender, §17-12-23.
Generally, §§17-12-1 to 17-12-80.
Offenses against municipalities.
Cash bond, §17-6-10.
Officers.
Arrest warrants.
Issuance by officers clothed with powers of magistrates, §17-4-40.
Police.
Discovery in criminal cases.
Work location and phone number of police witnesses, §17-16-8.
Public defenders.
Additional personnel provided circuit public defenders.
Contracting with council for, §17-12-32.
Contracting with circuit public defender.
Providing legal representation to indigents for ordinance or state law violations, §17-12-23.
Legal defense of indigent defendants generally, §§17-12-1 to 17-12-80.
Recovery of payment or reimbursement.
From persons receiving legal services from public defender, §17-12-52.
Supplementation of salaries.
State paid personnel employed in circuit public defender's office, §17-12-30.

MUNICIPAL COURTS.
Criminal records.
Authority to seal, §17-8-6.
Littering offenses.
Trial of offenses upon summons or citation, §17-7-73.
Preliminary commitment hearings.
Persons who may hold, §17-7-20.
Powers of presiding officer to bind over or commit criminal offenders to jail, §17-7-22.
Records.
Criminal records.
Authority to seal, §17-8-6.

MUNICIPAL POLICE.
Discovery in criminal cases.
Work location and phone number of police witnesses, §17-16-8.

MURDER.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Felony murder.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Limitation on prosecutions, §17-3-1.
Witnesses.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

MUTINY.
Evidence.
Testimony of inmates in trials for crime of mutiny, §17-8-51.

N

NARCOTIC DETECTION DOGS.
Simple battery upon police dogs generally.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

NATIONAL ORIGIN.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

NEEDY PERSONS.
Legal defense for indigent defendants generally, §§17-12-1 to 17-12-80.

NEPHEWS.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

NEW TRIAL.
Crime victims' rights, §17-17-12.
Criminal jury trial.
Judge's expression or intimation of opinion as to matters proved or guilt of accused.
Granting of new trial, §17-8-57.
Victims of crimes, rights of, §17-17-12.

NGRI PLEAS, §17-7-131.

NIECES.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

NOLLE PROSEQUI.
Discharge and acquittal of accused.
Lack of prosecution after demand for trial, §17-7-170.
Capital cases and cases in which death penalty is sought, §17-7-171.
Entrance.
Extension of period for limitation on prosecutions, §17-3-3.
Entry, §17-8-3.

NOLO CONTENDERE, §17-7-95.
Trial upon plea of, §17-7-70.1.

NONAPPEARANCE.
Bail and recognizance.
Forfeiture of bond on principal's failure to appear, §17-6-31.
Unsecured judicial release.
Effect of failure to appear, §17-6-12.
Game fish or boating violation.
Failure to appear after giving cash bond, §17-6-8.
Litter violations.
Failure to appear after giving cash bond, §17-6-8.
Motor carriers, hazardous materials transportation and road taxes violations.
Failure to appear after giving cash bond, §17-6-8.
Traffic violations.
Failure to appear after giving cash bond, §17-6-8.

NONCRIMINAL INVENTORY SEARCHES.
Inventory of items seized without search warrant, §17-5-2.

NOTICE.
Accusations.
Against corporations, §17-7-92.
Aggravation, §17-10-2.
Arraignments, §17-7-91.
Arrested persons.
Time and place of commitment hearing, §17-4-26.
Effect of failure to notify, §17-4-26.
Arrest of judgment.
Making of motion, §17-9-60.
Criminal trials.
Preferred scheduling.
Disabled adult or elder victim, §17-8-1.
Harassment of victim or witness in criminal case.
Temporary restraining order or protective order, §17-17-16.
Indictments.
Against corporations, §17-7-92.
Law enforcement agencies.
Sale of personal property in custody of agency, §17-5-54.
Law enforcement officers.
Indictment or special presentment of peace officer for crime in performance of duties, §17-7-52.
Public defenders.
Capital defender division.
Financial eligibility for indigent defense services.
Timing of notification for eligibility, §17-12-80.
Sentencing.
Time from which sentence runs, §17-10-9.
Special presentments.
Against corporations, §17-7-92.

NOTICE OF APPEAL.
Death penalty cases.
Mental incompetents, §17-10-70.
Review of pretrial proceeding, §17-10-35.1.

NUCLEAR POWER FACILITIES.
Refusal to submit search or vacate premises upon request by security officers.
Criminal penalty, §17-4-20.
Security officers.
Use of force, searches, detention of persons on premises.
Powers, §17-4-20.

NURSING HOMES.
Battery by employee, agents or volunteer against patient, punishment.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

O

OATHS.
Witnesses.
Criminal trials, §17-8-52.

OBJECTIONS.
Criminal trials.
Jury.
Judge's expression or intimation of opinion as to matters proved or guilt of accused, §17-8-57.
Jury instructions.
Charges to jury, §17-8-58.

OBJECT RAPE.
Aggravated sexual battery.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

ORAL SEX.
Bail and recognizance, §17-6-1.
Sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims, §§17-18-1, 17-18-2.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.

ORDERS.
Criminal actions.
Vacation.
Effect of perjury, §17-1-4.
Protective orders.
Harassment of victim or witness, §17-17-16.
Vacation.
Criminal actions.
Effect of perjury, §17-1-4.

ORDINANCES.
Arrest.
Adoption or promulgation of conflicting ordinances, §17-4-20.

ORDINANCES —Cont'd
Bonds for violations.
Cash bonds, §17-6-10.

ORGANS.
Legal organs.
Disposition of property seized by police, §17-5-54.

P

PAIN AND SUFFERING.
Damages.
Defined, §17-14-2.

PANDERING.
By compulsion.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

PAPER.
Criminal law and procedure.
Pleadings, motions and other papers, §17-9-62.
Venue change.
List of papers, §17-7-151.

PARDONS AND PAROLES.
Argument of counsel.
Possibility of pardon or parole.
Arguing before jury, §17-8-76.
Conditions.
Restitution, §17-14-3.
Granting parole prior to completion of one-third of sentence, §17-14-4.
Credit for time in confinement.
Eligibility.
Confinement awaiting trial, receiving treatment, etc.
Use in determining parole eligibility, §17-10-11.
Crime victims' bill of rights.
Notification to victim of impending parole proceedings, §17-17-13.
Eligibility.
Credit for time in confinement.
Confinement awaiting trial, receiving treatment, etc.
Use in determining parole eligibility, §17-10-11.
Judge's authority, §17-10-1.
Hate crimes.
Restriction on eligibility for parole or early release, §17-10-17.

PARDONS AND PAROLES —Cont'd
Judges.
Authority.
Eligibility for parole, §17-10-1.
Minors.
Conditions of parole.
High school education or equivalent, §17-10-1.
Parole officers.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Restitution.
Conditions, §17-14-3.
Granting parole prior to completion of one-third of sentence, §17-14-4.
Powers of courts not limited or abrogated, §17-14-19.
Revocation of parole or conditional release.
Bond pending hearing.
When probationer not entitled to, §17-10-1.
Serious violent offenders, restrictions, §17-10-6.1.
Victims of crimes.
Rights of victims.
Notification of impending parole proceedings, §17-17-13.

PARENT AND CHILD.
Assault.
Simple assault committed between parents and children.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Cruelty to children.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Desertion of spouse or child.
Sentence suspension, modification or probation.
Payment of child support as condition, §17-10-1.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

PARENT AND CHILD —Cont'd
Incest —Cont'd
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Restitution.
Definition of parent, §17-14-2.
Obligation of parent for restitution, §17-14-5.

PAYMENT IN FULL.
Crime victims emergency fund.
Award payments, §17-15-10.

PEACE BONDS, §§17-6-110 to 17-6-114.
Breach of bond, §17-6-112.
Effect of provoking, §17-6-113.
Discharge by court, §17-6-114.
Extension by court, §17-6-114.
Good behavior bonds, §§17-6-90 to 17-6-92.
Issuance, §17-6-110.
Spouse's right to obtain against other spouse, §17-6-111.

PEACE OFFICERS.
Aliens.
Illegal alien status.
Investigation during investigation of criminal suspect, §17-5-100.
Arrest warrant for officer's arrest.
Issuance.
Alleged offense committed in performance of duties, §17-4-40.
Discovery in criminal cases.
Work location and phone number of police witnesses, §17-16-8.
False arrest or imprisonment.
Officers' liability, §17-4-61.
Illegal aliens.
Investigation of status during investigation of criminal suspect, §17-5-100.

PEONAGE.
Restitution orders.
Peonage not authorized, §17-14-15.

PERISHABLE PROPERTY.
Law enforcement agencies.
Disposition of property in custody of agency, §17-5-54.

PERJURY.
Criminal actions.
Vacation of judgments, verdicts, rules or orders, §17-1-4.

PERSONAL PROPERTY.
Law enforcement agencies.
Custody of property subject of crime or abandoned.
Return to owner, sale, retention or other disposition, §17-5-54.

PERSONS WITH DISABILITIES.
Protection of disabled adults and elder persons.
Arrest by law enforcement officers, §17-4-20.

PETITIONS.
Trafficking of persons for labor or sexual servitude.
Victims, vacating of sentence.
Petition, §17-10-21.

PHARMACISTS AND PHARMACIES.
Theft of controlled substances while in course of committing armed robbery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

PHOTOGRAPHS.
Criminal law and procedure.
Lineups.
Photo lineups.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.
Evidence.
Seized items unlawfully obtained.
Admissibility of photographs in lieu of original property, §17-5-50.
Lineups.
Photo lineups.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.

PHOTO LINEUPS.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.

PHYSICAL EXAMINATIONS.
Criminal discovery.
Inspection and copying of results, §17-16-4.

PHYSICIANS AND SURGEONS.
Death penalty.
Compelling to participate in execution, prohibition, §17-10-38.
Number required to be present at executions, §17-10-41.

PHYSICIANS AND SURGEONS —Cont'd
Death penalty —Cont'd
Participation in executions by medical professionals.
Licensure challenge, suspension or revocation, exemption, §17-10-42.1.
Preparation and filing of certificate of execution, §17-10-42.

PIMPING.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

PLEADINGS.
Criminal proceedings.
Defects in pleadings.
Arrest of judgment.
Grounds, §17-9-62.
Filing and service, §17-1-1.
Pretrial motions, filing, §17-7-110.

PLEAS.
Arraignments, §17-7-93.
Entering plea on indictment or accusation, §17-7-96.
Failure of clerk to record plea.
Effect, §17-7-97.
Guilty pleas.
Recordation and pronouncement of judgment, §17-7-93.
Withdrawal, §17-7-93.
No contest pleas, §17-7-95.
Not guilty pleas.
Recordation and effect, §17-7-94.
Where demurrer or special plea denied, §17-7-111.
Receipt and entering of plea, §17-7-91.
Silence of accused.
Recordation and effect, §17-7-94.
Special pleas, §17-7-111.
Entering plea on indictment or accusation, §17-7-96.
Guilty pleas.
Recordation and pronouncement of judgment, §17-7-93.
Withdrawal, §17-7-93.
Mental incompetency to stand trial.
Proceedings upon plea, §17-7-30.
No contest pleas, §17-7-95.
Not guilty pleas.
Recordation and effect, §17-7-94.

PLEAS —Cont'd
Not guilty pleas —Cont'd
Where demurrer or special plea denied, §17-7-111.
Plea of misnomer, §17-7-112.
Receipt and entering of plea, §17-7-91.
Recordation.
Failure of clerk to record, §17-7-97.
Guilty pleas, §17-7-93.
Not guilty pleas, §17-7-94.
Silence of accused, §17-7-94.
Silence of accused.
Recordation and effect, §17-7-94.

POLICE.
Aliens.
Illegal alien status.
Investigation during investigation of criminal suspect, §17-5-100.
Arrest warrant for officer's arrest.
Issuance.
Alleged offense committed in performance of duties, §17-4-40.
Battery upon police officers.
Simple battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Bias crime reports.
Submission to GBI, §17-4-20.2.
Illegal aliens.
Investigation of status during investigation of criminal suspect, §17-5-100.
Personal property in custody of law enforcement agency.
Property subject of crime or abandoned.
Return to owner, sale, retention or other disposition, §17-5-54.
Return of property to owner.
Custody of property subject of crime or abandoned, §17-5-54.
Sale of personal property.
Custody of property subject of crime or abandoned, §17-5-54.
Witnesses.
Discovery in criminal cases.
Work location and phone number of police officer, §17-16-8.

POLICE BRUTALITY.
Arrest of suspected felon.
Degree of force allowed, §17-4-20.

POLICE DOGS.
Simple battery upon.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

POLYGRAPH EXAMINERS.
Polygraph examinations.
Sexual assault protocol.
Victim's right to refuse request for polygraph examinations or other truth-telling devices, §17-5-73.

POOR PERSONS.
Attorneys.
Legal defense for indigent defendants generally, §§17-12-1 to 17-12-80.
Legal defense for indigent defendants generally, §§17-12-1 to 17-12-80.

POSSE.
Summoning, §17-4-24.

POSSESSION OF CONTROLLED SUBSTANCE OR MARIJUANA.
Trial upon accusation, §17-7-70.1.
Trial upon summons or citation without accusation, §17-7-72.

PREDISPOSITION.
Victim impact statements.
Hearings generally, §17-10-1.1.

PREGNANCY.
Assault of pregnant woman.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Simple battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Execution of expectant mothers, §§17-10-34, 17-10-39.

PRELIMINARY HEARINGS.
General provisions, §§17-7-20 to 17-7-34.

PRESENTENCE HEARINGS.
Felony cases, §17-10-2.

PRESENTMENTS.
Special presentments.
Against corporations, §17-7-92.
Law enforcement officers.
Indictment or special presentment of peace officer for crime in performance of duties, §17-7-52.

PRESENTMENTS —Cont'd
Special presentments —Cont'd
Presentation to jury, §17-8-2.
Prosecutions upon, §17-7-51.

PRESUMPTIONS.
Death penalty.
Mentally competent to be executed.
Prior adjudication of mental competence, §17-10-69.
Mental illness.
Execution of mental incompetents.
Prior adjudication of competence as presumption of competency, §17-10-69.

PRETRIAL CRIMINAL PROCEEDINGS.
General provisions, §§17-7-1 to 17-7-192.

PRETRIAL RELEASE AND DIVERSION PROGRAMS.
Electronic pretrial release and monitoring program.
Alternative to posting bail or as special condition of bond, §17-6-1.1.

PRINCIPALS OF SCHOOLS.
Arrest warrants.
Issuance for arrest of school administrators.
Alleged offense committed in performance of duties, §17-4-40.

PRISON GUARDS.
Death row inmates.
Transporting defendant to prison, §17-10-33.

PRISON LABOR.
Graffiti.
Removal by inmates, §§17-15A-1 to 17-15A-4.

PRISONS AND PRISONERS.
Arrested persons.
Imprisonment in county other than one in which offense committed, §17-4-25.
Persons arrested by private persons, §17-4-62.
Bail and recognizance.
Imprisonment of person who offers bond for amount of bail set, §17-6-15.

PRISONS AND PRISONERS —Cont'd
Bail and recognizance —Cont'd
Receipt of bail after imprisonment, §17-6-15.
Battery upon correctional officers.
Simple battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Correctional officers.
Simple battery upon.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Death row inmates.
Transporting defendant to prison, §17-10-33.
Department of corrections.
Restitution.
Remand of sentence.
Copies of restitution order to be provided to department, §17-14-16.
Earned-time allowances.
Persons sentenced for misdemeanors of a high and aggravated nature, §17-10-4.
Restitution as condition, §17-14-3.
Escape.
Trial upon accusations, §17-7-70.1.
Extradition of person imprisoned in another state, §17-13-24.
Extradition of person imprisoned in Georgia, §17-13-39.
Good time credits.
Earned-time allowances.
Restitution as condition, §17-14-3.
Parole.
Credit for time in confinement.
Confinement awaiting trial, receiving treatment, etc, §17-10-11.
Restitution as condition, §17-14-3.
Probation.
Restitution as condition, §17-14-3.
Graffiti.
Removal by inmates, §§17-15A-1 to 17-15A-4.
Jails.
Extradited persons, §§17-13-32, 17-13-35.
Fees.
Imposition upon prosecutor or complainant, §17-11-4.

PRISONS AND PRISONERS —Cont'd
Jails —Cont'd
Jailing of prisoners where no jail in county, §17-7-1.
Jail fees and costs, §17-7-1.
Sheriff's duty to receive prisoner from another county where fees and costs not paid, §17-7-2.
Preliminary commitments.
Delivery of accused to person in charge of jail, §17-7-32.
Release pending voluntary surrender, §17-10-9.1.
Mutinous conduct.
Trial of inmates for crime of mutiny, §17-8-51.
Rehabilitation programs.
Restitution as condition for placement, §17-14-3.
Release of prisoners.
Restitution as condition, §17-14-3.
Voluntary surrender program, §17-10-9.1.
Sexual assault against patient in hospitals.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Sexual assault against persons in custody.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Victims, blocking of communications from offender to, §17-17-12.1.
Witnesses.
Trials of inmates escaping from correctional institutions, §17-8-50.
Trials of inmates for crime of mutiny, §17-8-51.
Work-release programs.
Condition of probation, participation.
Defendant sentenced to probated confinement, §17-10-1.

PRISON TERMS.
Appeals.
Terms exceeding twelve years.
Three-judge panel review, disposition of cases currently under review of defunct panel, §17-10-6.3.
Bail recovery agents, §17-6-58.
Concurrent terms, §17-10-10.

PRISON TERMS —Cont'd
Credit for time.
Confinement awaiting trial, receiving treatment, etc, §§17-10-11, 17-10-12.
Restitution as condition of probation or parole, §17-14-3.
Voluntary surrender program, §17-10-9.1.
Earned time allowance.
Persons sentenced for misdemeanors of a high and aggravated nature, §17-10-4.
Restitution as condition, §17-14-3.
Felonies.
Imposition of misdemeanor punishment for felonies punishable by imprisonment for term of ten years or less, §17-10-5.
Repeat offenders, §17-10-7.
Guilt adjudication.
Required, §17-10-13.
Human trafficking for labor or sexual servitude.
Victims, vacating of sentence.
Petition, §17-10-21.
Minors.
Felons, §17-10-14.
Misdemeanors.
Generally, §17-10-3.
Misdemeanors of a high and aggravated nature, §17-10-4.
Weekend or nonworking hours of defendant, §§17-10-3, 17-10-3.1.
Serious violent offenders, §17-10-6.1.
Time from which term runs, §17-10-9.
Trafficking of persons for labor or sexual servitude.
Victims, vacating of sentence.
Petition, §17-10-21.
Weekend terms, §17-10-3.
Weekends or nonworking hours of defendant, §17-10-3.1.

PRIVILEGES AND PRIVILEGED COMMUNICATIONS.
Arrest.
Active duty military personnel.
Privilege from arrest, §17-4-2.
Crime victims' bill of rights.
Communications with victim assistance personnel privileged, §17-17-9.1.

PROBABLE CAUSE.
Arrest warrants.
Issuance based on, §17-4-40.

PROBATE COURTS.
Hearings.
Preliminary commitment hearings.
Judges.
Persons who may hold, §17-7-20.
Judges.
Preliminary commitment hearings.
Persons who may hold, §17-7-20.
Litter.
Trial of offenses upon summons or citation, §17-7-73.
Preliminary commitment hearings.
Judges.
Persons who may hold, §17-7-20.

PROBATION.
Active probation supervision.
Defined, §17-10-1.
Administrative probation supervision.
Defined, §17-10-1.
Behavioral incentive date in sentencing order, §17-10-1.
Community supervision officers.
Restitution.
Payments.
Duties of receivers of restitution payments, §17-14-8.
Remand of sentence.
Copies of restitution order to be provided to department, §17-14-16.
Split sentence.
Supervision post-incarceration.
Community supervision department role in supervision, §17-10-1.4.
Conditions.
Behavioral incentive date in sentencing order, §17-10-1.
Debt owed to state, payment, §17-15-13.
Fee for legal services, payment, §17-10-8.1.
Minor without high school diploma or equivalent, §17-10-1.
Public defender's costs for providing representation.
Repayment as condition, §17-12-51.
Restitution, §17-14-3.
Delinquent or unruly juveniles, §17-14-5.
Traffic offenders, §17-10-3.
PROBATION —Cont'd
Conditions —Cont'd
Work release program operated by county.
Participation by defendant sentenced to probated confinement, §17-10-1.
Debt owed to state.
Payment as condition of probation, §17-15-13.
Delinquent children.
Restitution as condition, §17-14-5.
Fees.
Legal services, payment.
Condition, §17-10-8.1.
Public defender's costs for providing representation.
Repayment as condition, §17-12-51.
Judge's authority, §17-10-1.
Juvenile court probation officers.
Restitution payments.
Duties of receivers of restitution payments, §17-14-8.
Juvenile courts.
Restitution as condition, §17-14-5.
Probation officers.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Restitution payments.
Duties of receivers of restitution payments, §17-14-8.
Public defender's costs for providing representation.
Repayment as condition, §17-12-51.
Restitution.
Conditions, §17-14-3.
Delinquent or unruly juveniles, §17-14-5.
Powers of courts not limited or abrogated, §17-14-19.
Retention of jurisdiction through out period of probated sentence.
Sentencing court, §17-10-1.
Revocation.
Authority of sentencing judge, §17-10-1.
Bond pending hearing.
When probationer not entitled to, §17-10-1.
Felon who paid fine as condition precedent to probation.
Rebate or refund of fine, §17-10-8.

PROBATION —Cont'd
Revocation —Cont'd
Place of serving sentence of probation revoked for violation, §17-10-1.
Serious violent offenders, §17-10-6.1.
Split sentence.
Mandatory minimum, additional probated sentence, §17-10-6.1.
Sexual offenders.
Conviction requiring registration.
Duration of active probation supervision, §17-10-1.
Split sentence.
Mandatory minimum, additional probated sentence, §17-10-6.2.
Shortening period of probation.
Sentencing court, §17-10-1.
Split sentence.
Mandatory minimum, additional probated sentence.
Serious violent offenders, §17-10-6.1.
Sexual offenders, §17-10-6.2.
Supervision post-incarceration.
Community supervision department role in supervision, §17-10-1.4.
Supervision.
Fee, §17-15-13.
Termination of supervision.
Time period, §17-10-1.
Traffic offenders, §17-10-3.
Violent offenders.
Serious violent offenders, §17-10-6.1.
Work release program operated by.
Participation condition of probation.
Defendant sentenced to probated confinement, §17-10-1.

PROCURING PROSTITUTE FOR ANOTHER.
Pimping.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

PROFESSIONAL BONDSMEN, §§17-6-50 to 17-6-55.

PROFITS FROM CRIMES.
Search pursuant to lawful arrest.
When authorized, §17-5-1.
Son of Sam law, §§17-14-30 to 17-14-32.

PROPERTY.
Trespass.
Criminal trespass.
Arrest by citation, §17-4-23.

PROPERTY DAMAGE.
Criminal trespass.
Arrest by citation, §17-4-23.
Graffiti.
Compensation for criminally inflicted property, §§17-15A-1 to 17-15A-4.
Graffiti defined, §17-15A-2.
Legislative authority for enacting provisions, §17-15A-1.
Legislative findings, §17-15A-3.
Removal of graffiti by inmates, §17-15A-4.

PROSECUTING ATTORNEYS.
Children in detention pending trial.
List provided.
Responsibility of official in charge facility in which child detained, §17-7-3.

PROSTITUTION.
Pandering.
By compulsion.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Pimping.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Trafficking of persons for labor or sexual servitude.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.

PROTECTIVE ORDERS.
Victims or witnesses.
Harassment, §17-17-16.

PSYCHOTHERAPY.
Sexual assault by practitioner of psychotherapy against patient.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

PUBLICATION.
Law enforcement agencies.
Notice of sale of personal property in custody of agency, §17-5-54.

PUBLIC DEFENDER COUNCIL.
Generally, §§17-12-1 to 17-12-12.1.

PUBLIC DEFENDER COUNCIL —Cont'd
Legal defense of indigents generally, §§17-12-1 to 17-12-80.

PUBLIC DEFENDERS, §§17-12-1 to 17-12-80.
Actions and proceedings requiring representation, §17-12-23.
Alternative delivery system.
Single county composing judicial circuit, §17-12-36.
Appointed counsel.
Capital defender division.
Division unable to defend.
Appointment of private counsel, §17-12-12.1.
Conflict of interest of circuit defender, §17-12-22.
Assistance provided public defenders.
Public defender council, §17-12-6.
Assistant public defender.
Additional assistants, employment, §§17-12-27, 17-12-31.
Appointment for each superior court judge, §17-12-27.
Classification based on education, training and experience, §17-12-27.
Defined, §17-12-2.
Georgia bar membership required, §17-12-33.
Identification card, issuance to, §17-12-27.
Private practice of law prohibited, bar membership required, §17-12-33.
Promotion to next highest class, §17-12-27.
Salary range and advancements, §17-12-27.
Attorney's fees, recovery, §§17-12-50 to 17-12-52.
County or municipality.
Recovery of payment or reimbursement, §17-12-52.
Definitions, §17-12-50.
Repayment as condition of probation, §17-12-51.
Budget of council, §17-12-26.
Capital defender division.
Indigents charged with capital felony.
Capital defender, §17-12-5.
Division unable to defend.
Appointment of private counsel, §17-12-12.1.

PUBLIC DEFENDERS —Cont'd
Capital defender division —Cont'd
Indigents charged with capital felony —Cont'd
Duty to represent, §17-12-12.
Circuit public defender.
Additional personnel, employment, §§17-12-27, 17-12-31.
Contracting with council for.
Counties or municipalities providing additional personnel, §17-12-32.
Administrative, clerical and paraprofessional personnel.
Employment, compensation, §§17-12-29, 17-12-31.
Alternative delivery system.
Single county composing judicial circuit, §17-12-36.
Appeals.
Removal, §17-12-20.
Assistant public defender.
Appointment, classification, salary, §§17-12-27, 17-12-31.
Georgia bar membership required, §17-12-33.
Private practice of law prohibited, bar membership required, §17-12-33.
Authority, duties and powers.
Personnel employed by defender, §17-12-30.
Budget, §17-12-26.
Cases in which representation required, §17-12-23.
Classification of personnel employed by defender, §17-12-30.
Conflict of interest.
Appointment of attorneys to represent indigents, §17-12-22.
Contracting with local governments.
Representing indigents violating ordinances or state laws, §17-12-23.
Day-to-day operation of office, §17-12-24.
Defined, §17-12-2.
Deputy defenders, employment, §17-12-31.
Effective date of article, §17-12-37.
Eligibility to fill position, §17-12-21.
Evaluation of job performance.
Director of council, §17-12-5.
Expenses of office.
Pro rata sharing by counties in district, §17-12-34.

PUBLIC DEFENDERS —Cont'd
Circuit public defender —Cont'd
Financial eligibility for indigent defense services.
Determining, §17-12-24.
Timing of notification, §17-12-80.
Fiscal officer.
Public defender council, §17-12-6.
Funds and grants from public or private source.
Accepting, §17-12-35.
Identification card, issuance to, §17-12-27.
Independent contractors, employment, §17-12-31.
Investigator.
Appointment, duties, salary, §§17-12-28, 17-12-31.
Juvenile division.
Circuit defender to establish, §17-12-23.
Law students assisting in defense of indigent defendants.
Third-year law students and staff instructors, §§17-12-40 to 17-12-45.
Nomination of people to serve, §17-12-20.
Private practice of law prohibited, §17-12-25.
Qualifications, §17-12-21.
Records, §17-12-24.
Removal, §17-12-20.
Required representation, §17-12-23.
Review of job performance, §17-12-20.
Salary and cost-of-living adjustments, §17-12-25.
Salary for state paid personnel, §17-12-30.
Selection, §17-12-20.
State employees in unclassified service.
Full-time employees of office, §17-12-27.
Supervisory panel, §17-12-20.
Review of defender's job performance.
Annual review, §17-12-20.
Supplemental personnel.
Employment, compensation, §17-12-29.
Supplementation of salary.
Accountability court salary supplement, §§17-12-25, 17-12-25.1.

PUBLIC DEFENDERS —Cont'd
Circuit public defender —Cont'd
Supplementation of salary —Cont'd
County or counties comprising district, §17-12-25.
Terms, §17-12-20.
Third-year law students and staff instructors.
Assisting in defense of indigent defendants, §§17-12-40 to 17-12-45.
Travel budget, §17-12-26.
Vacancy, §17-12-20.
Circuit public defender supervisory panel, §17-12-20.
Conflict of interest.
Capital defender division.
Division unable to defend capital defendant.
Appointment of private counsel, §17-12-12.1.
Circuit public defender.
Appointment of attorneys to represent indigents, §17-12-22.
Continuing legal education for public defenders and staff.
Council, approval for credit or reimbursement, §17-12-9.
Contracting with local governments.
Circuit public defenders.
Representing indigents violating ordinances or state laws, §17-12-23.
Council.
Georgia public defender council, §§17-12-1 to 17-12-12.1.
Definitions, §17-12-2.
Effective date of article.
Circuit public defender, §17-12-37.
Third-year law students and staff instructors.
Assisting in defense of indigent defendants, §17-12-45.
Entitlement of indigent to counsel.
Actions and proceedings requiring representation, §17-12-23.
Financial eligibility for indigent defense services.
Determination by circuit public defender and others providing services, §17-12-24.
Timing of notification, §17-12-80.
Georgia indigent defense act.
Short title, §17-12-1.
Georgia public defender council, §§17-12-1 to 17-12-12.1.

PUBLIC DEFENDERS —Cont'd
Identification cards.
Issuance to circuit public defender, assistant public defender or local public defender, §17-12-27.
Immunity of public defender council.
Act or failure to act in carrying out purposes of article, §17-12-10.2.
Circuit public defender selection panel and other policy-making or administrative personnel, §17-12-10.1.
Investigators.
Appointment, qualifications, duties, salary, §§17-12-28, 17-12-31.
Law students assisting in defense of indigent defendants.
Third-year law students and staff instructors, §§17-12-40 to 17-12-45.
Mental health advocacy division.
Indigents found not guilty by reason of insanity or incompetent to stand trial.
Duty to represent, §17-12-11.
Mental health advocate.
Director of council to hire, §17-12-5.
Probation.
Repayment by defendant represented by public defender.
Condition of probation, §17-12-51.
Public defender council, §§17-12-1 to 17-12-12.1.
Alternative delivery system.
Single county composing judicial circuit, §17-12-36.
Assistance provided public defenders, §17-12-6.
Auditing procedures, adoption, annual audit, §17-12-4.
Authority, §17-12-4.
Best interest of indigent defendants.
Members to act in, §17-12-7.
Budget, §17-12-26.
Director to propose, requirements, §17-12-5.
Chairperson, §17-12-7.
Compensation and expenses, §17-12-7.
Continuing education for public defenders and staff.
Approval for credit or reimbursement, §17-12-9.
Created, §17-12-3.

PUBLIC DEFENDERS —Cont'd
Public defender council —Cont'd
Director.
Annual report, §17-12-5.
Direct legal representation to persons entitled to services.
Prohibited, §17-12-5.
Eligibility for appointment, §17-12-5.
Mental health advocate.
Duty to hire, §17-12-5.
Powers and authority, §17-12-5.
Private practice of law.
Prohibited, §17-12-5.
Qualifications for appointment, §17-12-5.
Removal of circuit public defender, §17-12-20.
Responsibilities, §17-12-5.
Support services and programs, §17-12-5.
Divisions within office.
Director may establish, §17-12-5.
Fiscal officer for circuit public defender, §17-12-6.
Immunity from civil liability.
Act or failure to act in carrying out purposes of article, §17-12-10.2.
Independent agency.
Within judicial branch of state government, §17-12-1.
Legislative oversight committee, §17-12-10.1.
Meetings, §17-12-7.
Membership.
Number, appointment, terms, vacancy, §17-12-3.
Qualifications, §17-12-3.
Minute of meetings.
Required to keep and maintain, §17-12-7.
Officers, §17-12-7.
Powers and duties, §17-12-4.
Quorum, §17-12-7.
Removal, §17-12-7.
Reports, §17-12-10.
Responsibility, §17-12-1.
Retirement compensation received by administrative or clerical staff.
Compensation from council funds, restrictions, §17-12-4.
Support services and programs.
Director to provide, §17-12-5.
Travel budget for circuit defenders, §17-12-26.
Voting entitlement, §17-12-7.

PUBLIC DEFENDERS —Cont'd
Recovery of attorney's fees, §§17-12-50 to 17-12-52.
Short title.
Georgia indigent defense act, §17-12-1.
Third-year law students and staff instructors.
Assisting in defense of indigent defendants, §§17-12-40 to 17-12-45.
Authorization to assist, §17-12-41.
Dean's certificate.
Clerk of court to keep on file, §17-12-43.
Definitions, §17-12-40.
Effective date of article, §17-12-45.
Exception to qualification requirements for public defenders, §17-12-44.
Form and manner of assistance.
Judge may prescribe, §17-12-42.
Judge may prescribe type of assistance, §17-12-42.
Oath of student and instructor.
Clerk of court to keep on file, §17-12-43.
Order of judge.
Clerk of court to keep on file, §17-12-43.
Qualification requirements for public defenders.
Exceptions to, §17-12-44.
Restrictions on assisting, §17-12-41.
Verification of indigency required, §17-12-80.

PUBLIC OFFICERS AND EMPLOYEES.
Conversion of public property.
Limitation on prosecutions.
Excluded periods, §17-3-2.
Grand jury.
Witnesses.
Right of public official to appear at grand jury, §17-7-70.1.
Limitation on prosecutions.
Conversion of public property.
Excluded periods, §17-3-2.

PUBLIC RECORDS.
Inspection of public records.
Exceptions to requirement.
Bias crime reports, §17-4-20.2.

PURCHASING CONTROLLED SUBSTANCE OR MARIJUANA.
Trial upon accusation, §17-7-70.1.

Q

QUASHING INDICTMENTS.
First indictments, §17-3-3.
Second indictments, §17-7-53.1.

QUESTIONNAIRES.
Death penalty.
Pretrial proceedings review, §17-10-35.1.
Supreme court.
Review of death sentences, §17-10-35.

R

RACIAL MINORITIES.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

RACING ON HIGHWAYS OR STREETS.
Habitual violators.
Trial upon accusations, §17-7-70.1.

RAILROADS.
Assault in public transit vehicle or station.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery in public transit vehicle or station.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

RAPE.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.

RAPE —Cont'd
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
DNA testing.
Sexual assault protocol.
Preservation of evidence, §17-5-71.
Information for victims of rape, §§17-18-1, 17-18-2.
Limitation of actions, §17-3-1.
Prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Medical examinations.
Sexual assault protocol.
Preservation of evidence, §17-5-71.
Object rape.
Aggravated sexual battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Spousal rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Statute of limitations, §17-3-1.
Victim under sixteen years of age, §17-3-2.1.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.

REASONABLE DOUBT.
Death penalty.
Procedure for imposition, §17-10-30.
Guilty but mentally ill at the time of crime, §17-7-131.
Guilty but with intellectual disability, §17-7-131.
Venue generally, §17-2-2.

RECIDIVISTS.
Sentencing.
Felons, §17-10-7.
Traffic laws.
Habitual violators.
Trial upon accusations, §17-7-70.1.

RECORDATION.
Arraignments.
Failure of clerk to record arraignment.
Effect, §17-7-97.
Not guilty plea and silence of accused, §17-7-94.
Bail and recognizance.
Receipt of cash bond on docket, §17-6-4.
Criminal proceedings.
Testimony in felony cases, §17-8-5.
Death penalty.
Change of time period for execution where time period set has lapsed, §17-10-40.
Pleas.
Failure of clerk to record, §17-7-97.
Guilty pleas, §17-7-93.
Guilty pleas at arraignments, §17-7-93.
Not guilty pleas, §17-7-94.
Silence of accused, §17-7-94.

RECORDS.
Arrest.
Open for public inspection, §17-4-27.
Criminal proceedings.
Capital felony expenses.
Maintenance of records by clerks of superior courts, §17-11-24.
Death sentence.
To whom copies sent, §17-10-33.
Defects in records.
Grounds for motion in arrest of judgment, §17-9-62.
Felonies, §§17-16-1 to 17-16-10.
Misdemeanors, §§17-16-20 to 17-16-23.
Death penalty.
To whom copies sent, §17-10-33.
Municipal courts.
Criminal records.
Authority to seal, §17-8-6.
Public defenders.
Circuit public defender, §17-12-24.
Searches and seizures.
Property unlawfully obtained, §17-5-50.

RECTUM.
Sodomy.
Information for victims, §§17-18-1, 17-18-2.

RECUSAL.
Death sentence reviews.
Grounds, §17-10-35.1.

REFUND FRAUD.
Arrest by citation, §17-4-23.

REFUNDS.
Fraud, offense of.
Arrest by citation, §17-4-23.

RELIGION.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Discrimination.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

REMANDS.
Supreme court.
Death sentence reviews, §17-10-35.

REPEAT OFFENDERS.
Sentencing felons, §17-10-7.
Traffic law violators.
Generally, §17-7-70.1.

REPORTS.
AIDS.
Persons convicted of AIDS transmitting crimes.
Results of HIV test, §17-10-15.
Bias crime reports, §17-4-20.2.
Criminal proceedings.
Felonies, §§17-16-1 to 17-16-10.
Misdemeanors, §§17-16-20 to 17-16-23.
Family violence.
Investigative report by law enforcement officer, §17-4-20.1.
Public defender council, §17-12-10.
Victim compensation.
Decision by director, §17-15-6.
Georgia crime victims compensation board, §17-15-4.

RESTITUTION, §§17-14-1 to 17-14-19.
Amount, §17-14-9.
Factors to be considered in determining, §17-14-10.

RESTITUTION —Cont'd
Burden of proof.
Hearing to determine restitution, §17-14-7.
Change in order, §17-14-12.
Civil actions against offender.
Effect of restitution order on, §17-14-11.
Collection of restitution in criminal cases, §17-10-20.
Compensation of victims of crimes.
Crime victim's compensation board.
Reduction of award from by amount of restitution, §17-14-6.
Crime victims emergency fund.
Payments to and by, §17-14-18.
Generally, §§17-15-1 to 17-15-16.
Governmental entities that have compensated victim.
Payment of restitution to, §17-14-6.
Conditions of relief.
Definition of relief, §17-14-2.
Poor persons, §17-14-15.
Prior total or partial restitution.
Setoff, §17-14-6.
Requiring restitution, §17-14-3.
Requiring restitution by juvenile, §17-14-5.
Crime victims' bill of rights.
Information to be provided to prosecuting attorney, §17-17-8.
Crime victims emergency fund.
Payments to and by, §17-14-18.
Declaration of public policy, §17-14-1.
Definitions, §17-14-2.
Enforcement of order, §17-14-13.
Fieri facias.
Collection of restitution in criminal cases, §17-10-20.
Fines.
Apportionment of payments for fines and restitution, §17-14-8.
Fraudulent transfers.
Action to set aside, §17-14-17.
Hearing to determine restitution, §17-14-7.
Interest, §17-14-14.
Juvenile courts, §17-14-5.
Modification of order, §17-14-12.
Multiple offenders or victims, §17-14-7.
Nature.
Factors to be considered in determining, §17-14-10.

RESTITUTION —Cont'd
Parent and child.
Definition of parent, §17-14-2.
Obligation of parent for restitution, §17-14-5.
Payment, §17-14-8.
Crime victims emergency fund.
Payments to and by, §17-14-18.
Governmental entities that have compensated victim.
Payment of restitution to, §17-14-6.
Interest, §17-14-14.
Review of compliance, §17-14-14.
Wage assignments, §17-14-14.
Peonage not authorized, §17-14-15.
Plan of offender, §17-14-7.
Policy of state, §17-14-1.
Poor persons.
Conditions of relief, §17-14-15.
Powers of courts.
Provisions not to limit or abrogate, §17-14-19.
Prior restitution.
Setoff, §17-14-6.
Probation.
Conditions, §17-14-3.
Delinquent or unruly juveniles, §17-14-5.
Powers of courts not limited or abrogated, §17-14-19.
Profits of accused.
Derived from entertainment media.
Distribution to victims or representatives, §§17-14-30 to 17-14-32.
Remand of sentence.
Copies of restitution order to be provided to corrections and juvenile justice departments, §17-14-16.
Right of offender to offer plan, §17-14-7.
Sanctions for failure to comply with order, §17-14-13.
Setoffs.
Prior total or partial restitution made to victim, §17-14-6.
Restitution payments against judgments in civil actions, §17-14-11.
Victim impact statements.
Consideration when entering order of restitution, §§17-10-1.1, 17-10-1.2.
Voidable transactions.
Action to set aside deceptive transfers under voidable transactions act, §17-14-17.

RESTITUTION —Cont'd
Wage assignments, §17-14-14.
Waiver of victim's rights, §17-14-7.

RETAILERS.
Refund fraud.
Arrest by citation, §17-4-23.

RETRIAL.
Capital felony expenses, §§17-11-21, 17-11-22.

ROBBERY.
Armed robbery.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Bail and recognizance.
Armed robbery.
Where offense bailable, §17-6-1.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
By intimidation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

RULES AND REGULATIONS.
Bail and recognizance.
Display of drivers' licenses for violations of laws pertaining to traffic, motor vehicles, etc., §17-6-11.
Professional bonding companies, §17-6-15.

S

SALARIES.
Public defenders.
Assistant public defender, §17-12-27.
Circuit public defender, §17-12-25.
Investigator, §§17-12-27, 17-12-28.
State paid personnel.
Employed in circuit public defender's office, §17-12-30.

SALE OF CONTROLLED SUBSTANCE OR MARIJUANA.
Trial upon accusation, §17-7-70.1.

SALES.
Refunds.
Fraudulent attempts to obtain.
Crime of refund fraud.
Arrest by citation, §17-4-23.

SANITY.
Criminal law and procedure.
Time of offense.
Evidence, §17-7-130.1.
Examination.
Trial admissibility, §17-7-130.1.

SCHOOLS AND EDUCATION.
Arrest warrants.
Issuance for arrest of teachers or school administrators.
Alleged offense committed in performance of duties, §17-4-40.
Assault and battery.
Simple assault against employee of public school system.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Athletics.
Battery against sports officials.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Interscholastic extracurricular sports.
Battery against sports officials.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Personnel.
Arrest warrants.
Issuance for arrest of teachers or school administrators.
Alleged offense committed in performance of duties, §17-4-40.
Sexual assault by person in disciplinary or supervisory position of authority.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Investigating sexual assault, §§17-5-70 to 17-5-73.

SCHOOLS AND EDUCATION —Cont'd
Sports.
Battery against sports officials.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SCIENTIFIC EVIDENCE.
Biological material evidence.
Maintenance and preservation, §17-5-56.

SEALS AND SEALED INSTRUMENTS.
Criminal records.
Authority of municipal court, §17-8-6.

SEARCHES AND SEIZURES, §§17-5-1 to 17-5-56.
Arrested persons.
Searches pursuant to lawful arrest.
Authorized, §17-5-1.
Inventory and return of items seized, §17-5-2.
Disposition of property seized.
Devices with historical or instructional value, §17-5-53.
Personal property in custody of law enforcement agency, §17-5-54.
Return of items seized.
Items seized pursuant to search warrants, §17-5-29.
Items seized pursuant to warrantless searches, §17-5-2.
Unlawfully obtained property, §17-5-50.
Unlawfully obtained property, §17-5-50.
Weapons used in commission of crime or illegally concealed, §17-5-52.
Dockets.
Maintenance of docket record of warrants issued, §17-5-22.
Evidence.
Documentary evidence in possession of attorney, §17-5-32.
Illegally seized evidence.
Motion to suppress, §17-5-30.
Property unlawfully obtained.
Admissibility of photographs in lieu of original property, §17-5-50.
Use of statements made by defendant or agent at trial, §17-5-50.
Suppressing evidence because of technicalities, §17-5-31.

SEARCHES AND SEIZURES —Cont'd
Exclusion of illegally seized evidence.
Documentary evidence in possession of attorney, §17-5-32.
Motion to suppress, §17-5-30.
Illegally seized evidence.
Documentary evidence in possession of attorney.
Exclusion, §17-5-32.
Motion to suppress, §17-5-30.
Inventory of items seized.
Property unlawfully obtained, §17-5-50.
Warrantless searches, §17-5-2.
Where searches pursuant to warrants, §17-5-29.
Nuclear power facility security officers.
Power to search persons on premises, §17-4-20.
Probable cause requirement.
Issuance of search warrant, §17-5-21.
Records.
Property unlawfully obtained, §17-5-50.
Return of items seized.
Unlawfully obtained property, §17-5-50.
Warrantless searches, §17-5-2.
Where searches pursuant to warrants, §17-5-29.
Scope of search.
Permissible scope, §17-5-21.
Searches without warrants, §§17-5-1, 17-5-2.
Search warrants, §§17-5-20 to 17-5-32.
Applications.
Who may apply, §17-5-20.
Contents.
Command to officer directed to execute warrant, §17-5-23.
General requirements, §17-5-21.
Time and date, §17-5-22.
Documentary evidence in possession of attorney.
Requirement of warrant, §17-5-32.
Execution.
Assistance to officers in execution of warrant.
Persons acting under direction of officers, §17-5-21.
Command to officer, §17-5-23.

SEARCHES AND SEIZURES —Cont'd
Search warrants —Cont'd
Execution —Cont'd
Copy of warrants.
Where to be left, §17-5-25.
Detention of persons on premises, §17-5-28.
Devices.
Electronic, laser, etc, devices, use in executing warrant authorized, §17-5-21.
Force in execution, §17-5-27.
Officers who may execute warrants, §17-5-24.
Search of persons on premises, §17-5-28.
Time limitation, §17-5-25.
When warrant may be executed, §17-5-26.
Force in execution, §17-5-27.
Issuance.
Docket record.
Maintenance, §17-5-20.
Grounds, §17-5-21.
Probable cause requirement, §17-5-21.
Requirements generally, §17-5-20.
Time and date.
Required, §17-5-22.
Video conference, §17-5-21.1.
Who may apply, §17-5-20.
Who may issue, §17-5-21.
Judges emeritus, §17-5-21.
Retired judges, §17-5-21.
Officers authorized to execute, §17-5-24.
Quashing because of technical irregularities, §17-5-31.
Video conference.
Issuance by, §17-5-21.1.
When warrant may be executed, §17-5-26.
Warrantless searches, §§17-5-1, 17-5-2.

SECOND DEGREE CRUELTY TO CHILDREN.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SELF-INCRIMINATION.
Accused.
Privilege against.
No presumption, no comment on failure to testify.
Commitment hearings, §17-7-28.

SELF-INCRIMINATION —Cont'd
Law enforcement officers.
Indictment or special presentment of officer for crime in performance of duties.
Prohibition against requiring self-incrimination, §17-7-52.

SENTENCING, §§17-10-1 to 17-10-21.
Appeals.
Prison terms exceeding twelve years.
Three-judge panel review, disposition of cases currently under review of defunct panel, §17-10-6.3.
Serious violent offenders.
State appeal where sentence imposed not in conformance with provisions, §17-10-6.1.
Victim impact statements.
Noncompliance with statutory provisions, §§17-10-1.1, 17-10-1.2.
Bias or prejudice.
Defendants guilty of crimes involving bias or prejudice.
Enhanced penalties, §17-10-17.
Notification of intention to seek, §17-10-18.
Recommencement of trial for determination, §17-10-19.
Change or modification.
Judge's authority, §17-10-1.
Prison terms exceeding twelve years.
Three-judge panel review, disposition of cases currently under review of, §17-10-6.3.
Citizenship status of convict.
Factoring into determination, §17-10-1.3.
Collection of fines in criminal cases, §17-10-20.
Concurrent sentences, §17-10-10.
Credit for time in confinement.
Confinement awaiting trial, receiving treatment, etc, §§17-10-11, 17-10-12.
Misdemeanor of high and aggravated nature.
Earned time allowance, §17-10-4.
Defendant previously appearing before juvenile court.
Cases involving felony.
Availability of records of dispositions of defendant as well as evidence in juvenile court, §17-10-1.

SENTENCING —Cont'd
Departure from mandatory minimum term.
Serious violent offenders, when lesser sentence permitted, §17-10-6.1.
Sexual offenders, when lesser sentence permitted, §17-10-6.2.
Determinate sentence for specific number of months or years.
Duty of judge to prescribe when fixing sentence, §17-10-1.
Early release.
Serious violent offenders, restrictions, §17-10-6.1.
Earned time allowance.
Misdemeanor of high and aggravated nature, §17-10-4.
Felony cases.
Fine, maximum amount, §17-10-8.
Imposition of misdemeanor punishment for felonies punishable by imprisonment for term of ten years or less, §17-10-5.
Minor under 17 convicted of felony, §17-10-14.
Presentence hearings, §17-10-2.
Repeat offenders, §17-10-7.
Fieri facias.
Collection of fines and restitution in criminal cases, §17-10-20.
Financial obligations other than restitution, factors in sentencing, §17-10-1.
Fixing of sentence, §17-10-1.
Good-time allowances.
Misdemeanor of high and aggravated nature, §17-10-4.
Guilt adjudication.
Prerequisite to assessment of punishment, §17-10-13.
Hate crimes.
Enhanced penalties, §17-10-17.
Notification of intention to seek, §17-10-18.
Recommencement of trial for determination, §17-10-19.
Human trafficking.
Labor or sexual servitude.
Trafficking of persons for.
Victims, vacating of sentence.
Petition, §17-10-21.
Judge's authority and responsibility.
Generally, §17-10-1.
Judge's duty to impose, §17-9-2.

SENTENCING —Cont'd
Jurisdiction.
Punishment for misdemeanors of a high and aggravated nature, §17-10-4.
Juvenile courts.
Cases involving felonies.
Previous appearance by defendant.
Availability of records of dispositions of defendant and evidence, §17-10-1.
Life without parole, §17-10-16.
Sentencing without seeking death penalty, §17-10-16.1.
Mandatory minimum term.
Serious violent offenders, §17-10-6.1.
Sexual offenders, §17-10-6.2.
Minors.
Misdemeanors committed by minors generally, §17-10-3.
Person under 17 convicted of felony, §17-10-14.
Sentencing certain juveniles to department of corrections, §17-10-14.
Suspension of sentences.
Condition on acquiring high school education or equivalent, §17-10-1.
Misdemeanor cases.
Generally, §17-10-3.
Misdemeanors of a high and aggravated nature, §17-10-4.
Mitigation of sentence.
Death penalty.
Consideration of mitigating circumstances, §17-10-30.
Modification.
Judge's authority, §17-10-1.
Prison terms exceeding twelve years.
Three-judge panel review, disposition of cases currently under review of, §17-10-6.3.
No contest cases, §17-7-95.
Presentence hearings.
Felony cases, §17-10-2.
Punishment for serious violent offenders, §17-10-6.1.
Reduction of sentences.
Judge's authority, §17-10-1.
Prison terms exceeding twelve years.
Three-judge panel review, disposition of cases currently under review, §17-10-6.3.
Serious violent offenders, restrictions, §17-10-6.1.

SENTENCING —Cont'd
Repeat offenders.
Felons, §17-10-7.
Review of prison terms exceeding twelve years.
Disposition of cases currently under review of three-judge panel, §17-10-6.3.
Serious violent felony.
Defined, §17-10-6.1.
Serious violent offenders, §17-10-6.1.
Sexual offenders.
Split sentence, mandatory minimum, additional probated sentence, §17-10-6.2.
Split sentence.
Defined, §17-10-1.4.
Serious violent offenders.
Mandatory minimum, additional probated sentence, §17-10-6.1.
Sexual offenders.
Mandatory minimum, additional probated sentence, §17-10-6.2.
Supervision post-incarceration.
Community supervision department role, §17-10-1.4.
Suspension of sentences.
Abandonment of dependent child.
Payment of child support as condition of suspension, §17-10-1.
Conditions, §17-10-1.
Judge's authority.
Generally, §17-10-1.
Minor without high school education or equivalent, §17-10-1.
Restitution as condition, §17-14-3.
Traffic offender cases, §17-10-3.
Time from which sentence runs, §17-10-9.
Trafficking of persons for labor or sexual servitude.
Victims, vacating of sentence.
Petition, §17-10-21.
Traffic offenders, §17-10-3.
Vacating of sentence.
Trafficking victims, petition for vacation, §17-10-21.
Victim impact statements, §§17-10-1.1, 17-10-1.2.
Waiver of fines on determination of significant financial hardship, §17-10-1.
Weekend confinements, §17-10-3.
Work release.
Serious violent offenders, restrictions, §17-10-6.1.

SERIAL KILLERS.
Son of Sam law generally, §§17-14-30 to 17-14-32.

SERIOUS VIOLENT OFFENDERS.
Punishment generally, §17-10-6.1.
Serious violent offense defined, §17-10-6.1.
Competency to stand trial, §17-7-130.

SERVICE OF PROCESS.
Accusations.
Against corporations.
Notice of filing, §17-7-92.
Arraignments, §17-7-91.
Bench warrants, §17-7-90.
Corporations.
Indictments, special presentments or accusations.
Notice of filing, §17-7-92.
Criminal pleadings, motions and other papers, §17-1-1.
Extradited persons.
Persons brought into Georgia.
Immunity from service as to civil actions based on facts in criminal charge, §17-13-45.
Immunity.
Extradited persons.
Persons brought into Georgia.
Immunity from service as to civil actions based on facts in criminal charge, §17-13-45.
Indictments against corporations.
Notice of filing, §17-7-92.
Special presentments.
Against corporations.
Notice of filing, §17-7-92.

SETOFFS.
Restitution.
Prior total or partial restitution made to victim, §17-14-6.
Restitution payments against judgments in civil actions, §17-14-11.

SETTING ASIDE.
Effect of perjury in criminal actions, §17-1-4.

SEX DISCRIMINATION.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

SEX DISCRIMINATION —Cont'd
Criminal law and procedure.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

SEX OFFENDERS.
Registration.
Probation supervision, duration, §17-10-1.

SEX SLAVES.
Trafficking of persons for labor or sexual servitude.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.

SEXUAL ASSAULT.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Protocol.
Definitions, §17-5-70.
Investigating sexual assault, §§17-5-70 to 17-5-73.

SEXUAL ASSAULT PROTOCOL.
Definitions, §17-5-70.
Failure of crime victim to cooperate, §17-5-71.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Polygraph examinations or other truth-telling devices.
Victim's right to refuse request, §17-5-73.
Preservation of evidence, §17-5-71.
Right to free forensic medical examination, §17-5-72.
Sexual offenses.
DNA analysis.
Preservation of evidence, §17-5-71.

SEXUAL BATTERY.
Aggravated sexual battery.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.

SEXUAL BATTERY —Cont'd
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.

SEXUAL INTERCOURSE.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.

SEXUAL OFFENSES.
Bail and recognizance, §17-6-1.
Battery.
Sexual battery.
Aggravated sexual battery.
Bail and recognizance.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Information for victims of rape or sodomy, §§17-18-1, 17-18-2.
Minors.
Enticing child for indecent purposes.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Sodomy.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Statutory rape.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution for certain offenses where victim under sixteen years of age, §17-3-2.1.

SEXUAL OFFENSES —Cont'd
Sentencing.
Split sentence for sexual offenders.
Mandatory minimum, additional probated sentence, §17-10-6.2.
Sexual assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Investigating sexual assault, §§17-5-70 to 17-5-73.
Split sentence for sexual offenders.
Mandatory minimum, additional probated sentence, §17-10-6.2.
Trafficking of persons for labor or sexual servitude.
Compensation through federal government.
Notification to victim, §17-17-6.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.
Trial.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Victims of crime.
Information for rape or sodomy victims, §§17-18-1, 17-18-2.

SEXUAL ORIENTATION.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.
Hate crimes.
Bias crime reports, §17-4-20.2.
Sentence enhancements for crimes involving bias, prejudice, hate, §17-10-17.

SHERIFFS.
Bias crime reports.
Submission to GBI, §17-4-20.2.
Children in detention pending trial.
List provided chief judges and prosecuting attorneys.
Responsibility of official in charge facility in which child detained, §17-7-3.

SHERIFFS —Cont'd
Deputies.
Cash bonds for violations of various laws.
Acceptance of bonds, §17-6-5.
Death row inmates.
Conveyance to appropriate state correctional institution prior to execution, §17-10-33.
Fugitives from justice.
Execution of warrants for arrest, §17-13-5.
Recognizance bonds for military personnel.
Terms and conditions, §17-6-3.
Discovery in criminal cases.
Work location and phone number of law enforcement witnesses, §17-16-8.
Personal property in custody of law enforcement agency.
Property subject of crime or abandoned.
Return to owner, sale, retention or other disposition, §17-5-54.
Return of property to owner.
Custody of property subject of crime or abandoned, §17-5-54.
Sale of personal property.
Custody of property subject of crime or abandoned, §17-5-54.
Sexual assaults.
Investigating sexual assault, §§17-5-70 to 17-5-73.

SHOPLIFTING.
Arrest by citation, §17-4-23.
Trial upon accusations, §17-7-70.1.

SHOW CAUSE ORDERS.
Bail and recognizance.
Good behavior bonds, issuance, §17-6-90.

SHOWUPS.
Identification procedures for lineups and showups, §§17-20-1 to 17-20-3.

SILENCE.
Arraignments.
Recordation and effect of accused's silence, §17-7-94.

SIMPLE ASSAULT.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SIMPLE BATTERY.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SLAVERY.
Trafficking of persons for labor or sexual servitude.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.

SODOMY.
Aggravated child molestation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Aggravated sodomy.
Bail and recognizance.
Appeal bonds, §17-6-1.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Bail and recognizance.
Aggravated sodomy.
Where offense bailable, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
DNA testing.
Aggravated sodomy.
Preservation of evidence, §17-5-71.
Information for victims, §§17-18-1, 17-18-2.
Medical examinations.
Sexual assault protocol.
Right to free forensic medical examination, §17-5-72.
Minors.
Aggravated child molestation.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Sexual assault protocol.
Investigating sexual assault, §§17-5-70 to 17-5-73.

SODOMY —Cont'd
Time of prosecution.
Where victim under sixteen years of age, §17-3-2.1.
Trafficking of persons for labor or sexual servitude.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.

SOLICITING ACT OF PROSTITUTION.
Pandering by compulsion.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SON OF SAM LAW, §§17-14-30 to 17-14-32.

SPECIAL PRESENTMENTS.
Against corporations, §17-7-92.
Presentation to jury, §17-8-2.
Prosecutions upon, §17-7-51.

SPEEDY TRIAL.
Capital cases.
Demand for, filing, §17-7-171.
Discharge for lack of timely prosecution, §17-7-171.
Time for trial when demand filed, §17-7-171.
Competency of defendant proceedings.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Demand for, filing, §17-7-170.
Capital cases, §17-7-171.
Expiration of demand, §17-7-170.
Lack of prosecution after demand made for trial.
Discharge and acquittal of accused, §17-7-170.
Capital cases and cases in which death penalty is sought, §17-7-171.
Mistrial of case in which demand filed.
Time for trial, §17-7-170.
Party, leading attorney or material witness on active duty with national guard or armed forces.
Continuance granted, tolling of demand, §17-8-31.

SPEEDY TRIAL —Cont'd
Reversal of case on appeal.
New demand required, §17-7-170.
Time for trial when demand filed, §17-7-170.
Capital cases, §17-7-171.

SPLIT SENTENCE.
Defined, §17-10-1.4.
Serious violent offenders.
Mandatory minimum, additional probated sentence, §17-10-6.1.
Sexual offenders.
Mandatory minimum, additional probated sentence, §17-10-6.2.
Supervision post-incarceration.
Community supervision department role, §17-10-1.4.

SPORTS OFFICIALS.
Amateur sporting events.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SPOUSAL SODOMY.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

STALKING.
Aggravated stalking.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Bail and recognizance.
Where offenses bailable.
Aggravated stalking, §17-6-1.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Offense of violating family violence order.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

STATE AUDITOR.
Extradition.
Payment of expenses on warrant of state auditor, §17-13-44.

STATE COURTS OF COUNTIES.
Children in detention pending trial.
List provided chief judge.
Responsibility of official in charge facility in which child detained, §17-7-3.
Judges.
Arrest warrants.
Issuance, §17-4-40.

STATE DEPARTMENTS AND AGENCIES.
Public defender council, §§17-12-1 to 17-12-12.1.
Public defender standards council, §§17-12-1 to 17-12-12.1.

STATE PATROL.
Discovery in criminal cases.
Work location and phone number of police witnesses, §17-16-8.

STATISTICS.
Family violence.
Publication, §17-4-20.1.

STATUTE OF LIMITATIONS.
Criminal prosecutions.
Excluded periods, §17-3-2.
Extension of periods, §17-3-3.
Generally, §17-3-1.
Sexual offenses involving minors.
Where victim under sixteen years of age, §17-3-2.1.
Victim 65 or older, §17-3-2.2.
Cruelty to children.
Time of prosecution of offense where victim under sixteen years of age, §17-3-2.1.
Death penalty cases, §17-3-1.
Felonies, §17-3-1.
Misdemeanors, §17-3-1.
Rape, §17-3-1.
Statutory rape.
Prosecution where victim under sixteen years of age, §17-3-2.1.
Restitution.
Fraudulent transfers.
Action to set aside, §17-14-17.
Sexual offenses.
Time of prosecution where victim under sixteen years of age, §17-3-2.1.
Sodomy.
Prosecution of offense where victim under sixteen years of age, §17-3-2.1.

STATUTE OF LIMITATIONS —Cont'd
Statutory rape.
Prosecution where victim under sixteen years of age, §17-3-2.1.
Trusts and trustees.
Conversion of property.
Criminal prosecutions.
Excluded periods, §17-3-2.
Victims of crimes.
Compensation.
Claims.
Time to file, §17-15-5.

STATUTORY RAPE.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.

STAYS.
General assembly members or staff.
General assembly in session, presence elsewhere required by general assembly duties.
Criminal trials, §17-8-26.

STEPCHILDREN.
Family violence.
Battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Stepdaughters.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Stepsons.
Incest.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

STEPPARENTS.
Assault committed between stepparents and stepchildren, punishment.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Battery.
Simple battery between parent and child, punishment.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

STEPPARENTS —Cont'd
Family violence battery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

STREET GANGS.
Bail and pretrial release.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for, §17-6-12.
Probable cause showing pattern of criminal gang activity, §17-6-1.
Criminal gang activity defined.
Unlawful participation in street gang activity.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Participation in criminal gang activity.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

SUA SPONTE.
Vulgar evidence.
Closed trial, §17-8-53.

SUBPOENAS.
Commitment hearings.
Compelling attendance, power of court, §17-7-25.
Criminal proceedings.
Commitment hearings.
Compelling attendance, power of court, §17-7-25.
Defense witnesses, §17-7-191.
Grand jury or trial proceedings, §§17-7-190 to 17-7-192.
Subpoenaing upon change of venue, §17-7-151.
Grand jury.
Material witnesses for state, §17-7-190.

SUBROGATION.
Crime victims' compensation.
Rights of state, §17-15-12.
Victim compensation payments.
Rights of state, §17-15-12.

SUMMONS AND PROCESS.
Legislators exemption, §17-8-28.
Litter offenses.
Trial upon summons with or without accusation, §17-7-73.

SUPERIOR COURTS.
Children in detention pending trial.
List provided chief judge.
Responsibility of official in charge of facility in which child detained, §17-7-3.
Clerks of court.
Capital felony expenses.
Maintenance of records by clerks, §17-11-24.
Judges.
Arrest warrants.
Issuance, §17-4-40.
Bail authority.
Delegation, §17-6-1.
Preliminary commitment hearings.
Persons who may hold, §17-7-20.
Jurisdiction.
Bailable offenses, §17-6-1.
Fugitives from justice.
Trials of inmates, §17-8-50.

SUPERSEDEAS.
Appeal bonds, §17-6-1.

SUPPRESSION OF EVIDENCE.
Searches and seizures.
Documentary evidence.
Illegally obtained evidence, §17-5-32.
Motion to suppress, §17-5-30.
Technical irregularity not affecting substantial rights of accused.
No suppression, §17-5-31.

SUPREME COURT.
Assistant to court.
Death penalty.
Review of death sentences, §17-10-37.
Death penalty.
Appeals to supreme court.
Assistant to court.
Review of death sentences, §17-10-37.
Felony cases.
Preparation of transcript by court reporter.
Petition to chief justice for additional period of time, §17-8-5.
Justices.
Chief justice.
Felony case transcript preparation.
Petition by court reporter for additional period of time, §17-8-5.

SUPREME COURT —Cont'd
Transcript from court below.
Felony cases.
Petition by court reporter for additional time for preparation, §17-8-5.

SURETIES.
Criminal bonds, §§17-6-30 to 17-6-55.

T

TEACHERS.
Arrest warrant issuance for arrest of teacher.
Alleged offense committed in performance of duties, §17-4-40.
Battery against teacher.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

TENDER OF PAYMENT.
Bail and recognizance.
Commitment of arrestee.
Commitment hearings.
Tender of bail after waiver of hearing.
Entry of memorandum on warrant, §17-6-16.

THEFT.
Appropriating property of another.
Trial upon accusations, §17-7-70.1.
By conversion.
Limitation on prosecutions.
Excluded periods, §17-3-2.
By shoplifting.
Arrest by citation, §17-4-23.
Trial upon accusations, §17-7-70.1.
By taking.
Trial upon accusations, §17-7-70.1.
Controlled substances.
Taking from pharmacy in course of committing armed robbery.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Credit card theft.
Trial upon accusations, §17-7-70.1.
Financial transaction cards.
Trial upon accusations, §17-7-70.1.
Limitation on prosecutions.
Conversion of property.
Excluded periods, §17-3-2.
Refund fraud.
Arrest by citation, §17-4-23.

THEFT —Cont'd
Shoplifting.
Arrest by citation, §17-4-23.
Trial upon accusations, §17-7-70.1.
Taking property of another.
Trial upon accusations, §17-7-70.1.
Trial upon accusations, §17-7-70.1.

THIRD-YEAR LAW STUDENTS.
Legal defense of indigent defendants.
Third-year law students and staff instructors assisting, §§17-12-40 to 17-12-45.

TICKETS.
Refunds.
Fraudulent attempts to obtain.
Refund fraud generally.
Arrest by citation, §17-4-23.

TIME.
Probation supervision.
Termination, §17-10-1.
Sentencing.
Time from which sentence to run.
Effect of appeal, §17-10-9.
Specification by judge imposing sentence, §17-10-9.

TORTURE.
Death penalty.
Imposition.
Aggravating circumstances, §17-10-30.

TRAFFICKING.
Cocaine.
Bail and recognizance.
Appeal bonds, §17-6-1.
Where offense bailable, §17-6-1.
Labor or sexual servitude.
Trafficking of persons for.
Compensation through federal government.
Notification to victim, §17-17-6.
Prosecution of offense.
Time where victim under sixteen years of age, §17-3-2.1.
Victims, vacating of sentence.
Petition, §17-10-21.
Marijuana.
Bail and recognizance.
Appeal bonds, §17-6-1.

TRAFFIC LAWS.
Accusations in misdemeanor cases, §17-7-71.
Arrest for violations, §17-4-23.

TRAFFIC LAWS —Cont'd
Bonds for violations.
Cash bonds, §§17-6-5 to 17-6-8.
Failure to appear.
Admission of guilt and forfeiture of bond, §17-6-8.
Display of driver's license in lieu of bail, recognizance or incarceration, §17-6-11.
Cash bonds for violations, §§17-6-5 to 17-6-8.
Failure to appear after giving bond.
Admission of guilt, §17-6-8.
Failure to appear after giving cash bond, §17-6-8.
Fleeing or attempting to elude officer while using motor vehicle.
Habitual violator.
Trial upon accusations, §17-7-70.1.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Homicide by vehicle.
Bail or other release from custody, §17-6-1.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Infractions.
Sentencing offenders, §17-10-3.
Racing on highways or streets.
Habitual violators.
Trial upon accusations, §17-7-70.1.
Sentencing offenders, §17-10-3.
Vehicular homicide.
Bail or other release from custody, §17-6-1.
Habitual violators.
Trial upon accusations, §17-7-70.1.

TRANSCRIPTS.
Death penalty cases.
Testimony, §17-8-5.
Felony cases.
Testimony, §17-8-5.

TREASON.
Bail and recognizance.
Where offense bailable, §17-6-1.
Death penalty.
Imposition authorized, §17-10-30.

TRESPASS.
Criminal trespass.
Arrest by citation, §17-4-23.
Property.
Criminal trespass.
Arrest by citation, §17-4-23.

TRIAL.
Closing arguments.
Criminal cases, §§17-8-71 to 17-8-74.
Criminal trials.
General provisions, §§17-8-1 to 17-8-76.
Fugitives, §17-8-50.
Speedy trial.
Capital cases.
Demand, filing, §17-7-171.
Discharge for lack of timely prosecution, §17-7-171.
Time for trial when demand filed, §17-7-171.
Competency of defendant proceedings.
Period of time not included in determining if demand satisfied, §§17-7-170, 17-7-171.
Demand for, filing, §17-7-170.
Expiration of demand, §17-7-170.
Lack of prosecution after demand for trial.
Discharge and acquittal of accused, §17-7-170.
Capital cases, §17-7-171.
Mistrial.
Time of trial, §17-7-170.
Party, leading attorney or material witness on active duty with national guard or armed forces.
Continuance granted, tolling of demand, §17-8-31.
Reversal of case.
New demand required, §17-7-170.
Time for trial when demand filed, §17-7-170.
Capital cases, §17-7-171.

TRUSTS AND TRUSTEES.
Conversion of property.
Limitation on prosecutions.
Excluded periods, §17-3-2.
Limitation of action.
Conversion of property.
Criminal prosecutions.
Excluded periods, §17-3-2.

U

UNCLAIMED PROPERTY.
Evidence.
Custody, storage and disposal, §17-5-55.

UNCLAIMED PROPERTY —Cont'd
Police or other law enforcement.
Personal property subject of crime or abandoned in custody of agency.
Sale, retention, return to owner or other disposition, §17-5-54.

UNDERAGE DRINKING.
Arrest by citation, §17-4-23.
Trial upon summons or citation without accusation, §17-7-72.

UNIFORM CRIMINAL EXTRADITION ACT.
General provisions, §§17-13-20 to 17-13-49.
Short title, §17-13-20.

UNIFORMS.
Bail recovery agents.
Restrictions on wearing of uniforms, §17-6-58.

UNIVERSITY SYSTEM OF GEORGIA.
Board of regents.
Continuances in criminal trials.
Grounds for granting.
Party or parties' counsel in attendance at meeting of board of regents, §17-8-29.

V

VACATION OF COURT ORDERS.
Perjury, §17-1-4.

VANDALISM AND DAMAGING PROPERTY.
Graffiti.
Compensation for criminally inflicted property, §§17-15A-1 to 17-15A-4.
Graffiti defined, §17-15A-2.
Legislative authority for enacting provisions, §17-15A-1.
Legislative findings, §17-15A-3.
Removal of graffiti by inmates, §17-15A-4.

VANS.
Assault in public transit vehicle or station.
Simple assault.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

VANS —Cont'd
Battery in public transit vehicle or station.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.

VEHICULAR HOMICIDE.
Bail or other release from custody, §17-6-1.
Habitual violators.
Trial upon accusations, §17-7-70.1.

VENUE.
Change of venue.
Criminal proceedings, §§17-7-150 to 17-7-152.
Costs and expenses, §17-11-5.
Defendant arrested, held or present in county other than that in which indictment or accusation is pending, §17-2-4.
Issuance of subpoenas, §17-7-151.
Procedures, §17-7-150.
Subsequent change, §17-7-152.
Transfer of evidence, list of witnesses and papers, §17-7-151.
Criminal proceedings, §§17-2-2, 17-2-3.
Change of venue, §§17-7-150 to 17-7-152.
Costs and expenses, §17-11-5.
Defendant arrested, held or present in county other than that in which indictment or accusation is pending, §17-2-4.
Issuance of subpoenas to witnesses, §17-7-151.
Procedures, §17-7-150.
Subsequent changes, §17-7-152.
Transfer of evidence, list of witness and papers, §17-7-151.
Defendant arrested, held or present in county other than that in which indictment or accusation is pending, §17-2-4.

VERDICTS.
Criminal proceedings.
Acquittal of accused.
Directed verdict, §17-9-1.
Action by juror on private knowledge as to facts, witnesses, etc., §17-9-20.

VERDICTS —Cont'd
Criminal proceedings —Cont'd
Amendment of verdict after dispersion of jury, §17-9-40.
Construction, §17-9-2.
Death penalty, §17-10-30.
Jury instructions, §17-10-31.
Jury not recommending mercy, §17-9-3.
Requirement of jury finding of aggravating circumstance and recommendation of death penalty, §17-10-31.
Directed verdict, §17-9-1.
Duty to impose verdict, §17-9-2.
Guilty verdicts.
Recommendations for mercy in capital cases, §17-9-3.
Effect of no recommendation for mercy, §17-9-3.
Where defendant under age of 17 at time of commission of offense, §17-9-3.
Judge's expression of approval or disapproval of verdict, §17-9-22.
Commending or complimenting of jury, §17-9-23.
Life without parole.
Jury instructions, §17-10-31.
Perjury.
Vacation, §17-1-4.
Province of jury, §17-9-2.
Receipt of verdict, §17-9-21.
Death penalty, §17-10-30.
Jury instructions, §17-10-31.
Requirement of jury finding of aggravating circumstance, §17-10-31.
Where jury does not recommend mercy in verdict, §17-9-3.
Directed verdict.
Acquittal of accused, §17-9-1.
Interpretation.
Criminal proceedings, §17-9-2.
Judge's approval or disapproval.
Criminal proceedings, §17-9-22.
Commending or complimenting of jury by judge, §17-9-23.
Life without parole.
Jury instructions, §17-10-31.
Perjury in criminal action.
Vacation, §17-1-4.

VERIFICATION.
Crime victims.
Compensation claims, §17-15-5.

VETERANS COURT DIVISIONS.
Public defenders.
Circuit public defender.
Compensation.
Accountability court salary supplement, §§17-12-25, 17-12-25.1.

VICTIMS OF CRIMES.
AIDS transmitting crimes.
HIV test of person arrested or convicted, report of results, §17-10-15.
Aliens.
Illegal aliens status.
Victim's immigration status not investigated, §17-5-100.
Appeals.
Rights of victims.
Failure to provide rights not to constitute basis for error, §17-17-15.
Notification of accused's motion for appeal, §17-17-12.
Retention of rights on appeal, §17-17-12.
Arrest.
Rights of victims.
Notification of accused's arrest, §17-17-7.
Bail and recognizance.
Rights of victims.
Notification of accused's release on bail or recognizance, §17-17-12.
Compensation, §§17-15-1 to 17-15-16.
Acceptance of award.
Effect, §17-15-12.
Amount of award, §17-15-8.
Claims.
Contents, §17-15-5.
False claims, §17-15-11.
Filing, §17-15-5.
Rejection, §17-15-8.
Report of decision to claimant, §17-15-6.
Time to file, §17-15-5.
Verification, §17-15-5.
Conviction of victim for felony involving criminally injurious conduct.
Ineligible for award, §17-15-7.
Criminally responsible for crime upon which claim based.
Ineligible for compensation, exception, §17-15-7.

VICTIMS OF CRIMES —Cont'd
Compensation —Cont'd
Criminally responsible person.
Ineligible for compensation, §17-15-7.
Definitions, §17-15-2.
Effect of date for award, §17-15-8.
Eligibility, §17-15-7.
Exemption from garnishment, execution and treatment as ordinary income, §17-15-8.
False claims, §17-15-11.
Findings required, §17-15-8.
Forensic interviews.
Costs, §17-15-16.
Grounds for reimbursement, §17-15-16.
Forensic medical examination.
Defined, §17-15-2.
Responsibility for costs, §17-15-15.
Funding to victim service providers for disseminating information, §17-15-14.
Georgia crime victims compensation board.
Appointment of members, §17-15-3.
Created, §17-15-3.
Criminal justice coordinating council.
Service as board, §17-15-3.
Criminal justice coordinating council director.
Appointment by governor, §17-15-3.
Duties generally, §17-15-4.
Expenses, §17-15-3.
Powers generally, §17-15-4.
Restitution.
Reduction of award from board by amount of restitution, §17-14-6.
Review of director's decision, §17-15-6.
Georgia crime victims emergency fund.
Administration, §17-15-9.
Appropriations, §17-15-9.
Compensation payments to be made into fund, §17-15-13.
Created, §17-15-9.
Insufficiency of fund to pay compensation, §17-15-10.
Payments authorized, §17-15-9.
Payments to and by fund, §17-14-18.
Injury suffered by victim while confined in correctional facility.
Ineligible for award, §17-15-7.

VICTIMS OF CRIMES —Cont'd
Compensation —Cont'd
Intent of legislature, §17-15-1.
Interviews.
Forensic interviews, §17-15-16.
Investigation of claims, §17-15-6.
Legislative intent, §17-15-1.
Mandatory reporting requirement.
Delay in reporting, §17-15-8.
Memorial sign erected on state highway.
Deceased victim of homicide caused by violation of drunk driving statute.
Award to eligible claimant, §17-15-8.
Payment.
Authorized from Georgia crime victims emergency fund, §17-15-9.
Insufficiency of fund to pay compensation, §17-15-10.
Subrogation rights of state, §17-15-12.
Persons eligible, §17-15-7.
Property loss.
Award not made for, §17-15-7.
Psychological counseling.
Expenses, §17-15-8.
Reductions, §17-15-8.
Rights of victims.
Defined, §17-17-3.
Notification of availability of victims' compensation, §17-17-6.
Son of Sam law, §§17-14-30 to 17-14-32.
Victim trafficked for labor or sexual servitude.
Compensation through federal government, notification, §17-17-6.
Crime victims' bill of rights, §§17-17-1 to 17-17-16.
Address of victim.
Victim required to provide current address to notifying parties, §17-17-14.
Appeals.
Failure to provide rights not to constitute basis for error, §17-17-15.
Notification of accused's motion for appeal, §17-17-12.
Retention of victims' rights on appeal, §17-17-12.

VICTIMS OF CRIMES —Cont'd
Crime victims' bill of rights —Cont'd
Attendance at criminal proceedings, §17-17-9.
Behavioral health and developmental disabilities department.
Notification from department to victim, §17-17-5.1.
Blocking of communications from offender, §17-17-12.1.
Citation of provisions, §17-17-2.
Communications with victim assistance personnel privileged, §17-17-9.1.
Compensation.
Defined, §17-17-3.
Notification of availability of victims' compensation, §17-17-6.
Criminal justice coordinating council.
Designated as coordinating agency, §17-17-6.
Current address of victim.
Requirement by court that defense counsel not disclose victim information to accused, §17-17-10.
Damages, §17-17-15.
Death sentence.
Commutation, notice to victim of hearing on request, §17-17-13.
Defense counsel.
Requirement by court that defense counsel not disclose victim information to accused, §17-17-10.
Definitions, §17-17-3.
Disabled victim.
Designation of family member to act in place of, §17-17-4.
Effect of provisions, §17-17-15.
Enumeration of rights, §17-17-1.
Exclusion of victim from criminal proceedings, §17-17-9.
Harassment of victim or witness.
Temporary restraining orders or protective orders, §17-17-16.
Information concerning victim.
Disclosure to accused.
Requirement by court that defense counsel not disclose, §17-17-10.
Interview with accused or attorney or agent of accused.
Rights regarding, including right to refuse, §17-17-8.1.

VICTIMS OF CRIMES —Cont'd
Crime victims' bill of rights —Cont'd
Legislative declaration, §17-17-1.
New trial.
Notification of accused's motion for new trial, §17-17-12.
Retention of victims' rights at new trial, §17-17-12.
Notification.
Appellate proceedings, §17-17-12.
Arrest of accused, §17-17-5.
Availability of victims' compensation and services, §17-17-6.
Bail or recognizance.
Release of accused on, §17-17-12.
Behavioral health and developmental disabilities department, §17-17-5.1.
Current address and phone number.
Victim required to provide to notifying parties, §17-17-14.
Death sentence, commutation.
Request for commutation, notice of hearing, §17-17-13.
Defined, §17-17-3.
Failure to provide required notifications.
Effect, §17-17-15.
Legal procedures and victim's rights in relations thereto.
Prosecuting attorney to notify, §17-17-8.
Motion for accused for new trial or appeal, §17-17-12.
Pardon, consideration.
Advance notification to victim of consideration of pardon, §17-17-13.
Parole.
Impending parole proceedings, §17-17-13.
Pretrial release of accused, §17-17-6.
Prompt advance notification of court proceedings, §17-17-8.
Release from custody and any judicial proceedings at which such release considered, §§17-17-4, 17-17-7.
Impending release of offender from imprisonment.
Extended release (more than 60 days), advance notification to victim of consideration, §17-17-13.
Pretrial release of accused, §17-17-6.

VICTIMS OF CRIMES —Cont'd
Crime victims' bill of rights —Cont'd
Notification —Cont'd
Restitution sought by victim.
Information to be provided to prosecuting attorney, §17-17-8.
When notifications required, §17-17-5.
Opinion as to pending proceedings.
Victim's right to express opinion, §17-17-7.
Opinion on disposition of accused's case.
Right of victim to express opinion, §17-17-11.
Pardon.
Consideration of pardon.
Advance notification to victim of consideration of pardon, §17-17-13.
Parole.
Notification of impending parole proceedings, §17-17-13.
Physically disabled victim.
Designation of family member to act in place of, §17-17-4.
Policy of state, §17-17-1.
Prosecuting attorney.
Defined, §17-17-3.
Duties, §§17-17-5, 17-17-7, 17-17-8.
Offering victim right to express opinion, §17-17-11.
Protective orders.
Harassment of victim or witness, §17-17-16.
Release of accused.
Complaint to prosecuting attorney.
Right to file event of release, §17-17-7.
Extended release (more than 60 days).
Advance notification to victim of consideration of release, §17-17-13.
Requests not to receive mail or other communications from offender, §17-17-12.1.
Restitution sought by victim.
Information to be provided to prosecuting attorney, §17-17-8.
Separate victims' waiting areas, §17-17-9.

VICTIMS OF CRIMES —Cont'd
Crime victims' bill of rights —Cont'd
Telephone number of victim.
Requirement by court that defense counsel not disclose victim information to accused, §17-17-10.
Victim required to provide to notifying parties, §17-17-14.
Temporary restraining orders.
Harassment of victim or witness, §17-17-16.
Title of provisions, §17-17-2.
Victim trafficked for labor or sexual servitude.
Compensation through federal government, notification, §17-17-6.
Waiting areas.
Separate victims' waiting areas, §17-17-9.
Waiver of rights by victim, §17-17-15.
Damages.
Rights of victims.
Failure of responsible person to comply with notification requirements, §17-17-15.
Definitions.
Rights of victims, §17-17-3.
Forensic medical examination.
Defined, §17-15-2.
Free examination, right to, §17-5-72.
Responsibility for costs, §17-15-15.
Harassment of victim.
Temporary restraining order or protective order, §17-17-16.
Human trafficking, labor or sexual servitude.
Vacating of sentence.
Petition for vacating of sentence, §17-10-21.
Illegal alien status.
Victim's immigration status not investigated, §17-5-100.
Information dissemination.
Funding to service providers, §17-15-14.
Rape or sodomy victims, §§17-18-1, 17-18-2.
Minors.
Time of prosecution of offense involving a victim under sixteen years of age, §17-3-2.1.
New trial.
Rights of victims.
Notification of accused's motion for new trial, §17-17-12.

VICTIMS OF CRIMES —Cont'd
New trial —Cont'd
Rights of victims —Cont'd
Retention of rights at new trial, §17-17-12.
Pardons and paroles.
Rights of victims.
Notification of impending parole proceedings, §17-17-13.
Profits of accused.
Derived from entertainment media.
Distribution to victims or representatives, §§17-14-30 to 17-14-32.
Contracts regarding reenactment, §17-14-31.
Definitions, §17-14-30.
Violations of article, §17-14-32.
Protective orders.
Harassment of victim, §17-17-16.
Psychological counseling.
Relatives of deceased, §17-15-8.
Rape victims.
Polygraph examinations or other truth-telling devices.
Victim's right to refuse request, §17-5-73.
Preservation of evidence.
Failure of victim to cooperate, §17-5-71.
Right to free forensic medical examination, §17-5-72.
Written statements of information for victims, §§17-18-1, 17-18-2.
Rights of victims.
Crime victims' bill of rights, §§17-17-1 to 17-17-16.
Sentencing proceedings.
Victim impact statements, §§17-10-1.1, 17-10-1.2.
Service providers.
Funding for disseminating information, §17-15-14.
Sexual offenses.
Polygraph examinations or other truth-telling devices.
Victim's right to refuse request, §17-5-73.
Preservation of evidence.
Failure of victim to cooperate, §17-5-71.
Right to free forensic medical examination, §17-5-72.
Sodomy victims.
Written statements of information for victims, §§17-18-1, 17-18-2.
VICTIMS OF CRIMES —Cont'd
Son of Sam law, §§17-14-30 to 17-14-32.
Contract regarding reenactment of crime.
Payments to victims, §17-14-31.
Violations of article, §17-14-32.
Definitions, §17-14-30.
Temporary restraining orders.
Harassment of victim, §17-17-16.
Victim trafficked for labor or sexual servitude.
Compensation through federal government, notification, §17-17-6.

VIDEO CONFERENCE.
Arrest warrants, issuance by, §17-4-47.
Search warrants, issuance by, §17-5-21.1.

VIOLENT OFFENSE.
Defined.
Competency to stand trial, §17-7-130.

VOIDABLE TRANSACTIONS.
Actions.
Restitution.
Action to set aside deceptive transfers under voidable transactions act, §17-14-17.
Restitution.
Action to set aside deceptive transfers under voidable transactions act, §17-14-17.

VULNERABLE ADULT ABUSE.
Arrests.
Law enforcement officers, §17-4-20.

W

WAGES.
Assignments.
Restitution, §17-14-14.
Restitution.
Wage assignments, §17-14-14.

WAIVER.
Crime victims' bill of rights.
Waiver of rights by victim, §17-17-15.
Victims of crimes.
Waiver by rights, §17-17-15.

WARRANTS.
Bench warrants, §17-7-90.
Bail and recognizance.
Failure of principal to appear.
Issuance of warrant and forfeiture of bond, §17-6-71.

WARRANTS —Cont'd
Motor vehicles.
Issuance for failure of persons charged to appear in court, §17-4-23.
Searches without warrants, §§17-5-1, 17-5-2.
Search warrants, §§17-5-20 to 17-5-32.

WEAPONS.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for.
Certain firearms offenses, §17-6-12.
Carrying weapons.
Forfeiture.
Civil forfeitures, §§17-5-51, 17-5-52.
Disposition of weapon used in commission of crime, §17-5-52.
Concealed weapons.
Carrying weapons generally.
Forfeitures.
Civil forfeitures, §§17-5-51, 17-5-52.
Disposition of weapon used in commission of crime, §17-5-52.
Forfeiture.
Civil forfeitures, §§17-5-51, 17-5-52.
Disposition of weapon used in commission of crime, §17-5-52.
Contraband.
Used in commission of crime or illegally concealed, §17-5-51.
Evidence.
Custody, storage and disposal of dangerous contraband, §17-5-55.
Firearms.
Bail restricted offense.
Unsecured judicial release, offenses not eligible for.
Certain firearms offenses, §17-6-12.
Forfeitures.
When used in commission of crime or illegally concealed.
Civil forfeitures, §§17-5-51, 17-5-52.
Disposition of weapon, §17-5-52.
Possession constitutes crime or delinquent act.
Disposition of weapon, §17-5-52.
Forfeitures.
Civil forfeitures, §§17-5-51, 17-5-52.
Seized weapons.
Disposition, §17-5-52.

WEEKEND SENTENCES.
Confinements.
Misdemeanors generally, §§17-10-3, 17-10-3.1.

WEEKEND SENTENCES —Cont'd
Prison terms, §17-10-3.
Weekends or nonworking hours of defendant, §17-10-3.1.

WILDLIFE.
Law enforcement agencies.
Disposition of property in custody of agency, §17-5-54.

WITNESSES.
Attendance at proceedings.
Absence of witness.
Continuance of trial.
Criminal proceedings, §17-8-25.
Preliminary commitment hearings, §§17-7-25 to 17-7-27.
Bonds, surety.
Preliminary commitment hearings.
Securing appearance of witnesses, §§17-7-26, 17-7-27.
Child witness.
Criminal cases.
Physical presence of accused, testimony outside of, §17-8-55.
Sex offense cases.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Presence of accused, testimony outside of, §17-8-55.
Commitment hearings.
Accused, §17-7-28.
Criminal proceedings.
Absence of witness.
Grounds for granting of continuance, §17-8-25.
Accused's witnesses.
Subpoenaing, §§17-7-191, 17-7-192.
Accused wishing to testify.
Commitment hearings, §17-7-28.
Aliens.
Illegal alien status.
Witness' immigration status not investigated, §17-5-100.
Child witnesses.
Physical presence of accused, testimony outside of, §17-8-55.
Sex offense cases.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Codefendants.
Right to testify for or against one another, §17-8-4.
Commitment hearing.
Bonds to secure appearance, §§17-7-26, 17-7-27.

WITNESSES —Cont'd
Criminal proceedings —Cont'd
Commitment hearing —Cont'd
Compelling attendance, power of court, §17-7-25.
Indorsement of names of state's witnesses on warrant, §17-7-31.
Power of court to compel attendance, §17-7-25.
Costs.
Defendant's liability, §17-11-2.
Crime of mutiny.
Testimony of inmates in trials for, §17-8-51.
Death penalty cases.
Transcripts of cases, §17-8-5.
Discovery.
Felonies.
Alibi witnesses, §17-16-5.
Defendant as witness, §17-16-1.
List of witnesses, §17-16-3.
Lists of names and information concerning witnesses, §17-16-8.
Statements of witnesses, §17-16-7.
Who may be called as witness, §17-16-10.
Misdemeanors.
List of witnesses, §17-16-21.
Escapees from correctional institutions.
Testimony of other inmates at trial of, §17-8-50.
Failure of accused to testify.
No presumption, no comment.
Commitment hearings, §17-7-28.
Felony cases.
Recordation of testimony, §17-8-5.
Harassment.
Temporary restraining orders or protective orders, §17-17-16.
Illegal alien status.
Witness' immigration status not investigated, §17-5-100.
Material witnesses for state before grand jury.
Subpoena, list of witnesses subpoenaed furnished prosecution, §17-7-190.
Oath to be administered, §17-8-52.
Protective orders.
Harassment of victim or witness, §17-17-16.
Securing attendance at grand jury or trial proceedings, §§17-7-190 to 17-7-192.

WITNESSES —Cont'd
Criminal proceedings —Cont'd
Sex offense cases.
Child witnesses.
Presence of accused, testimony outside of, §17-8-55.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Subpoenas.
Change of venue, §17-7-151.
Grand jury or trial proceedings, §§17-7-190 to 17-7-192.
Temporary restraining orders.
Harassment of victim or witness, §17-17-16.
Death penalty.
Persons required to be present at executions, §17-10-41.
Expert witnesses.
Accused's sanity at time of offense, §17-7-130.1.
Grand jury.
Law enforcement officers.
Indictment or special presentment of peace officer for crime in performance of duties.
Right of officer to testify, §17-7-52.
Securing attendance at proceedings, §§17-7-190 to 17-7-192.
Harassment of victim or witness in criminal case.
Temporary restraining or protective orders, §17-17-16.
Law enforcement officers.
Discovery in criminal cases.
Work location and phone number of officer, §17-16-8.
Minors.
Criminal cases.
Presence of accused, testimony outside of, §17-8-55.
Sex offense cases.
Broadcasting testimony of child 14 years old or younger in certain cases, §17-8-55.
Exclusion of persons from courtroom when person under age of 16 testifies, §17-8-54.
Presence of accused, testimony outside of, §17-8-55.
Oaths.
Criminal trials, §17-8-52.
Police.
Discovery in criminal cases.
Work location and phone number of police officer, §17-16-8.

WITNESSES —Cont'd
Preliminary commitment hearings.
Attendance, §§17-7-25 to 17-7-27.
Indorsement of names of state's witnesses on warrant, §17-7-31.
Prisoners.
Trials of inmates escaping from correctional institutions, §17-8-50.
Trials of inmates for crime of mutiny, §17-8-51.
Protective orders.
Harassment of victim or witness in criminal case, §17-17-16.
Self-incrimination.
Privilege against.
Accused.
Commitment hearings, §17-7-28.
Temporary restraining orders.
Harassment of victim or witness in criminal case, §17-17-16.
Transcript of testimony.
Death penalty cases, §17-8-5.
Felony cases, §17-8-5.

WORK PRODUCT.
Crime victims' bill of rights.
Communications with victim assistance personnel privileged, §17-17-9.1.

WORK-RELEASE PROGRAMS.
Condition of probation.
Participation.
Defendant sentenced to probated confinement, §17-10-1.

WORTHLESS CHECKS.
Trial upon accusations, §17-7-70.1.

WOUNDS.
Bailable offenses, §17-6-1.

WRONGFUL DEATH.
Victims of crime.
Restitution, §§17-14-1 to 17-14-19.

Y

YOUTH SERVICES.
Sentencing.
Youthful offenders, §17-10-14.